

ITF 225/ EC 1400: The Future of Globalization: Issues, Actors and Decisions
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Simulation 1: Investor-State Dispute Settlement in the
Trans-Pacific Partnership Agreement

CONFIDENTIAL INSTRUCTIONS:
REPRESENTATIVE DEVIN NUNES (R-CA), HOUSE
COMMITTEE ON WAYS AND MEANS AND CHAIR OF
SUBCOMMITTEE ON TRADE

Situation

It is August 2015. The negotiations of the Trans-Pacific Partnership Agreement (TPP) appear to have entered their final stage. After the latest negotiation round in Maui (Hawaii) in July 2015, the trade ministers of the TPP countries jointly announced that work will now focus on “a limited number of remaining issues” and that participants are “more confident than ever that TPP is within reach and will support jobs and economic growth”.¹ Meanwhile, the Republican-controlled US Congress renewed Trade Promotion Authority (TPA) in June 2015, providing assurance to other members that US participation will be put to a clean up-or-down vote.

While TPA renewal has improved the TPP’s prospects, resistance to the agreement in the US has increased as well, particularly from trade unions, NGOs and anti-TPP Democrats in Congress. One major point of contention is the planned inclusion in the TPP of an Investor-State Dispute Settlement (ISDS) mechanism, which aims to protect foreign investors from direct or indirect government expropriation. A leaked version of the Investment Chapter from the confidential TPP negotiations has further ignited this debate.²

In order to clarify the political, economic and legal implications of the inclusion of ISDS in the TPP, congressional leaders from the House Committee on Ways and Means have called a hearing with experts from industry, trade unions, and NGOs, as well as the United States Trade

¹ <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/july/joint-statement-tpp-ministers>

² <https://wikileaks.org/tpp-investment/>

Representative (USTR). The hearing will be followed by a press conference with statements from the Democrats and Republicans on the committee.

Background on The Trans-Pacific Partnership (TPP)

TPP is a proposed regional free trade agreement (FTA) among the United States, Japan, Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. If implemented, the TPP will eliminate both tariff and non-tariff barriers to trade and investment among the signatories. As a leading trade policy initiative of the Obama Administration, the TPP serves several strategic goals. It is the economic linchpin of the Administration's goal of "rebalancing" to the Asia-Pacific, and if concluded, may serve to shape the economic architecture of the region. It also has the potential to attract new participants, and establish regional rules on policy issues facing the global economy, possibly providing the impetus for future multilateral liberalization under the WTO.

The twelve countries that make up the TPP partners are comprised of advanced industrial, middle income, and developing countries. Many of them have no free-trade agreements with the United States presently and so both sides stand from the implementation of the TPP through the lowering of trade barriers, the inclusion of common regulatory standards, and mutual access to new markets. One model widely cited by advocates of the agreement predicts the TPP will improve the labor market by creating more export-related jobs (and correspondingly fewer less productive import-competing jobs) and add some \$77bn to US real incomes by 2025.³ But critics of the deal question those estimates and point to possible unintended consequences of job offshoring, increased income inequality, and empowering corporations to attack our environmental and health safeguards.

Background on Investor-State Dispute Settlement (ISDS)

International trade agreements have broadened in scope with the rise of supply-chain fragmentation and intra-firm trade. Foreign direct investment (FDI) has become a main issue in negotiations of mega-regional trade agreements such as the TPP or the TTIP. As they stand, these planned agreements include rules on investment protection and an Investor-State Dispute Settlement (ISDS) mechanism.

Investor-State Dispute Settlement (ISDS) is a legal mechanism designed to prevent arbitrary expropriation and ensure nondiscriminatory treatment for foreign investors. In contrast to state-to-state dispute settlement (such as in the WTO), ISDS allows an investor from one member state to initiate legal proceedings directly against another member state in which it has made an

³ <http://blogs.piie.com/trade/?p=106>

investment (also known as the host state), including claims for compensation for alleged loss of investment value.

Investor-State Dispute Settlement (ISDS) systems are found in more than 3,000 international investment treaties. Proponents consider ISDS necessary to protect foreign investors from the vagaries of domestic judicial systems, particularly in developing countries. Critics, on the other hand, warn that ISDS could give foreign investors greater protection than domestic investors and could enable foreign multinationals to circumvent conventional domestic judicial procedures. Moreover, opponents argue that ISDS could allow foreign companies to challenge regulation in fields such as health, environment or consumer protection – infringing on the sovereignty of the host government to protect its citizens.

The Hearing

Adapted Protocol

The Hearing at the House Committee on Ways and Means will run according to an adapted protocol. The Chairman of the Committee, Paul Ryan, has announced the hearing and has presented the following witness list:

- Michael B. Froman, U.S. Trade Representative
- Richard L. Trumka, President AFL-CIO
- Jay Timmons, CEO and President of the National Association of Manufacturers (NAM)
- Lori Wallach, Director of Public Citizen's Global Trade Watch

The following representatives will also be at the hearing:

- Rep. Paul Ryan (R, Chair, WI)
- Rep Sander Levin, (D, Ranking Member, MI)
- Rep Devin Nunes (R, Chair of Subcommittee on Trade, CA)
- Rep Charles Rangel (D, Ranking Member of Subcommittee on Trade, NY)

The hearing will run in two 50-minute sessions, both chaired by Rep. Paul Ryan.

