Brewing Storm over ISDR Clouds Trans-Pacific Partnership Talks

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Trans-Pacific Partnership (TPP) negotiations have become the territory where a brewing perfect storm over investor-state dispute resolution (ISDR) is making landfall. The June 2012 leak of the draft TPP Investment Chapter[1] text added energy, but much more is fueling this tempest.

In general the ISDR system is coming under increased scrutiny. Public and policymaker concerns in numerous countries have been building alongside awareness of the regime and its implications as large ISDR awards in challenges against common public interest policies increase.

U.S. government insistence that the TPP include an expansive ISDR system is having a boomerang effect. And I am not mainly referring to Australia's announcement[2] that it will not submit to ISDR in the TPP given the Australian Productivity Commission's 2010 conclusion[3] that ISDR is not in the national interest.

Rather, policymakers, jurists[4], and legal scholars[5] are increasingly questioning the very notion of elevating an individual foreign firm or investor to equal status with sovereign nation signatories to have the power to privately enforce a public treaty. In countries with well-functioning domestic court systems, the obvious question is why should there ever be a parallel system of privatized justice, much less one with the structural problems inherent in ISDR?

Studies[6] showing no correlation[7] between having investment agreements with ISDR and attraction of foreign direct investment have diminished the ostensible upside of ISDR-enforced investment treaties for developing countries. South Africa and India are among those now conducting critical reviews of the regime. Brazil, the number one FDI recipient[8] in Latin America and fifth highest recipient in the world, has refused to be bound to ISDR.

The Perfect Storm Emerging over IDSR

When ISDR was limited to the ostensible intent of the international investment regime – establishing a venue for compensation when governments expropriated factories, land or other "hard" investments in countries without well-functioning court systems – it was of little impact or interest to most. But now the ISDR regime being spread through Free Trade Agreements (FTAs) and Bilateral Investment Treaties (BITs) is increasingly resulting in diverse, damaging and direct impacts on peoples' day-to-day lives around the world. ISDR has enabled a stunning array of investor-state attacks on health,[9] tobacco,[10] natural resources,[11] financial,[12] environmental, oil and gas extraction, land-use,[13] transportation,[14] toxics[15] and other policies.

But government actions deemed subject to ISDR now include environmental and health protections (from toxics bans to cigarette packaging requirements), natural resource management (from water rights[16] to mining policy), the functioning of domestic court systems,[17] the denial of regulatory permits,[18] emergency regulatory measures taken during financial crises, [19] and more. In fact, all of the 16 pending ISDR claims under only U.S. FTAs—seeking over $13.1 billion in

damages—relate to environmental, energy (including oil and gas extraction[20]), land use, public health and transportation policies – not traditional trade issues.

Second, the use of ISDR is skyrocketing. BITs with investor-state enforcement have existed since the 1950s, but between 1972 and 2000 only about 50 disputes were resolved. Since 2000, the number of new treaty-based investor-state cases launched per year has soared by 254%. The sudden flood of cases has persisted throughout the last decade, pushing the cumulative number of filed cases through 2011 (450 cases) to nine times the cumulative number seen in 2000 (50 cases). Just this year, 43 cases have been filed at the International Centre for the Settlement of Investment Disputes alone.

Correspondingly, the number of countries facing ISDR challenges has increased. And, there is nothing like being the subject of an ISDR case to alter government and public perceptions of the regime. Meanwhile, the awards being generated are adding up. Over $3 billion has been awarded to corporations and investors under U.S. FTAs and BITs alone, over 85 percent of which pertains to challenges against natural resource, energy, and environmental policies, not to traditional expropriations involving government seizure of land or a factory. The recent "win" by Exxon-Mobil in an investor-state North American Free Trade Agreement (NAFTA) case attacking a Canadian province's offshore oil and gas exploration regulations will add significantly to the $365 million that governments have had to pay[21] to investors attacking environmental, zoning, timber and other policies just under NAFTA and the Central America Free Trade Agreement (CAFTA).

Third, the definition of "investment" in FTAs and BITs is much broader than the real property and specific interests in property that are typically protected under domestic property rights law. In recent U.S. FTAs and the U.S. demands for the TPP, the definition includes regulatory permits and licenses; financial instrument such as futures, options, and derivatives; intellectual property rights; procurement contracts between a state and a foreign investor; and natural resource concession contracts granted by a national government to a foreign investor. In addition, the standard investor-state definition of an "investor"—a person or legal entity that makes an investment—has not required that person or entity's actual business activities or commitment of capital in the host country to be substantial.

