

**Sharon Anglin Treat, National Caucus of Environmental Legislators  
Stakeholder Presentation, Round 8 TTIP negotiations, Brussels, Belgium  
February 4, 2015**

**“Regulatory cooperation” and the U.S. states: A threat to federalism and democracy, and to public health and the environment**

Good afternoon. My name is Sharon Treat and I am here on behalf of the more than 900 U.S. state legislators who are members of the National Caucus of Environmental Legislators (NCEL). While no longer an elected official myself, though NCEL I am working with state elected officials on environmental and trade matters.

Last week, Republican and Democratic legislators in Maine, Vermont and Wisconsin all introduced legislation to ban plastic microbeads in personal care products; Illinois already bans this ingredient, which is contaminating waterways and is ingested by fish.

***This legislative activity is just the latest by U.S. states that have acted to protect public health and the environment from the effects of chemicals and other toxic materials.***

In 2014, 30 states considered toxic chemical policy legislation. Today, 169 laws in 35 states have been enacted which ban or regulate toxic chemicals from a variety of consumer products, including:

- Bisphenol-A
- Heavy metals
- Flame retardants
- Phthalates
- Mercury
- Coal tar byproducts
- Certain pesticides including neonicotinoids

Of particular significance, several states including my own state of Maine, have established a rigorous process to define hazardous chemicals of greatest concern to vulnerable populations, and then to require reporting and notice, and potentially regulations including product bans. Maine is reviewing up to 70 chemicals in this process, including a strong focus on endocrine disruptors.

The system of federalism set forth in the U.S. Constitution provides wide latitude to state governments to regulate to protect the public health, safety and welfare. Federal environmental laws – on toxic chemicals, pesticides, air and water pollution – all make clear that federal standards are the minimum “floor”, not a “ceiling”, and that state governments may set more protective standards.

**This is a very good thing, because the U.S. federal government has failed to act.** Of the 84,000 chemicals on the inventory with the Toxic Substance Control Act, only 200 have undergone health and safety testing before entering the market. The EU has banned the use

of 1,328 chemicals and additionally regulated more than 250 ingredients, while in the U.S., approximately 11 substances have been banned at federal level. 82 pesticides that are banned in the EU are allowed in the U.S.

**We are concerned that TTIP's regulatory coherence provisions will threaten the democratic process, the U.S. system of federalism, and ultimately, the health of our citizens and of the environment.**

Of course, much of what we know is based on leaks, and the regulatory coherence proposals in particular – now re-branded as less coercive-sounding “regulatory cooperation” – seem to change on almost a daily basis. Nonetheless, some themes are apparent, and they are disturbing.

- **Sub-central level governments, including U.S. states and EU national governments would be covered. The latest EU draft doesn't spell out how, but makes very clear its intent to do so.**
- The “regulations” covered would include laws enacted by elected parliamentarians at all levels of government.
- An ongoing, unelected regulatory oversight entity would be created, which in multiple ways would oversee the actions of the elected representatives.
- As proposed by the EU, this body would likely impose onerous burdens on U.S. state lawmakers and regulators, such as requiring:
  - early notice proposed laws;
  - numerous rounds of notice and comment;
  - complaint mechanisms; and
  - trade impact analyses

***U.S. states' legislative and regulatory activities in reviewing, labeling, restricting and banning chemicals and products -- actions which diverge so greatly from the lax approach to regulating at the U.S. federal level -- will surely be targeted.***

Indeed, industry stakeholders have made clear that this is their TTIP goal: to prevent U.S. state regulation that exceeds U.S. federal standards. Targeted are GMO labeling laws in Vermont, pesticide provisions in Minnesota and Oregon, and chemical laws in California, Maine, and Washington state.

***It is one thing to file a legal challenge to a law or regulation after it is enacted. It is quite another to seek to change or suppress those laws before they are enacted, not through the democratic process of a legislature with public hearings and opportunities to provide testimony, but through an unelected and unaccountable – and at this time, ill-defined - regulatory oversight body.*** A body, moreover, that may insert significant conflicts of interest into the process, with industry stakeholders perhaps participating through working groups associated with this body.

