ECAT

Emergency Committee for American Trade

Four Myths About Investment and Enforcement in the TPP

Among the many issues on the table in the Trans-Pacific Partnership (TPP) talks are ones related to investment by individuals and enterprises from one TPP country into another. These discussions are focused on the ability of investors to access foreign markets, the level of protections such investors should receive in foreign markets, and how such investment provisions should be enforced. There are many strongly held views on the these issues — albeit not all based on fact or law . Let's dispense with some of the most common misconceptions surrounding this basic rule-of-law and economic-growth issue.

Myth 1: Investment Obligations and Investor-State Enforcement Undermine a Government's Right to Regulate in the Public Interest

Perhaps the most prevalent of myths, this claim suggests that investor-state dispute settlement and the obligations enforced through it create some super-extraordinary right that allows corporations to overrule valid government measures taken to protect public welfare, safety, health and the environment. In fact, all that the core investment protections and investor-state enforcement are about is ensuring the rule of law and baseline protections that all individuals and enterprises should be accorded. The core obligations are that governments should not discriminate, treat investors unfairly or inequitably, or expropriate without adequate compensation; and that governments should abide by their own commitments and not condition investment on domestic content or similar protectionist measures. The U.S. government, like others, has long worked to ensure that these provisions do not undermine valid government regulation in the public interest. But just as U.S. environmental and other public welfare legislation is not exempt from court review in the United States' own legal system, no government commitment internationally should be above these basic rules of law-abiding nations.

Myth 2: Investor-State Panels Are Unaccountable, Anti-Democratic and Rife with Conflicts

The use of investor-state forums is authorized by about 2,700 international treaties and other agreements worldwide. It is an enforcement mechanism that has gained wide acceptance by most governments around the world (including all the TPP negotiating partners until Australia's 2011 reversal). Arbitrators are highly respected experts, in some cases former judges, who adhere to strong ethics rules. The scope of review is limited by the governing law of the treaty, contract or other instrument under which the parties have consented to arbitration. The United States has also led in ensuring transparency and the early dismissal of frivolous claims.

In many of the critiques, however, the most basic point of investor-state enforcement is routinely missed — it has become the forum of choice because of its basic neutrality. As any sports fan can understand, it's important to have neutral referees that are not from the other team's city, no matter how developed or advanced the system of rules is. Nature Conservancy recognizes this issues and includes similar provisions in its own debt-for-nature swap agreements with foreign governments.

Myth 3: Investor-State Enforcement Has Led to a Costly Onslaught of Cases

While there has been an uptick in the number of cases filed, there is no deluge. Nor is the increased number of cases at all out of proportion to the substantial expansion in the levels of foreign investment over the last few decades, which has increased from the billions to trillions of dollars, helping countries build infrastructure and create economic growth and opportunity for their citizens. Consider three data points:

900 17th Street, N.W. Suite 1150 Washington, D.C. 20006 T: 202.659.5147 F: 202.659.1347 email: ecattrade@ecattrade.com

- For the United States, typically the largest recipient of foreign investment, only 15 sets of investor-state cases have been brought against it in the nearly 30 years it has had such provisions (and all of them under NAFTA in the last 18 years). By contrast, there are thousands of cases filed against the U.S. government in the Federal Claims Court (not to mention suits against the United States in other courts).
- Worldwide, according to UNCTAD, a total of 390 investor-state disputes were reported as having been filed from 1995 through 2010 under a total of 2,700 BITs. UNCTAD notes just 25 cases were known to be filed worldwide in 2010. Of the 197 cases known to be concluded overall, governments won 78 cases (40%), investors won 59 cases (30%), 60 cases (30%) were settled and the result in 29 cases is not known.
- Except for a few countries where particular actions result in a large number of cases, most countries, like the United States, have faced few, if any ISD cases. An empirical analysis of known cases (through 2007) by American academic Susan Franck, "Empirically Evaluating Claims About Investment Treaty Arbitration," **North Carolina Law Review** (January 30, 2008) found that only about three percent of BITs in force has ever had a case arbitrated under its terms. Of the 52 awards Franck reviewed, governments won 57.7 percent of the time. When investors won, the amount of damages awarded was typically less than requested and in some cases, investors received no monetary damages at all despite winning the case.

Myth 4: Investment and Financial-Services Obligations Undermine Governments' Ability to Undertake Regulatory Reforms to Address Issues Raised by the Financial Crisis or Those that May Arise from Future Crises.

It would be worrisome if there were any merit to it. But there is not. Investment rules do prohibit most limits on capital movement related to investments, but also provide both specific and prudential exceptions. Those with extensive expertise on international financial-services commitments have debunked the critiques on this point repeatedly in the context of the financial-services commitments in the WTO General Agreement on Trade in Services (GATS), which includes virtually identical language to the prudential exception under consideration in the TPP financial services chapter. Consider the November 2011 **Economic and Political Weekly** article, *Regulatory Freedom under GATS: Financial Services Sector*" by India's former Ambassador and Permanent representative to the GATT, B. K. Zutshil, that examined these allegations in detail and concluded without reservation:

> "GATS obligations and commitments were neither responsible for the [recent financial] crisis, nor do they stand in the way of necessary regulatory reform in the sector."

On the prudential exception language, he noted:

> "GATS gives full freedom to members to regulate services, short of thereby causing breach of any specific commitments, applicable to all sectors; but in the case of the financial services sector it even permits violation of any obligation, including of specific commitments, for prudential reasons of protection of investors, depositors, etc, or to ensure the integrity and stability of the financial system, except that this flexibility cannot be used to circumvent an obligation or a specific commitment in the sector. This provision in the annex on financial services is quite clear and there is no room for any uncertainty in this regard. It has also been shown that the examples of alleged impermissible regulatory interventions under the GATS are not correct. In fact, in all those examples interventions would be permissible."

BOTTOM LINE: Investment provisions enforced through modern investor-state dispute settlement are important to promoting a more-secure legal environment and promoting the rule of law, enhancing cross-border investment flows and their related benefits of economic growth and opportunity. Investor-state dispute settlement is good enforcement, plain and simple.