In Session One, after a welcome by the chairman, each of the Representatives will deliver a brief opening statement (5 minutes each) arguing for their positions on ISDS.

Then each witness will likewise be called forward and will give a five-minute statement that summarizes his/her written testimony and highlights his/her position on the object of the

hearing.

In Session Two, the chair will open to Q&A from representatives and witnesses to the other participants. In addition to prepared questions, the floor will be open to follow-up questions or debate among witnesses and representatives on any of the statements that have been made in testimony.

It is expected that the chair will seek to draw all participants into active discussion and, in particular, will ensure that all participants have a chance to ask at least two questions during the session. The chair is responsible for selecting the order of witnesses.

At the end of both sessions, the Committee members will take a vote directed at the USTR, expressing approval / disapproval of the inclusion of ISDS in the ongoing TPP negotiations.

Your Role

As the Republican Chair of the Sub-Committee on Trade, you come to this hearing from a particular vantage point. While the passage of TPA has increased the likelihood that TPP will be approved, concerns have been raised over the extra-judicial scope of the ISDS. Views have been divided within the Republican caucus, with some arguing that the arbitration process amounts to a cessation of sovereignty.⁴

As someone who would like to see the TPP approved, your view is that the US is already part of trade agreements with similar provisions. Since ISDS arbitration cannot change any US law or regulation, it does not threaten sovereignty nor weaken existing protections.

As you think about the hearing, you should consider the following:

1. Who are the main winners and losers, if the ISDS is approved? Which of those winners and losers are most important to you, as a member of the Republican Party and a Representative of the State of California?
2. What is the best way to frame your arguments to gain the necessary support for your position?
3. What would be the economic, political, and legal consequences if ISDS was included or excluded? How would our position impact the negotiation process?

⁴ <http://www.wsj.com/articles/nontrade-concerns-cloud-obamas-push-for-pacific-deal-1438031286>

4. How can you ensure that Congress will approve the final TPP deal? What is at stake?
5. What are important opportunities and significant dangers to consider?

Please make sure to cover these, and other issues, in the written memo, but also consider carefully which issues you will emphasize in the public hearing. Also take into account the factors motivating and constraining the decisions and actions of all the relevant parties represented in this hearing as you prepare your recommendations. These include political, economic, social and legal interests.

Assignment

Oral Presentation

During the first session of the Committee Hearing, you will present your stance as a Representative on the position the House Ways and Means Committee should take in a five-minute presentation. In the second session, your role will be to ask intelligent and controversial questions of the expert witnesses and the other Representatives. A list of potential questions will have been prepared in advance, but feel free to ask other questions as issues arise. Please note that you are expected to consider additional information relevant to the case, even if it is not presented or discussed during the first meeting or contained in the suggested readings.

Written Policy Memo

For the written assignment, you will take on the role of a high-level policy advisor to your Representative. As a policy advisor, you are to individually draft a four or five page memo (12-point Times New Roman Font, double-spaced, with 1-inch margins), to the Representative, outlining what you think your position should be, what types of issues your representative should emphasize in session (and which to avoid), and who might support or oppose your view. The memo should end with a separate (additional) one-page list of potential questions for the witnesses and the other Representatives, with a few questions addressed to each of the other roles. Your memo will be confidential, allowing you to freely discuss the rationale and implications of your recommendation without fear of it being leaked to the press.

Please read “How to Write a Good Memo” before completing this assignment. The written memo is due before the first session of the simulation.

GENERAL LINKS TO GET YOU STARTED

Some useful links on the big issue of Investor-State Dispute Settlement in the Trans-Pacific Partnership Agreement:

(Note: These links are to help you get started with your research. You are expected to look beyond these materials in preparing your role and memo.)

Press:

<http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/03/26/people-are-freaking-out-about-the-trans-pacific-partnerships-investor-dispute-settlement-system-why-should-you-care/>

<http://www.newsweek.com/odd-couple-democrats-republicans-and-new-politics-trade-319948>

<http://www.newrepublic.com/article/121989/trans-pacific-partnership-divides-left-dems-support-free-trade>

Political debate:

<http://waysandmeans.house.gov/isds-whats-that/>

<http://www.teaparty.org/obama-negotiating-away-u-s-sovereignty-secret-37755/>

<http://www.c-span.org/video/?c4538838/senator-ron-wyden-defends-isds>

<https://www.whitehouse.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers>

Stakeholders:

<http://www.aflcio.org/Issues/Trade/What-Is-ISDS>

<http://www.citizen.org/Page.aspx?pid=5411>

<http://www.nam.org/Newsroom/Multimedia/Fair-Play--Investor-State-Dispute-Settlement/>
