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Democrats in the U.S. House of Representatives host an unofficial session on the merits of TPP

INVESTMENT CHAPTER OF THE TRANS-PACIFIC PARTNERSHIP IS FOCUS OF THE DISCUSSION

A series on "Trading Views: Real Debates on Key Issues in TPP" is being organized by Democratic members of the Ways and Means Committee in the U.S. House of Representatives. These unofficial sessions are intended to provide a forum for discussion with invited experts to shed light on the recently completed negotiations of the Trans-Pacific Partnership (TPP). The session on December 2, 2015, focused on the legal implications of the treaty's investment chapter. Sander Levin (D-MI) is the ranking member of the committee and hosts these sessions.

On November 29, 2015, the U.S. administration released the final text of the trans-pacific free trade accord, the TPP, to the public. The President is now tasked to win congressional approval of the largest regional trade deal in history. Since the negotiations were completed on October 5, 2015, the agreement must now be ratified by all 12 nations. The U.S. Congress has 90 days to review the final version of the agreement before it can come up to a vote; early February 2016 is the earliest possible time for such a vote.

In light of the schedule, Democrats, who are currently in the minority in both chambers of the U.S. Congress, decided to initiate "unofficial" sessions by inviting legal trade experts to discuss the merits of the various aspects of TPP. This session focused on the Investor-State Dispute Settlement (ISDS) chapter in the TPP. Attendance among members of the House of Representatives and the general public was high. Invited to the forum were four experts: **Matt Porterfield**, former official to the US Department of State and currently at Georgetown University, has recently published *Exhaustion of Local Remedies in ISDS: An Idea Whose Time has Come?* in the Yale Journal of International Law. **Ted Posner** has spent an extensive period in various government agencies focusing on

international investment provisions. He now is a partner in a law firm. **Michael Smart**, too, has spent many years in the executive and legislative branch as an international trade policy expert. As a consultant, he now provides trade and legal services. **Thea Lee** is one of the chief legal advisors to AFL-CIO on trade and investment issues.

The arbitration mechanism as part of bilateral investment treaties (BIT) was first established in the 1950s, later to be adopted by the U.S. in the 1980s. The ISDS mechanism was intended to provide private investors recourse against alleged expropriation, discrimination, and certain other unlawful actions taken by governments in the host country. Today, ISDS mechanisms are typically included in bilateral and regional trade agreements and function as a legal instrument that grants investors the right to use dispute settlement proceedings through an arbitral tribunal against a foreign government.

Although the U.S. government has not yet lost an arbitration dispute, there is growing concern that new cases brought against the U.S. are exceeding the original intent of ISDS. Democrats used the session to point out that most recent cases have challenged environmental, health and other governmental regulation. Much of the criticism coming from the Democrats is the concern that future ISDS cases may have negative implications on U.S. consumer, labor and environmental protection laws and regulations.

Witnesses **Posner** and **Smart** advocated for an ISDS chapter in TPP and argued not to reopen negotiations. The general objective of international trade agreements, such as the TPP, is to liberalize and open new markets for U.S. firms. Any expansion of market access needs to go hand-in-hand with solid legal frameworks that protect the flow of trade and investment. Only with a strong legal system in place can U.S. investments flow into third countries. Even though an

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ISDS chapter in TPP will allow foreign investors the right to choose international arbitration outside the U.S. court system, U.S. companies are granted such reciprocal rights abroad. In general, Smart suggested that TPP will provide many trade and investment benefits to U.S. firms abroad, including increased transparency through an improved rule of law. Smart concluded that U.S. companies will not only gain greater access to new markets, but that treaties, such as the TPP, will also provide U.S. firms with better protection abroad.

A more critical stance towards ISDS in TPP was taken by **Porterfield**. According to him, ISDS needs to be modernized and adjusted as certain parts of ISDS are biased, i.e., the mechanism seems to favor foreign investors and do little to protect domestic investors. He presented the example where most-favored nation clauses only apply to foreign investors while domestic investors do not derive additional rights from the treaty. Furthermore, Porterfield argued that due to their ad-hoc nature, arbitration tribunals are less "professional" and lack a certain amount of sophistication. At the same time Porterfield confessed that many countries lack reliable and unbiased judiciary systems; for this reason one cannot forego ISDS completely. While generally supporting trade and investment treaties, **Lee** suggested that changes needed to be made to the investment chapter of TPP before being ratified. Currently TPP limits the most-favored nation clause when a legitimate public welfare objective is at stake. According to Lee, this exemption needs to be better clarified and protected against abuse.

To conclude, the session boiled down to the question whether the advantages U.S. firms derive from TPP and the treaty's ISDS provisions are sufficient to compensate for the privileges ISDS bestows upon foreign firms in the U.S. The session made it apparent that the Democrats remain critical towards ISDS.

Questions pertaining to specific legal implications of TPP are relevant for U.S. Congressmen, who might have to cast their vote in February. A close examination of TPP will help facilitate the ongoing negotiations of the Transatlantic Trade and Investment Partnership (TTIP). In particular, the inclusion of an international arbitration has sparked heavy public debate in Europe

questioning the legitimacy and potential reach of TTIP. Due to the similarities of TPP and TTIP, sessions such as this will open the debate up to the public and allow experts from all sides to discuss the facts.

(Note: For videos and more information on the series "Trading Views: Real Debates on Key Issues in TPP", please see:

<http://democrats.waysandmeans.house.gov/issue/trading-views-real-debates-key-issues-tpp>)