

8 May 2012 (Updated)

As lawyers from the academy, bench and bar, legislature, public service, business and other legal communities in Asia and the Pacific Rim, we are writing to raise concerns about the Investment and Investor-State dispute arbitration provisions being considered in the on-going negotiations for a Trans-Pacific Partnership (TPP) agreement.

We have diverse views about the TPP generally. However, we are united in our view that the foreign investor protections included in some recent Free Trade Agreements (FTA) and Bilateral Investment Treaties (BIT) and their enforcement through Investor-State arbitration should not be replicated in the TPP. We base this conclusion on concerns about how the expansion of this regime threatens to undermine the justice systems in our various countries and fundamentally shift the balance of power between investors, states and other affected parties in a manner that undermines fair resolution of legal disputes.

We are encouraged to note that the Government of Australia has said it is unwilling to submit to Investor-State dispute settlement powers under a TPP and other future trade agreements, and urge the TPP negotiators to exclude the Investor-State system for all countries, not just Australia.

As lawyers, we believe that all investors, regardless of nationality, should have access to an open and independent judicial system for the resolution of disputes, including disputes with government. We are strong supporters of the rule of law. It is in this context that we raise our concerns.

The ostensible purpose for investor protections in international agreements and their Investor-State enforcement was to ensure that foreign investors in countries without well-functioning domestic court systems would have a means to obtain compensation if their real property, plant or equipment was expropriated by a government. However, the definition of “covered investments” extends well beyond real property to include speculative financial instruments, government permits, government procurement, intangible contract rights, intellectual property and market share, whether or not investments have been shown to contribute to the host economy.

Simultaneously, the substantive rights granted by FTA investment chapters and BITs have also expanded significantly and awards issued by international arbitrators against states have often incorporated overly expansive interpretations of the new language in investment treaties. Some of these interpretations have prioritized the protection of the property and economic interests of transnational corporations over the right of states to regulate and the sovereign right of nations to govern their own affairs.

Increasingly decisions issued under this system see foreign investors being granted greater rights than are provided to domestic firms and investors under the Constitutions, laws and court systems of host countries. In several instances, arbitral tribunals have gone beyond awards of cash damages and issued injunctive relief that creates severe conflicts of law. For instance, a recent order by a tribunal in the case brought by Chevron against Ecuador under a U.S.-Ecuador BIT ordered the executive

branch of that country to violate its constitutional separation of powers and somehow halt the enforcement of an appellate court ruling.

This is not a unique case. The scope of government actions that arbitral tribunals have previously considered they may subject to review for possible violations of investor rights includes a ruling on jurisdiction in the *Loewen v. United States* case under the North American Free Trade Agreement (NAFTA) in January 5, 2001 that 'measures' include the function of a domestic court and the standing rules of civil procedure. The arbitral tribunal concluded that a jury decision in private contract litigation constituted a government measure that was subject to NAFTA's investor rules.

Investors are also seeking to avoid the deliberate decision of governments to require investors to pursue remedies in the domestic courts of the host nation, at least initially, by invoking the most-favoured-nation rule. Subsidiaries of Philip Morris International are seeking to circumvent a requirement in the Uruguay-Switzerland BIT that they must attempt to litigate their objections to Uruguay's new tobacco labelling laws through the domestic courts for eighteen months before pursuing international arbitration by invoking a provision from a BIT between Uruguay and a third country that does not have that requirement.

Moreover, the design of the Investor-State system tribunals allows lawyers to rotate between roles as arbitrators and advocates for investors in a manner that would be unethical for judges. The system also excludes the right for non-investor litigants and other affected parties to participate and fails to meet the basic principles of transparency, consistency and due process common to our legal systems. Investment arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of disputes between sovereign nations and private investors.

It is of particular concern that, rather than being an option of last resort, the use of this regime is increasing exponentially. BITs with Investor-State enforcement have existed since the 1950s, but between 1972 and 2000 only about 50 disputes were resolved. Since 2000, in the World Bank's international arbitration body, the International Centre for the Settlement of Investment Disputes (ICSID), alone 173 cases have been resolved and an additional 128 filed.

To put this in perspective, as recently as 1999 only 69 ICSID cases had been launched. Today, there are 370-plus such cases underway, an increase of 436% - and that is only the number of Investor-State cases at ICSID. Over \$675 million has been paid out under U.S. FTAs and BITs alone, 70% percent of which pertained to challenges to governments' natural resource and environmental policies, not to traditional expropriations. Tobacco companies have also used Investor-State dispute settlement to challenge government tobacco control policies enacted to implement obligations under the World Health Organization Framework Convention on Tobacco Control.

The current regime's expansive definition of covered investments and government actions, the grant of expansive substantive investor rights that extend beyond domestic

law, the increasing use of this mechanism to skirt domestic court systems and the structural problems inherent in the arbitral regime are corrosive of the rule of law and fairness.

WE THEREFORE CALL UPON

all governments engaged in the TPP negotiations to follow Australia's example by rejecting the Investor-State dispute mechanism and reasserting the integrity of our domestic legal processes.

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