U.S. state lawmakers have previously been contacted by foreign governments, pressuring them to withdraw legislation because of claims of trade violations. ***These claims had little***

*basis and the contact was inappropriate. Now, under TTIP, EU negotiators want to institutionalize this interference, and provide remedies not only to governments but potentially to investors as well.*

In the U.S., we know from experience that requiring cost benefit and regulatory impact statements is burdensome and expensive, resulting in delays to critical health and safety measures, and providing grounds for legal challenges. **TTIP proposes to add another layer, a trade impact analysis, elevating trade and financial concerns above all other considerations.**

State laws are already subject to industry lobbying and litigation. TBT and other trade rules, combined with the enforcement mechanism of ISDS, provide multinational corporations even more powerful mechanisms to suppress laws that reduce their profits, regardless of the human cost.

Whatever you call it – harmonization, convergence, coherence, or cooperation – the purpose and impact remain unchanged. If these proposals are allowed to proceed, we fear the likely outcome will be to undermine not only public health and environmental protections, but our democratic institutions themselves, and in particular, elected government.

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>

February 10, 2015

Now online - EU negotiating texts in TTIP

The European Commission is **negotiating** TTIP as **openly** as possible.

A final agreement would have **24 chapters**, grouped together in 3 parts:

1. [Market access](#)
2. [Regulatory cooperation](#)
3. [Rules](#)

And as part of our latest **transparency initiative**, we're publishing:

- new **2-page factsheets**, in plain language
- **negotiating texts** we've given US negotiators:
  - EU textual **proposals** on parts 2 and 3 of the TTIP – these set out how we'd want a final deal to read, line by line
  - EU **position** papers – what we want to achieve in a chapter.

We will publish further texts as they become available.

We will make the whole text of the agreement public once negotiations have been concluded – well in advance of its signature and ratification.

For the text of a recently completed EU trade agreement, see the [text of the EU-Canada Free Trade Agreement \(CETA\)](#). The text is still subject to legal revision.

**POSITION PAPERS** set out and describe the European Union's general approach on topic in the TTIP negotiations. They are tabled for discussion with the US in negotiating rounds.

**TEXTUAL PROPOSALS** are the European Union's initial proposals for legal text on topics in TTIP. They are tabled for discussion with the US in negotiating rounds. The actual text in the final agreement will be a result of negotiations between the EU and US.

[Reader's guide](#)

[Glossary](#)

## EU negotiating texts, chapter by chapter



### Part 1: Market Access

#### Better access to the US market



#### *Trade in Goods and Customs Duties*

- **Factsheets**
  - [Factsheet on Trade in Goods and Customs Duties](#)



#### *Services*

- **Factsheets**
  - [Factsheet on Services](#)
  - [TTIP and public services](#)
  - [TTIP and culture](#)
- **EU position papers**
  - [Financial Services in TTIP](#)



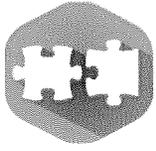
#### *Public Procurement*

- **Factsheets**
  - [Factsheet on Public Procurement](#)



#### *Rules of Origin*

- **Factsheets**
  - [Factsheet on Rules of Origin](#)



## Part 2: Regulatory Co-operation

### Cutting red tape and costs - without cutting corners



#### *Regulatory Coherence*

- **Factsheets**
  - [Factsheet on Regulatory Coherence](#)
  - [TTIP and regulation: an overview](#) - (other language versions)
- **EU textual proposal**
  - [Introduction to the EU legal text on Regulatory Cooperation in TTIP](#)
  - [Textual proposal on regulatory cooperation in TTIP](#)



#### *Technical Barriers to Trade (TBTs)*

- **Factsheets**
  - [Factsheet on Technical Barriers to Trade \(TBTs\)](#)
- **EU textual proposal**
  - [Technical Barriers to Trade \(TBTs\) in TTIP](#)