Further, "indirect" expropriation provisions in BITs and FTAs provide property rights not available in many nations' domestic legal systems. Under ISDR, governments can be required – and have been, *a la* the NAFTA *Metalclad* case – to pay compensation based on a government action or policy *diminishing the value* of an investment, regardless of whether there has actually been appropriation of an asset by the government or a full and permanent destruction of all value of the property.

Fourth, in an era of growing public awareness of corporate influence on every aspect of our lives, the ISDR regime is an example of a system of global governance that *formally* prioritizes corporate rights over nations' rights to regulate and govern their own affairs. When the cases pertained to actual expropriations, this perspective would not have had traction.

But boil down the current ISDR regime to its core elements: foreign private commercial interests are elevated to equal standing with nations to directly enforce public treaties that provide them with greater rights than those afforded to domestic commercial interests or citizens. Using foreign tribunals, they can skirt domestic courts to extract large sums of taxpayer monies on claims that any one of a vast array of government actions undermines what a three-person tribunal of private lawyers, who rotate between serving as "judges" and suing governments, decide to be the reasonable expectations of an investor. There are extremely limited opportunities for "appeal," regardless of the arbitrariness of a given award. And now specialized private equity firms have sprung up to finance this system of foreign corporations raiding public treasury funds.

From a conservative perspective, this system poses an unparalleled threat to national sovereignty and solvency, and from a progressive perspective to democratic governance and the public interest polices won through years of struggle. In the past, little attention was paid to the ISDR regime by the vast majority of voters, policymakers, journalists, academics or civil society advocates. Now the results of the regime are awakening diverse interests to a quiet but very troubling transformation of the legal system that has taken place over the last few decades without their awareness, much less consent.

There are at least two "schools" of concern with ISDR, both of them voiced in the mounting debate about ISDR in the TPP, as well as outside the TPP context.

Threats to Public Interest Policy

For a growing array of domestic policymakers, civil society organizations and people impacted by ISDR decisions, ISDR is viewed as a threat to vast swaths of public interest policy achieved through decades of struggle, and to the prospect of further advances. Either by winning an investor-state attack and collecting millions in compensation, or by preemptively chilling government actions to address critical public needs, international investor rights and private investor-state enforcement are seen as imposing significant limits on progressive reforms related to health, the environment, water or other natural resources. Further, the ISDR system is increasingly being understood as a threat to governments' ability to effectively respond to emergent demands, such as financial crises or climate change, the redress of which requires new policies and approaches.

The mere filing of an ISDR challenge can have a chilling effect on needed policy initiatives. Important mining policy reforms affecting access to clean water for millions of people in El Salvador have been bogged down in the face of ISDR challenges under CAFTA. The threat of a NAFTA claim by insurance firms against Ontario, Canada's proposed no-fault government auto insurance regime led to the abandonment of that proposal. Canada also reversed a nationwide ban on MMT, a gasoline additive banned in many U.S. states as a probable carcinogen, after the U.S. Ethyl Corporation filed a NAFTA investor-state case.

The filing of ISDR cases is also increasingly being used as a form of rough bargaining. Consider the *Renco* case against Peru under the U.S.-Peru FTA, which relates to the severe pollution created by a metal smelter owned by Renco subsidiary Doe Run in the town of La Oroya, which was listed as one of the top 10 most polluted[22] sites in the world. The Peruvian government shut

down the facility after Renco's years of delay in implementing environmental improvements. Renco has taken no action on the FTA case itself since its initial 2010 notice, despite being authorized to do so since April 2011.

But, Renco has used the investor-state case as a tactic to pressure the Peruvian government to allow it to reopen its smelter without installing pollution-capturing devices, and to evade a U.S. court case seeking compensation for children injured by the past pollution. Renco's investor-state case demands $800 million[23] in compensation from Peru over the denial of a *third* extension on a 1997 environmental remediation agreement after failing to fulfill contractual commitments[24] to the Peruvian government to install pollution devices in the facility in La Oroya.

The Peruvian government has allowed the La Oroya smelter to restart zinc smelting operations[25] and in November 2012 Doe Run took the first steps to restart lead smelting, which has already resulted in reports of fresh emissions.[26] Meanwhile, Renco has also successfully used the mere filing of its investor-state case to delay and possibly derail[27] a Missouri state court case demanding compensation for Oroyan children poisoned by the smelter.

