Leaked TPP investment chapter provides greater rights for foreign investors than U.S. Constitution.

Greater substantive rights

. Investors' substantive rights in 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 an "investor" as well as a similarly broad 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.

Definition of investment The overbroad definition of investment protects the mere expectation of gain or profit. The leaked TPP text defines investment to means 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 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. The definition covers some 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.

Expropriation article. The vague expropriation obligations in 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 II-B to the leaked TPP investment chapter is somewhat better than the comparable NAFTA language, but still a problem. A finding of "indirect expropriation" may be made on a subjective "case-by-case" factual inquiry.

Minimum standard of treatment article. The "minimum standard of treatment" article is the big problem in large part because in 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.

Greater procedural rights.

The leaked TPP investment chapter provides 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 leaked TPP text 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 rain forest. 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.[9] 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.