#### *Food Safety and Animal and Plant Health (SPS)*

- **Factsheets**
  - [Factsheet on Food Safety and Animal and Plant Health \(SPS\)](#)
- **EU textual proposal**
  - [SPS in TTIP](#)

#### *Specific industries*



## Chemicals

- **Factsheets**
  - [Factsheet on Chemicals](#)
- **EU position papers**
  - [Chemicals in TTIP](#)
  - [Chemicals in TTIP - outline](#)
  - [Chemicals in TTIP - examples](#)



## Cosmetics

- **Factsheets**
  - [Factsheet on Cosmetics](#)
- **EU position papers**
  - [Cosmetics in TTIP](#)



## Engineering

- **Factsheets**
  - [Factsheet on Engineering](#)
- **EU position papers**
  - [Engineering in TTIP](#)



## Medical Devices

- **Factsheets**
  - [Factsheet on Medical Devices](#)



## Pesticides

- **Factsheets**
  - [Factsheet on Pesticides](#) NEW



## Information and Communication Technology (ICT)

- **Factsheets**
  - [Factsheet on Information and Communication Technology \(ICT\)](#)



## Pharmaceuticals

- **Factsheets**
  - [Factsheet on Pharmaceuticals](#)
- **EU position papers**
  - [Pharmaceuticals in TTIP](#)



## Textiles

- **Factsheets**
  - [Factsheet on Textiles](#)
- **EU position papers**
  - [Textiles in TTIP](#)



## Vehicles

- **Factsheets**
  - [Factsheet on Vehicles](#)
- **EU position papers**
  - [Vehicles in TTIP - example 1 - seatbelts](#)
  - [Vehicles in TTIP - example 2 - lighting and vision standards](#) **NEW**
  - [Vehicles in TTIP](#)



## Part 3: Rules

New rules to make it easier and fairer to export, import and invest



### *Sustainable Development*

- **Factsheets**
  - [Factsheet on Sustainable development](#)
  - [Labour rights and civil society participation in TTIP](#)
- **EU position papers**
  - [Sustainable Development in TTIP – issues, provisions](#)
  - [Sustainable Development in TTIP](#)



### *Energy and Raw Materials (ERMs)*

- **Factsheets**
  - [Factsheet on Energy and Raw Materials \(ERMs\)](#)
- **EU position papers**
  - [Energy and Raw Materials in TTIP](#)



### *Customs and Trade Facilitation (CTF)*

- **Factsheets**
  - [Factsheet on Customs and Trade Facilitation \(CTF\)](#)
- **EU textual proposals**
  - [Customs and Trade Facilitation in TTIP](#)



### *Small and Medium-Sized Enterprises (SMEs)*

- **Factsheets**
  - [Factsheet on Small and Medium-Sized Enterprises \(SMEs\)](#)
- **EU textual proposals**
  - [SMEs in TTIP](#)



### *Investment Protection and Investor-State Dispute Settlement (ISDS)*

- **Factsheets**
  - [Factsheet on Investment Protection and Investor-State Dispute Settlement \(ISDS\)](#)
  - [Investment protection and ISDS in 2 pages](#)
  - [Investment protection and ISDS in 8 pages](#)



### *Competition*

- **Factsheets**
  - [Factsheet on Competition](#)
- **EU textual proposals**
  - [Competition in TTIP – Anti-trust and Mergers](#)
  - [Competition – State-Owned Enterprises \(SOEs\)](#)
  - [Competition – Subsidies](#)



### *Intellectual Property (IP) and Geographical Indications (GIs)*

- **Factsheets**
  - [Factsheet on Intellectual Property \(IP\) and Geographical Indications \(GIs\)](#)
- **EU position papers**
  - [Intellectual Property in TTIP](#) NEW



### *Government-Government Dispute Settlement (GGDS)*

- **Factsheets**
  - [Factsheet on Government-Government Dispute Settlement \(GGDS\)](#)
- **EU textual proposals**
  - [Government-Government Dispute Settlement \(GGDS\)](#)

*For further information*

[More on TTIP](#)





## Trade in goods and customs duties in TTIP

Cutting the cost of exporting and importing goods between the EU and the US

In this chapter we want to:

- remove customs duties and other barriers to trade
- stimulate the economy and create jobs
- help EU companies grow and compete worldwide.