After Renco's three unsuccessful attempts to remove the case from state courts where it would face more favorable prospects, the filing of the ISDR case led a federal judge to approve Renco's fourth attempt at removal. Why? "[U.S. law] allows removal of any action in state court in which 'the subject matter ... relates to an arbitration agreement or award falling under the Convention' [Convention on the Recognition and Enforcement of Foreign Arbitral Awards]," she ruled.

Threats to Systems of Justice

For jurists, legal scholars and domestic practitioners, the ISDR critique is structural, focusing on the details of a parallel system of privatized justice.

Many of the lawyers who serve on ISDR tribunals also represent corporations in attacking governments, which creates inherent conflicts of interest by allowing lawyers to rotate between roles as arbitrators and advocates for investors in a manner that would be unethical for judges. Specific conflicts of interest have raised alarm, such as in the *Vivendi v. Argentina* case, in which the award was not annulled despite one of the tribunalists serving on the board of directors of a bank that held shares in Vivendi. The tribunalist did not disclose the conflict, much less recuse herself.

In addition, the bill-by-the-hour fee structure for tribunalists, in contrast to domestic judges who are not paid for piecework, creates an incentive for lengthy proceedings, for which governments are usually billed even if a case is ultimately dismissed. This fee structure creates a dynamic in which the mere filing of a case creates an incentive for governments to concede to investor demands to avoid costs.

Another, more fundamental legal concern with the ISDR regime is that it empowers foreign corporations to not only circumvent sovereign immunity protections, but to directly challenge domestic laws and regulations outside of domestic courts. Exhaustion of domestic remedies is

not required before proceeding to international tribunals even though the exhaustion requirement is a fundamental principle of international law.

Furthermore, as arbitral tribunals have extended beyond awards of cash damages and issued injunctive relief, severe conflicts of law problems are being created with investor-state actions being used to meddle in domestic court processes. For instance, in the *Chevron v. Ecuador* case under the U.S.-Ecuador BIT, a tribunal ordered Ecuador's executive branch to violate its constitutional separation of powers and somehow halt the enforcement of an Ecuadorian appellate court ruling[28] that ordered Chevron to pay for its contamination of the Ecuadorian Amazon.

This case, alongside *Renco*, also highlights how the investor-state regime is increasingly being used to evade justice in domestic courts. Legal claims against Chevron were lodged in U.S. courts on behalf of indigenous and *campesino* farmer residents affected by the company's oil operations in the Ecuadorian Amazon. After a decade of litigation, the case was heading to a jury trial in U.S. federal court when Chevron moved in 2002 to transfer it to Ecuadorian courts, arguing that it could only obtain a fair trial in Ecuador. The plaintiffs consented to the transfer after Chevron signed an agreement to abide with the final ruling of Ecuador's courts. In 2011, after an eight-year trial in Ecuador that generated over 220,000 pages of evidence, the Ecuadorian court ordered Chevron to pay $18 billion to clean up the environmental damage. An Ecuadorian appellate court affirmed the decision in January 2012. Chevron's executives vowed never to pay, despite Chevron's promise to U.S. courts that it would abide by the decision as a condition of moving the trial to Ecuador.

Having lost the case in Ecuador's domestic courts on the merits, Chevron – one of the wealthiest corporations on the planet, with revenues of $240 billion in 2011 – sought to escape its liability by commencing an investor-state case under the U.S.-Ecuador BIT that would shift the clean-up costs to the government of Ecuador, a country where the per capita income is $4,000 per annum. Ostensibly, the BIT was designed to allow U.S. investors to seek monetary damages from the government of Ecuador for expropriation or unfair treatment. But Chevron is using ISDR to try to immunize itself from liability in private litigation. It is asking a tribunal of three private lawyers to substitute its judgment for that of 18 years of robust U.S. and Ecuadorian court proceedings with respect to the merits of who is liable to clean up the toxic mess in the Ecuadorian Amazon. Although this BIT took effect in 1997, five years *after* the oil company abandoned its Ecuador operations, the tribunal issued an initial award ordering Ecuador's government to interfere in its independent judiciary and somehow suspend enforcement of the appellate court ruling until the ISDR investment tribunal can rule.

