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**Investment Hearing
Trading Views: Real Debate on Key Issues in TPP
U.S. House of Representatives Committee on Ways and Means
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On behalf of the twelve and a half million working men and women of the AFL-CIO, I'd like to thank Representative Levin for organizing today's briefing, as well as others designed to examine key provisions of the Trans-Pacific Partnership (TPP) in detail over the coming weeks.

The investment provisions in TPP are of enormous consequence to working people in the United States, and in all the TPP countries. Not only does this agreement cover 40 percent of global GDP, but it is an open-ended agreement, designed to expand as additional countries join. Because TPP includes major industrialized countries, as well as developing countries, it could potentially expand the reach of controversial and problematic investment provisions to many thousands of additional transnational corporations.

Given that the U.S. Congress may also consider a Transatlantic Trade and Investment Partnership (TTIP) and a proposed U.S.-China Bilateral Investment Treaty (China BIT) over the next several years, the combined impact of new and proposed investment provisions will potentially alter the economic landscape and balance of power globally as well as domestically.

The United States now has several decades of experience with Bilateral Investment Treaties, as well as investment chapters in trade agreements that include many of the same provisions as those in BITs – namely, investor-state dispute settlement (ISDS), expansive definitions of investors and investment, and vague standards such as Minimum Standard of Treatment (MST) and Fair and Equitable Treatment (FET) that are not found in U.S. law. We have seen a dramatic increase in the number of global investor challenges in recent years, as well as an expansion of the scope of these cases, in troubling ways. If TPP is adopted as negotiated, we can expect these problems to be significantly exacerbated -- with permanent and negative consequences for the global environment and public health, as well as democratic decision-making.

I have worked on international investment agreements for more than twenty years now – starting with the inclusion of broad investment provisions in the North American Free Trade Agreement (NAFTA) and including consideration of a Multilateral Agreement on Investment at the OECD, the revisions of the U.S. Model BIT, and numerous trade agreements. It is clear that the problems caused by these investment provisions have gotten worse over the years, as private arbitrators and rent-seeking law firms have aggressively exploited these provisions to challenge, harass, and intimidate democratically elected governments – often for implementing perfectly legitimate environmental or public health measures. Even when the governments “win” the cases, taxpayers have footed the bill for millions of dollars in legal costs, and there is undeniably a chilling effect that is well understood by other governments.

It is clear that such a chilling effect is not an accidental side effect, but rather intended by the corporations using these challenges. In a recent Kluwer Arbitration Blog, lawyers Cezary Wisniewski and Olga Gorska explain the rationale for pre-emptive use of BITs: "there is an obvious need at the investors' side for a mechanism making it possible to prevent the threatened violation of their investment...it is fair to say that where the violation of the investment is still only potential, notifying the dispute (or even addressing the Host State on an informal basis) should be the primary tool for investment protection. *It may be easily imagined that in certain cases a mere threat of significant compensation payable to a foreign investor may induce the Host State to reconsider its anticipated actions*"¹ (emphasis added).

While the U.S. Trade Representative (USTR) has argued that the TPP investment provisions contain significant reforms that address the concerns that have been raised, we disagree. I will detail our concerns below. As Lise Johnson and Lisa Sachs of the Columbia Center on Sustainable Investment (CCSI) have concluded: "the changes that have been made to the TPP do not address the underlying fundamental concerns about ISDS and strong investment protections; in some cases, the changes represent just small tweaks around the margins, while in other cases, the provisions represent a step backwards."²

Some have argued that TPP represents our best opportunity to reform and improve existing – and admittedly problematic – investment provisions negotiated in earlier agreements. This is illogical. If we can now agree that mistakes were made in negotiating over-broad investor protections in earlier agreements, we should abrogate or renegotiate those agreements directly – and make sure that in doing so, we really do address the concerns that have been raised, especially about the essential imbalance created by ISDS. Instead, what TPP does is expand ISDS and other provisions to several important trading partners with whom we do not currently have such commitments, while offering mostly inadequate reforms to the language and introducing some distinct new problems.

The TPP investment provisions – similar to many existing ones -- have the effect of explicitly putting legitimate and democratic government decisions with respect to regulation on the defensive. As York University legal scholar Gus Van Harten has written, "With ISDS, foreign investors are entitled to compensation for the value of their assets – including future revenues – against 'risks' of democratic and political decision-making. ... This set-up inverts the 'polluter pays' principle; due to ISDS, polluters have had to be paid from public funds after they were required, in effect, to stop polluting."³

¹ http://kluwarbitrationblog.com/2015/09/30/a-need-for-preventive-investment-protection/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A%20KluwerArbitrationBlogFull%20%28Kluwer%20Arbitration%20Blog%20-%20Latest%20Entries%29

² <http://ccsi.columbia.edu/2015/11/18/the-tpps-investment-chapter-entrenching-rather-than-reforming-a-flawed-system/>

³ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2697555

On its face, provision of ISDS is a violation of the principle that the U.S. Congress has repeatedly affirmed: U.S. trade and investment agreements should offer no greater rights to foreign investors than to domestic companies. This problem is exacerbated by the problematic and inconsistent application of the MST and FET standards by arbitrators.