### Reasons for negotiating trade in goods and customs duties

Customs duties (tariffs in the jargon) make trade in goods more expensive.

This makes it hard for EU firms to sell their goods in the US because it makes them more expensive than American-made goods.

At just under 2%, average customs duties between the EU and the US are generally low. But the average hides a different situation for individual products:

- Over half of EU-US trade is not subject to customs duties.
- Most of the rest faces widely differing duties, ranging from 1-3% for basic goods, such as raw materials, and 30% for goods like clothes and shoes.
- Some customs duties are so prohibitively high they effectively cut off any trade; for

instance, the US duty on raw tobacco is 350% and over 130% for peanuts.

- In some cases, US and EU duties are different even on the same product. For example:
  - for cars:
    - EU duty on imports from the US is 10%
    - US duty on imports from the EU is only 2.5%
  - for train carriages:
    - the US imposes a 14% duty on imports
    - the EU charges only 1.7% on imports from the US.

The EU wants to remove these duties and other barriers to trade, such as lengthy administrative checks, that increase the cost of trade in goods.

### EU goals

This chapter would remove nearly all customs duties on EU-US trade

This would:

- result in immediate savings for EU companies
- create 'spill-over' effects – benefits not directly related to trade; for example:
  - scrapping tariffs would lower the cost of the goods we export...
  - ...which would increase sales...
  - ...which would mean more jobs to enable firms to produce more...
  - ...which would boost demand from people filling

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those new jobs for other goods we produce.

- encourage trade in goods between the EU and the US.

### **Sensitive or controversial issues**

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Most tariffs will be gone on day one of the agreement because doing so will have few negative effects.

Where removing EU customs duties immediately could pose difficulties for EU firms, we want to agree a longer phase-out period to allow firms to adapt.

Where they would still face problems, even with longer phase-out periods, we would only partially open our market.

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# Tall Tales of the TPP (and TTIP)

<http://www.foe.org/news/blog/2015-02-tall-tales-of-the-tpp#sthash.Sw3GmqAs.dpuf>

## Friends of the Earth, U.S.

Posted Feb. 27, 2015 / Posted by: Bill Waren

Dean Baker, the co-director of the Center for Economic and Policy Research, recently [wrote about official misinformation](#) in the effort to pass Fast Track trade promotion authority legislation to grease the skids for approval of the Trans Pacific Partnership and similar trade agreements:

“Washington politics always involves a high level of silliness (does President Obama really love America?), but when it comes to trade policy it shifts to full-fledged craziness. Anything is fair game when the political establishment wants to pass major trade agreements like NAFTA or the Trans-Pacific Partnership. At such times we see respectable Washington types making pronouncements bearing so little relationship to reality that they would cause Sarah Palin to cringe.”<sup>[1]</sup>

### **The White House says TPP and TTIP investment chapters are similar to U.S. law.**

Corporate lobbyists and even “respectable” staff of the Office of the U.S. Trade Representative, including Ambassador Michael Froman himself, have been making pronouncements to members of Congress and even environmental groups that bear little relationship to reality. They have been saying that the Trans Pacific Partnership and Transatlantic Trade and Investment Partnership provisions for investor-state dispute resolution are similar to U.S. constitutional standards (as when the state highway department takes a family’s backyard for a road expansion and must pay them just compensation).

