

THE INVESTMENT CHAPTER OF THE TRANS-PACIFIC PARTNERSHIP
Committee on Ways & Means

Testimony of Matthew C. Porterfield,¹ Deputy Director and Adjunct Professor,
The Harrison Institute for Public Law, Georgetown University Law Center
(December 2, 2015)

Introduction

Investment treaties are facing unprecedented scrutiny around the world. Critics have raised concerns that both the substantive rights that these treaties provide and the investor-state dispute settlement (ISDS) system used to enforce those rights are biased in favor of foreign investors and provide them with greater rights than those provided to citizens under domestic law. According to the United Nations Conference on Trade and Development (UNCTAD), at least 50 countries or regions are revising their model investment treaties in order to strike a better balance between foreign investor rights and the sovereign regulatory authority of governments.²

Unfortunately, rather than reflecting this trend, the investment chapter of the Trans-Pacific Partnership (TPP) contains only minor changes from previous agreements that do little to rebalance either the substantive investor rights or the ISDS procedures.

The TPP does not contain meaningful reforms of the “fair and equitable treatment” provision

The approach to the right to “fair and equitable treatment” (FET) in the TPP is illustrative. It is unlikely that Congress would enact legislation permitting corporations to sue the federal government for potentially unlimited damages on the grounds that regulations – including environmental and health measures – are not “fair and equitable,” and delegating to the federal courts the authority to determine what constitutes “fair and equitable treatment” in any given case.

That, however, is essentially what Congress does when it approves free trade agreements such as the TPP that contain FET provisions, with at least two important distinctions. First, under the TPP only foreign investors – not U.S. citizens and corporations—would be able to sue the United States. Second, under the TPP the determination of what constitutes “fair and equitable treatment” is not delegated to the federal courts, but rather to a system of ad hoc tribunals comprised of private attorneys, many of whom represent foreign investors in other disputes.

¹ This document reflects the views of the author and not those of Georgetown University.

² See United Nations Conference on Trade and Development, *WORLD INVESTMENT REPORT 2015—REFORMING INTERNATIONAL INVESTMENT GOVERNANCE*, at 108 (June 2015), http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

The tribunals that adjudicate investment disputes have acknowledged the vagueness of the standard for FET. In the award in the *Bilcon* dispute against Canada decided earlier this year, the tribunal indicated that the standard for FET could be violated if a tribunal considered it to be “unfair” or inconsistent with “natural justice,” whatever that might mean to the tribunal, and conceded that the standard is “a flexible one which must be adapted to the circumstances of each case.”³

The new investment language in the TPP will do little to constrain overly broad interpretations of FET. For example, the TPP contains language indicating that Parties may adopt environmental and other regulatory measures, but only to the extent that those measures are “otherwise consistent with” the investment chapter.⁴ Another new provision simply reiterates the existing rule of international law that an “investor has the burden of proving all elements of its claims.”⁵

Rather than these largely ineffective measures, the TPP could have incorporated any of a number of significant reforms to the FET provision, including simply adopting the narrow standard for FET that the State Department has argued for in investment disputes, focused primarily on denial of justice in adjudicatory proceedings.⁶

The TPP Maintains the Flawed ISDS mechanism

The TPP also contains the controversial ISDS mechanism at a time when a number of U.S. trading partners are pursuing significant reforms to investment dispute settlement procedures. India, for example, has recently released a draft model investment treaty that would require investors to exhaust domestic legal

³ *Bilcon of Delaware et al. v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Merits, para. 442 (Mar. 17, 2015), *available at* <http://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf>.

⁴ TPP, Article 9.15 (emphasis added):

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *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.

⁵ TPP, Article 9.22(7):

For greater certainty, if an investor of a Party submits a claim under this Section, including a claim alleging that a Party breached Article 9.6 (Minimum Standard of Treatment), the investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration.

⁶ See, e.g., *Mesa Power Group, LLC v. Canada*, Second Submission of the United States of America, PCA Case No. 2012-17, para. 12 (June 12, 2015), *available at* <http://www.state.gov/documents/organization/246726.pdf>.

remedies before bringing an ISDS claim.⁷ The European Union (EU) has gone either further, proposing to replace ISDS with an “Investment Court System.”⁸ The EU’s proposal would be a dramatic improvement over the current system, and would help to ensure more balanced and consistent interpretations of investment treaties.

To conclude, the TPP’s investment chapter constitutes a missed opportunity for the United States to join in the efforts of many of its trading partners to reform the deeply flawed ISDS system. Thank you. I would be happy to attempt to answer any questions you have.

⁷ See MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY, art. 14.3, https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

⁸ See European Commission, Press Release, *EU Finalizes Proposal for Investment Protection and Court System for TTIP* (Nov. 12, 2015), http://europa.eu/rapid/press-release_IP-15-6059_en.htm.