Furthermore, international investment agreements (BITs and investment chapters in trade agreements) do not achieve the promised goals with respect to developing countries – attracting and retaining foreign direct investment (FDI) that promotes sustainable and equitable growth.⁴

After examining the record, the AFL-CIO opposes the inclusion of ISDS in future trade or investment agreements, including the TPP. Furthermore, the investment provisions need to be substantially narrowed and made more precise. The original premise of international investment agreements – to provide recourse in the case of outright expropriation and to prevent discrimination against foreign investors – has been completely overshadowed by decades of abuse and overreach.

ISDS Tilts the Playing Field in Favor of Investors by Providing a Separate Justice System

ISDS tilts the playing field in the United States further in favor of big multinational corporations. The system is *only* open to foreign investors—and no one else—not domestic companies, not labor unions, not environmental organizations. We have seen repeatedly that even domestic corporations take advantage of foreign subsidiaries in order to bring cases (as in Glamis Gold) under ISDS, something that would not be necessary if domestic courts provided them identical opportunities.

ISDS Provides Rights Far Outside of U.S. Law

USTR claims that ISDS provides “protections for a limited and clearly specified set of basic rights – like non-discrimination and compensation in the event of an expropriation – that are already consistent with U.S. law.” This statement is not correct. The [U.S. ISDS model](#) requires countries to provide foreign investors a “minimum standard of treatment,” which includes “fair and equitable treatment and full protection and security.” The concepts of “minimum standard of treatment” and “fair and equitable treatment” are vague, ill-defined concepts that **do not exist in U.S. law and are not interpreted according to U.S. law**. And even the basic protections of U.S. law are interpreted differently by international tribunals than by U.S. judges using U.S. case law.

In the [Metalclad v. Mexico](#) case, a U.S. investor won more than \$15 million in compensation from the Mexican government on a claim arising from the refusal of a local government to issue a building permit for a hazardous waste landfill on environmentally sensitive land.

⁴ https://www.wto.org/english/res_e/reser_e/ersd201013_e.pdf

Under U.S. law, a local decision to deny a permit for a particular kind of economic activity on a particular piece of land does not constitute an expropriation. However, in the *Metalclad* case, the panel determined that the denial was an expropriation. The panel determined that expropriation includes:

“covert or *incidental interference with the use of property* which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.” [Metalclad v. Mexico](#), ICSID Additional Facility Rules, CASE No. ARB(AF)/97/1, ¶ 103 (emphasis added).

Such a standard is far beyond U.S. law and, if adopted into U.S. law, could require governments to compensate business for virtually every conceivable type of regulatory measure or protective law.

ISDS is a Far More Powerful Process than the One Used for Labor and the Environment

The arbitration procedures for labor, environmental, and other commercial disputes in trade deals are government-to-government, which simply means the dispute involves the elected governments of two countries. Workers whose rights are violated (as is currently happening in [Guatemala](#), [Honduras](#), and [Colombia](#)) can’t bring a claim on their own. We have to petition our governments to do so—and wait indefinitely for a response. But under ISDS, foreign investors, such as [Occidental Petroleum](#), [Chevron](#), or [The Renco Group](#), can bring cases directly—no government middleman required.

Unlike government-to-government arbitration, ISDS puts the interests of for-profit investors on a higher level than the interests of democratically elected governments responsible for preventing their citizens from being harmed by poisons in the air and water.

It’s Expensive and Wasteful to Defend ISDS Cases, Even When the Government Prevails

According to the OECD, an average ISDS case costs more than [\\$8 million](#) in legal and arbitration fees (outside of any award made or settlement reached). For all countries involved, these fees represent taxpayer money that could be better spent building science labs and repairing bridges. *There is no maximum amount an investor can seek.*

There Is No Adequate Process to Correct Legal Mistakes Made by ISDS Tribunals

The annulment committee at the [World Bank’s ICSID](#), which USTR refers to in its memo, has made quite clear that its job is “[not to correct legal mistakes.](#)”

ISDS is Bad for Democracy

U.S. companies already invest heavily off-shore in places like the U.K., China, and Brazil, with which the U.S. has no ISDS agreements. So ISDS isn’t a necessary prerequisite for foreign investment. In the end, ISDS is little more than an [unjustified subsidy](#) to protect investment decisions against democratic efforts to rein in corporate excess.