In an Op Ed in the Washington Post, Senator Elizabeth Warren [attacked the TPP investment chapter](#) and posed the very reasonable question: “Why create these rigged, pseudo-courts at all? What’s so wrong with the U.S. judicial system?” In a reply posted on the White House website, Jeff Zients, the director of the National Economic Council, said: “The purpose of investment provisions in our trade agreements is to provide American individuals and businesses who do business abroad with the same protections we provide to domestic and foreign investors alike in the United States.”<sup>[2]</sup>

The only polite adjective that can be applied to Zients’ statement is that it is “astonishing,” given the firm conviction of the U.S. Trade Representative’s office [not to depart significantly](#) from the U.S. Model Bilateral Investment Treaty language. A leak of the TPP investment chapter text a few months after the 2012 Model BIT was published corroborated this.<sup>[3]</sup> Investor-state claims for compensation under the U.S. model for bilateral investment treaties and free trade agreement investment chapters depart significantly from U.S. constitutional standards.

The stock talking point of the U.S. Trade Representative's office is that investment protections are **intended** to prevent discrimination, repudiation of contracts, and expropriation of property without due process of law and appropriate compensation and that these are the same kinds of protections that are included in U.S. law.<sup>[4]</sup> The lawyerly weasel word here is “intended.” In fact, many investment tribunals have read the language in U.S. investment agreements and the “fair and equitable treatment” language in the “minimum standard of treatment” article in particular to embody foreign investor rights that are far more sweeping than rights provided in U.S. constitutional law, such as for example a right to a “stable legal and business framework.” This can result in massive tribunal awards of money damages in compensation for lost future profits resulting from changes in government regulatory policy. <sup>[5]</sup>

**The U.S. model for TPP and TTIP investment chapters provides greater rights for foreign investors than U.S. investors enjoy under the Constitution.**

It is unnecessary to provide for investor-state arbitration in the TPP, and particularly in the TTIP. The U.S. and EU already have well-developed and generally fair court systems to resolve allegations of property rights and due process violations resulting from enforcement of environmental and public health safeguards. Most TPP countries also have well-developed and fair court systems. And, with respect to TPP countries that do not have fair court systems, it has to be asked: why is the U.S. negotiating the TPP with the communist dictatorship of Vietnam and the Sultanate of Brunei, which is ruled under a harsh form of Sharia law?

In fairness, the expropriation articles in the new U.S. Model BIT and in the leaked TPP investment chapter text are an improvement at the margins over similar language in NAFTA's chapter 11 on investment, but are still problematic. The most serious problems are with the wide-open article on “Minimum Standard of Treatment” (especially its “Fair and Equitable Treatment” provision)<sup>[6]</sup>, the definitions of “investment” and “investor,”<sup>[7]</sup> the ineffective or non-existent environmental exceptions<sup>[8]</sup>, and the procedural structure for adjudication of investor claims by biased tribunals of trade lawyers.

Investors' substantive rights in the model BIT and the leaked TPP investment chapter text are sweeping when compared to U.S. constitutional law or the general legal practice of nations around the world. Greater substantive rights follow first from an overbroad definition of investment that includes the expectation of gain or profit, and second, from vague standards of investor rights under the expropriation and minimum standard of treatment articles that are subject to multiple and conflicting interpretations by tribunals. Many tribunals have offered expansive interpretations of investor rights. Greater procedural rights flow from the business-friendly investor–state dispute resolution process and the ad hoc appointment of biased arbitrators.

**Investment tribunals protect corporate privilege, not the public interest.**

*The wealthy enjoy greater procedural rights.* The U.S. Model BIT and the leaked TPP investment chapter provide greater procedural rights for foreign investors than U.S. investors enjoy. For example, they get to pick one of the arbitrators. In addition, the usual practice in international law is for claims to be arbitrated on a government-to-government basis, but the new model BIT would put transnational corporations and investors on the same level as nation-states. Only foreign investors have access to these investment tribunals convened under the authority of

the World Bank and United Nations. No similar procedural rights are provided to ordinary citizens, other than the occasional opportunity to file briefs as a friend-of-the-court.

