

# Kluwer Arbitration Blog

## Scholars Debate Investment Arbitration Chapter in TPP and TTIP

Roger Alford (General Editor) (Notre Dame Law School) · Tuesday, April 7th, 2015

Negotiations over the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) have highlighted the growing debate over investment arbitration. Last week the *New York Times* published an [article](#) summarizing objections to the TPP investment chapter. The article notes that politicians, law professors and liberal activists “have expressed fears the provisions would infringe on United States sovereignty and impinge on government regulation involving businesses in banking, tobacco, pharmaceuticals, and other sectors.”

The reference to academic opposition is based on a [letter](#) published by the Alliance for Justice with the signatories from numerous law professors. The one-page AFJ letter urges Congress to “protect the rule of law and our nation’s sovereignty by ensuring [investment arbitration] is not included.” Foreign corporations, the letter continues, can use investment arbitration to “challenge government policies, actions, or decisions that they allege reduce the value of their investments.... This practice threatens domestic sovereignty and weakens the rule of law by giving corporations special legal rights, allowing them to ignore domestic courts, and subjecting the United States to extrajudicial private arbitration.”

Today another group of prominent law professors who are experts in investment arbitration have written a lengthy response. The [letter](#) (to which I am a signatory) challenges the notion that signing an investment treaty constitutes a loss of sovereignty or undermines the rule of law. “Corporations cannot and will not gain victory simply by arguing reduced investment value.” Instead, a corporation must establish that “a host state has discriminated on the basis of nationality, has failed to accord a foreign investor due process, or has expropriated the property of a foreign investor without payment of prompt, adequate, and effective compensation.” The letter then addresses the contentious issue of regulatory takings, and highlights the limits of corporate claims challenging environmental, health, and safety regulations.

It concludes: “investment treaty arbitration does not undermine the rule of law.... The obligations commonly found in investment agreements—including non-discrimination on the basis of nationality; due process; expropriation of property only for a public purpose and on payment of prompt, adequate and effective compensation; and repatriation of profits—are the hallmarks of a society that is governed by law.”

Frankly, the rebuttal letter is substantive and faithful to the true state of investment arbitration, while the AFJ letter reads more like a piece of political advocacy than a memorandum by scholars

offering legal analysis.

Of course, these battle lines are not new. The Multilateral Agreement on Investment was scuttled in the late 1990s because of similar concerns. In the meantime, over 3,000 bilateral and multilateral investment agreements have now been signed, with the United States a signatory to over 50 such agreements. NAFTA and CAFTA-DR are among the most prominent examples of such agreements.

What is new is the potential economic impact of the deals. The sheer size of TTP and TTIP significantly raises the stakes. The TPP countries collectively would represent the largest U.S. trading partner, accounting for 40% of total U.S. goods trade and 25% of total U.S. services trade. As for the TTIP, the combined share of the U.S.-EU GDP is approximately 45% of global GDP and reflects 17% of global foreign direct investment.

Any hope for a TTP or TTIP deal depends on Congress granting the Obama Administration trade promotion authority, which seems [increasingly likely](#). Whether that authority includes investment arbitration remains to be seen. But the fact that the Obama Administration and the vast majority of Republicans in Congress strongly favor investment arbitration in both agreements bodes well for its inclusion.

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