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## Will U.S. Lack of Consensus on Investment Protection Slow the TPP Negotiations?

David Gantz (University of Arizona James E. Rogers College of Law) · Friday, June 25th, 2010 · Institute for Transnational Arbitration (ITA), Academic Council

By the end of the second round of negotiations on the Trans-Pacific Partnership (TPP) in San Francisco June 14-18 some observers were concerned that the lack of inter-agency consensus on the protection of foreign investment risks slowing the negotiation of investment issues in the TPP context. If there is no internal U.S. agreement by the next round of TPP negotiations in October in Brunei, when draft texts are to be tabled, the tentative November 2011 completion date for the negotiations (when the United States is scheduled to host the annual APEC summit) could become problematic. (See Amy Tsui, “Negotiators Discuss How to Start Drafting Texts for Next Round of TPP Talks in October,” *Int’l Trade Daily (BNA)*, Jun. 16, 2010). Because the inter-agency review of the 2004 “Model” BIT begun in August 2009 with the Advisory Committee on International Economic Policy has not been finalized, USTR and State Department negotiators are not currently prepared to engage in detailed, substantive negotiations of the planned investment chapter.

The eight party TPP discussions include, in addition to the United States, Australia, Brunei, Chile, New Zealand, Peru, Singapore and (provisionally) Vietnam. The United States already has free trade agreements with Australia, Chile, Peru and Singapore, and all but the Australia FTA include chapters addressing both investor rights and binding investor-state arbitration. (The Australian FTA omits the latter.) These investment chapters reflect both NAFTA Chapter 11 and the negotiating objectives for investment contained in the Trade Promotion Authority Act of 2002 (19 U.S.C. ” 3802 ff.) The United States – Peru Trade Promotion Agreement reflects minor further changes emanating from the so-called 2007 “Bipartisan Trade Deal.” (See USTR, *Bipartisan Trade Deal*, May 2007, available at [https://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file127\\_11319.pdf](https://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf)). Earlier, in Chapter IV of the 2000 United States – Vietnam Bilateral Trade Agreement, somewhat less extensive investor protection language, including investor-state arbitration, was incorporated.

Thus, for the five of the seven intended non-U.S. parties to the TPP, investors are already afforded protection under a binding international trade/investment agreement. This situation raises several significant issues for the Obama Administration and USTR Ron Kirk in the course of the negotiations (which are likely to require several years or more to complete). First, if a 2010 (or 2011) U.S. Model Investment Treaty and its incorporation in the TPP agreement provides less protection for U.S. investors abroad than current BITs and FTAs, will the provisions of the existing five investment chapters be abrogated, or will investors be permitted to elect between the earlier trade agreements and the TPP? (This is part of a broader issue of the legal relationship between the

TPP and existing FTAs.) Secondly, if the apparent inter-agency stalemate over a new model BIT persists into 2011, will the Administration be forced to eliminate (or water down) the investment chapter of the TPP, perhaps electing instead at some later date to seek bilateral investment treaties with Brunei, New Zealand and Vietnam (which negotiations are already under way with Vietnam as noted below)? Finally, will the inability to move forward on investment within the TPP context have repercussions for other investment agreements considered by some to be important aspects of future U.S. international economic policy?

The answer probably depends on how long the inter-agency stalemate continues. The Office of the U.S. Trade Representative (which is jointly responsible with the Department of State for investment treaty negotiations) remains formally committed to “moving forward with investment” as part of the TPP negotiations, and the eight prospective TPP Parties reaffirmed the “importance of reaching meaningful outcomes in all areas typically included in high-standard FTAs” (presumably including investment) in a TPP preparatory meeting at the beginning of June. (See USTR, “Readout of Trans-Pacific Partnership Ministers’ Meeting Ahead of Second Round of Negotiations,” available at <https://www.ustr.gov/about-us/press-office/press-releases/2010/june/joint-readout-trans-pacific-partnership-ministers-mee>).