*A separate "court" for foreign capital is established.* Foreign investors would be able to bypass domestic courts and bring suit before special international tribunals designed to encourage international investment. The authority of domestic judicial institutions is undermined. For example, an international investment tribunal, in the Chevron v. Ecuador case, issued the equivalent of an injunction to forbid the enforcement of an Ecuadorian court judgment requiring the oil company to pay for the clean up and health care costs resulting from a massive oil spill in the Amazon rainforest. Foreign corporations and investors can even sue for damages running in the millions or billions of dollars, in compensation for a legitimate court judgment. What happens the first time a foreign investor claims such an award in compensation for a U.S. Supreme Court judgment?

*Tribunal arbitrators typically have a pro-corporate bias.* Arbitrators in these cases are typically international commercial lawyers who may alternately serve as arbitrators one day and return as corporate counsel the next, thus raising questions of conscious or unconscious bias.<sup>[9]</sup> Scholarly studies often based on empirical research make a convincing case that arbitrator bias is real

*Crippling awards of money damages chill regulatory initiatives and put pressure on governments to settle.* U.S.-style investment agreements provide a highly effective enforcement tool: the assessment of money damages. Such damage awards can be large enough to severely stress the public budgets of both small and large countries. The fear of such ruinous judgments can force a country to settle unjust investor claims and to back away from protecting the environment and the public interest.

### **TPP and TTIP investment chapters upset the balance between investor protection and public regulation.**

Far from being a benign replication of U.S. constitutional jurisprudence, the TPP and TTIP investment chapters are based on U.S. and international models for bilateral investment treaties and free trade agreement investment chapters. These models bear little resemblance to property rights and substantive due process protections in the U.S. Constitution or the legal traditions of other countries with well developed legal systems that protect private property from arbitrary expropriation and regulation. Seventy six law professors and other distinguished scholars from around the world issued a "Public Statement on the International Investment Regime" on August 31, 2010, in which they state that:

"Awards issued by international arbitrators against states have in numerous cases incorporated overly expansive interpretations of language in investment treaties. These interpretations have prioritized the protection of the property and economic interests of transnational corporations over the right to regulate of states and the right to self-determination of peoples. This is especially evident in the approach adopted by many arbitration tribunals to investment treaty concepts of corporate nationality, expropriation, most-favoured-nation treatment, non-discrimination, and fair and equitable treatment, all of which have been given unduly pro-investor interpretations at the expense of states, their governments, and those on whose behalf

they act. This has constituted a major reorientation of the balance between investor protection and public regulation in international law...."

"Investment treaty arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of investment disputes and therefore should not be relied on for this purpose. There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration..."<sup>[10]</sup>

### Selected Endnotes

[1] Dean Baker, Trade Crazy: The Push for Fast Track Trade Authority, Huffington Post, February 23, 2015 According to Baker "The *Washington Post* gave us one such gem last week when it took issue with those saying that currency rules should be part of any new trade pact. Its lead editorial last Thursday argued against including any provisions on currency. Its main point is best summarized by a paraphrase of an old Barbie line: 'Currency values are hard.'", available at, <http://www.huffingtonpost.com/dean-baker/trade-crazy-the-push-for-b-6740130.html>

[2] Senator Elizabeth Warren, The Trans-Pacific Partnership clause everyone should oppose, Washington Post, Opinion, February 25, 2015, available at, [http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html](http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html); Jeffrey Zients, Investor-State Dispute Settlement (ISDS) Questions and Answers, The White House Blog, February 26, 2015, available at <http://www.whitehouse.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers>

[3] As Professor Jane Kelsey, University of Auckland (NZ) law faculty, and Lori Wallach, Director of Global Trade Watch explain, "The United States has made it clear that it expects the TPP to include an Investor-State dispute mechanism based on the US Model BIT used in recent US FTAs, which is in turn based on the Investment Chapter 11 of the North American Free Trade Agreement (NAFTA)." Investor-State Disputes in Trade Pacts Threaten Fundamental Principles of National Judicial Systems April 2012, available at, <https://tpplegal.files.wordpress.com/2012/05/isds-domestic-legal-process-background-brief.pdf>

[4] Ben Beachy and Lori Wallach, Myths and Omissions: Unpacking Obama Administration Defenses of Investor-State Corporate Privileges, Public Citizen, October 2014, p.8 available at, <http://www.citizen.org/documents/ISDS-and-TAFTA.pdf>.