Increasingly Expansive Tribunal Interpretations of Obligations and Jurisdiction

Governments that previously agreed to ISDR provisions without trepidation have shown rising concern with a trend of tribunals creating new obligations for States with enormously elastic interpretations of the "minimum standard of treatment" and related "fair and equitable treatment" standards. By fabricating new obligations under these standards - obligations not contemplated when countries signed FTAs and BITs - tribunals are then issuing stunningly arbitrary awards. Tribunal-fabricated obligations related to fanciful notions of investors' expectations and what a

tribunal deems a proportionate response by a government to an investor's malfeasance open the door to ISDR claims and awards over a wide range of government measures that are otherwise permissible under nations' constitutions and legal systems.

Such concerns were confirmed with the recent and historic $1.8 billion judgment (plus compound interest) against Ecuador in a case brought by Occidental under the U.S.-Ecuador BIT. While the press focused on the staggering penalty—the largest to ever come out of an International Centre for Settlement of Investment Disputes (ICSID) tribunal—that may not have been the real news. Perhaps even more shocking is the illogic that the tribunal used[29] to rule that Ecuador violated the BIT's Fair and Equitable Treatment and Indirect Expropriation obligations.

The tribunal acknowledged that Occidental breached a government contract by selling a 40 percent share of its oil concession. The contract included a provision stating that the assignment of any share to another party without government consent would terminate the contract. And, the tribunal noted the Ecuadorian law that stated that such an action could result in forfeiture of the concession altogether. Thus, the tribunal concluded that Oxy should have expected its contract to be terminated and noted that it had a right to challenge this outcome in domestic court. But, the tribunal created a "proportionality" obligation, and opined that Ecuador's action in enforcing the exact language of the contract was unduly harsh. Having found a FET violation, the tribunal declared that this also equated to an indirect taking without further analysis or explanation. It then ordered Ecuador to pay 100 percent of the lost future earnings under the contract, even though the whole conflict related to Oxy's sale of a 40 percent share.

Recognizing and seeking to limit tribunals' expansive interpretations of governments' obligations to investors, some States have attempted clarifications and interpretive annexes to rein in ISDR tribunals. But this summer's CAFTA *Railroad Development Corporation v. Guatemala* award showed that the touted U.S. Customary International Law (CIL) Annex has proved quite useless[30] in foreclosing tribunals from generating ever-expanding interpretations of States' obligations to investors, such as those based on fanciful notions of investors' expectations. Rejecting the arguments raised by Guatemala, the United States, El Salvador and Honduras that the minimum standard of treatment obligation must be interpreted under a CIL state practice and *opinio juris* analysis, the tribunal instead imported an inventive MST interpretation from the NAFTA *Waste Management II* award and ordered Guatemala to pay $11.3 million, plus backdated compound interest and fees, for actions that did not violate the CIL denial of justice standard.

While ISDR tribunals have expanded States' obligations to investors, they have also been widening the jurisdiction through which the investors can seek to enforce those "obligations." Despite the standard "Denial of Benefits" language, investors from countries that are not signatories to an agreement increasingly are launching investor-state cases via subsidiaries. For example, in the *Pacific Rim v. El Salvador*[31] case brought under CAFTA, a Canadian firm reincorporated a Cayman Islands subsidiary as a U.S. corporation three months before launching a CAFTA investor-state case against El Salvador. The case made it through CAFTA's preliminary objections process. Only after three years and millions in costs did the tribunal dismiss the CAFTA aspect of the case. The tribunal agreed with El Salvador's denial of benefits

arguments, but noted that had the firm done a more careful job of setting up its U.S. subsidiary, the Canadian firm could have used CAFTA's ISDR provisions.

Perhaps the most glaring example of the increasingly common and unfair practice of nationality-shopping can be found in the multi-front war being waged against cigarette plain packaging health policies. Philip Morris International moved the head office of its Australian subsidiary to Hong Kong shortly before it attacked Australia under the Hong Kong-Australia BIT in 2011. However, the corporation claimed to be a Swiss-based company when it launched its 2010 ISDR attack against Uruguay under a Uruguay-Swiss BIT. Meanwhile, the firm described itself as a U.S.-based company when it made a submission in 2010 to the Office of the U.S. Trade Representative in support of including ISDR in the TPP.

The Perfect Storm over ISDR Makes Landfall in the TPP

With public and policymaker alarm about ISDR growing in parallel to the upward trajectory of arbitrary ISDR awards against common public interest policies, the TPP negotiations could have been a venue to address[32] well-founded concerns. Instead, U.S. official have dismissively waived off congressional and civil society reform proposals, doubling down to try to expand both the substantive investor rules and the scope of ISDR. This does not bode well, neither for the TPP, nor the future of the investor-state dispute resolution system.

ENDNOTES

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