Unfortunately, the U.S. inter-agency review has dragged on for at least six months beyond the target completion date of late fall 2009; the process was reported to be in the “final stages” more than three months ago. (See Amy Tusi, “U.S. in Final Stages of Model BIT Review, Will Move Forward on the [BIT] Talks, [Under-Secretary of State for economic, energy and agricultural affairs Robert] Hormats Says,” 27 Int’l Trade Rep. (BNA) 372, Mar. 10, 2010). While the initial advisory committee report was issued on September 30, 2009, as planned (USTR Press Release, “Advisory Committee on Review of U.S. Model Bilateral Investment Treaty,” Sep. 2009), the report resolved virtually nothing, with the views ranging from business interests who advocated reversion to the somewhat more business friendly NAFTA model, to labor and certain NGO interests that effectively advocated the avoidance of future investor protection agreements of any kind. (See Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty, Sep. 30, 2009, available at <https://www.state.gov/e/eeb/rls/othr/2009/131098.htm>). As USTR Ron Kirk observed at the time (perhaps in understatement), “The report demonstrates the complex nature of the issues and their importance to a wide range of stakeholders . . . .” (USTR Press Release, above.)

Formally, the Obama Administration remains committed to protecting investment abroad, with USTR seeking “to keep investment flows open and a continuing source of U.S. benefits by pressing for the removal of barriers to U.S. investment through WTO and bilateral free trade agreements, Bilateral Investment Treaty (BIT) negotiations and discussions, and other investment dialogues.” (USTR Office of Services and Investment, available at <https://www.ustr.gov/trade-topics/services-investment>). However, the Administration’s predicament is illustrated by a recent statement by Public Citizen/Global Trade Watch’s Lori Wallach, calling on President Obama to comply with his campaign promise to “ensure that foreign investor rights are strictly limited and will fully exempt any law or regulation written to protect public safety or promote the public interest.” (Quoted in Rossella Brevetti, “Public Citizen Says CAFTA-DR Case Shows Need to Fix Investor Provisions,” 27 Int’l Trade Rep. (BNA) 827, Jun. 3, 2010.) Under the circumstances it seems unlikely that the Administration will wish to complete the review, with the promulgation of a new model BIT, before the November 2010 elections at the earliest, even though many observers believe that the new model BIT ultimately will closely

resemble the investment provisions of the United States – Korea FTA (Tsui, “Drafting Texts,” above), which are not a major departure from earlier Bush administration agreements.

Ironically, the inability of the United States Government to reach a policy consensus on investment protection comes at a time when the use of investor-state dispute settlement is surging. Of 357 known investor-state arbitrations, 57% have been submitted since 2005, the vast majority submitted either under the ICSID, the ICSID Additional Facility or the UNCITRAL Arbitral Rules. (UNCTAD, “Latest Developments in Investor-State Dispute Settlement,” 2010, available at [https://www.unctad.org/en/docs/webdiaeia20103\\_en.pdf](https://www.unctad.org/en/docs/webdiaeia20103_en.pdf)). (These three options are incorporated in virtually all U.S. BITs or investment chapters.) Moreover, the current list of over 2,600 BITs continues to expand. (ICSID Database of Bilateral Investment Treaties, <https://icsid.worldbank.org/ICSID/FrontServlet>). Of the United States’ 48 BITs, only two have been signed since 2000 (Uruguay, Rwanda), although more than ten countries committed to investment protection under Bush-era FTAs. Today, China has at least 90 such agreements, India, 61, and South Korea, 68. The BIT making process will certainly continue world-wide, with or without U.S. participation.

Beyond the TPP negotiations, where one could argue that the additional trade and investment benefits of bring Brunei and New Zealand within binding international agreements are likely to be minor for the United States, the United States has at least informally committed to BIT negotiations with China, India, Georgia, Mauritius, Vietnam and a number of others. In theory, negotiations on a BIT with Vietnam that would expand Chapter IV of the bilateral trade agreement have been underway for more than a year, but to date they appear to have been limited to technical discussions of how BITs work, with no negotiating drafts being proffered by either side. BITs with China, India and Vietnam would likely be much more significant for U.S. economic relations than the TPP.

While the Vietnamese negotiations could reasonably be expected to move forward promptly if and when the United States has a negotiating text, the challenges with China and India in particular are more daunting. It would unrealistic to expect China and India, and perhaps Vietnam, to accept a U.S. model BIT without major modifications. Moreover, with China in particular there is substantial foreign investment in the United States and likely to be more in the future. If the investment volume increases as the result of a BIT, it is probable that the United States Government eventually will have to defend against one or more investor-state claims, as has been the case in approximately 15 instances under NAFTA (see <https://www.naftaclaims.com> for information on NAFTA investment litigation), but not to date under any other FTA investment provisions or under any BIT.

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