[5] See, Occidental Exploration and Production Company v. The Republic of Ecuador, Final Award, Ad hoc – UNCITRAL Arbitration Rules (2004), at para. 183. Italics added. Available at: <http://italaw.com/sites/default/files/casedocuments/ita0571.pdf>; Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23, Available at: [http://italaw.com/sites/default/files/casedocuments/ita0709\\_0.pdf](http://italaw.com/sites/default/files/casedocuments/ita0709_0.pdf)

[6] Foreign investors enjoy greater substantive rights under "expropriation" and "minimum standard of treatment" articles.

*Expropriation.* The vague expropriation obligations in the U.S. Model BIT and the leaked TPP investment chapter are easily given a broad or narrow reading by investment tribunals depending on the bias of the arbitrators. Tribunal decisions interpreting similar language in existing agreements are all over the map. Annex 12-D in the leaked TPP investment chapter is somewhat better than the comparable NAFTA language, but still a problem. It says that an indirect expropriation is a violation when a “deprivation” of the investor’s property is severe, disproportionate, or continues over time. A finding of discrimination or breach of contract can trigger a finding of “indirect expropriation” (aka a “regulatory taking” of property).

*Minimum standard of treatment.* The “minimum standard of treatment” article is the big problem in large part because it contains an open ended and largely undefined right to “fair and equitable treatment,” that invites a subjective interpretations by arbitrators that inevitably reflect their personal values and political philosophy about when government action is substantively unfair. These loose concepts make it very difficult to predict when a tribunal will find that justice has been denied particularly when the question is not about procedural fairness but substantive “due process.” Arbitrators are essentially asked to make a “gut call” on whether government action offends their personal sense of fundamental fairness. Successful investor claims against governments in investment tribunal proceedings have disproportionately relied on this kind of “gut check” interpretation of “fair and equitable” treatment.

**[7] Sweeping definitions of investment and Investor grant foreign investors greater rights.**

*Definition of investment* The overbroad definition of investment protects the mere expectation of gain or profit. The U.S. Model BIT defines investment to mean every asset that an investor owns or controls, directly or indirectly, that has such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. As a practical matter, this definition in combination with other language in the model BIT would result in an inflated award of damages based in part on a valuation of the investment based on speculative projections of lost future profits. “Investment” is broadly defined in the leaked TPP text to cover permits, intellectual property rights, derivatives and other financial instruments, and contracts, among many others.

*Definition of Investor.* This covers investors that have made or are “attempting to make” an investment. The broad “attempting to make” language can be satisfied by spending a relatively small amount of money to start up an enterprise or even simply seeking a permit or license. In other words it protects a speculative business plan in these circumstances. Moreover, the definition covers investors from non-TPP countries that have incorporated in a TPP country. The so-called “denial of benefits” language requires “substantial business activities” in a country that is a party to the TPP. But, this has proved to be a low threshold in some cases as tribunals have accepted jurisdiction over claims from investors that had merely set up a small office in a country that is party to the agreement.

**[8]** There is no effective across the board exception for environmental measures in either the U.S. Model Bilateral investment Treaty or the leaked TPP investment chapter. U.S. international investment agreements are extremely broad in coverage and provide very few general exceptions. They provide effective exceptions only for essential security interests and for disclosure of confidential information.

[9] *See generally on arbitrator behavior*, Gus Van Harten, Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration, 50 OSGOODE HALL L.J. 211, 226 (2012). Gus Van Harten, Fairness and Independence in Investment Arbitration: A Critique of Susan Franck's "Development and Outcomes of Investment Treaty Arbitration, SOCIAL SCIENCE RESEARCH NETWORK 1-2 (Dec. 1, 2011), <http://ssrn.com/abstract=1740031>

[10] Public Statement on the International Investment Regime – 31 August 2010, *available at* <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>