



Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
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Comments by Lise Johnson Columbia Center on Sustainable Investment May 12, 2015

Thank you, Senator Brown and Representative Levin, for the opportunity to discuss these issues.

Today I want to focus my remarks on the implications of investor-state dispute settlement (ISDS) for the US. There are four main issues I will highlight.

First is that, if we include ISDS in future agreements, we are entrenching an experiment that seems to have failed.

I refer to ISDS as an experiment because, although it is commonly noted that there are 3000 investment treaties around the world and, therefore, the ISDS mechanism is nothing new, the first investment treaty with ISDS was actually not concluded until the late 1960s. Investment treaties with ISDS were not widely negotiated until the 1990s, and ISDS claims only really emerged in earnest in the 2000s. Thus, ISDS is still a new area of law. An experiment.

I note that ISDS is a *failed* experiment because it does not appear to have achieved three of the commonly stated objectives of the mechanism. It has not led to increased investment flows, to a set of predictable international legal rights for investors, nor to an increase in the rule of law in host countries.

If the TPP and TTIP were concluded with ISDS, we would not only be entrenching this failed experiment, but significantly expanding it. Currently, the US only has an investment treaty with one major capital exporting state, Canada, meaning that only a relatively small share of foreign direct investment in the US (approximately 10% from Canada) is currently protected under ISDS. With the TPP and TTIP, however, the amount of covered FDI will rise significantly to approximately 70%, and along with it the US's exposure to costly litigation and liability.

My second point is that ISDS risks undermining development, application and enforcement of domestic law. The USTR has defended ISDS by saying that the standards of protection investors receive under it mirror those under domestic law. But that is precisely the problem: What ISDS does is give private arbitrators the power to decide cases that, at their core, are questions of domestic constitutional and administrative law. Through ISDS, investors can bypass and therefore

undermine the domestic institutions that have traditionally been responsible for interpreting and applying the law. Instead of recourse through those domestic institutions, investors are able to take their claims to a panel of party-appointed international arbitrators and ask them to determine the bounds of proper administrative, legislative, and judicial conduct. Moreover, as some cases like *Eli Lilly v. Canada*, *Teco v. Guatemala*, and *Philip Morris v. Australia* show, investors are also using ISDS as de facto courts of appeal to challenge the substance of domestic judicial decisions.

Third, if ISDS were included in future treaties, we need a more critical look at the provisions. Although the Administration says that it has remedied errors from past agreements, based on the leaked chapter of the TPP and recent decisions, the TPP's "fixes" are incomplete. Some examples include:

- The FET problem remains: Decisions under the NAFTA and the more recently negotiated CAFTA have shown tribunals to be disregarding the state parties' instructions regarding the meaning of the fair and equitable treatment (FET) obligation, including the 2001 binding interpretive statement of the NAFTA parties. The majority decision against Canada in *Bilcon v. Canada* and the decision against Guatemala in *Teco v. Guatemala* are two examples. Further refinements to protect against tribunals' expansive interpretations are needed.
- Protections against frivolous claims are weak: As highlighted by a recent decision in *Renco v. Peru*, the mechanism that the US and its treaty parties have included in their more recent treaties to try to ensure prompt dismissal of frivolous claims has been interpreted narrowly, leaving states exposed to the possibility of having to defend facially meritless claims.
- No language protects against abusive use of the most-favored nation and national treatment provisions: Tribunals have allowed investors to use those standards to bring claims alleging that they should not have been penalized for wrongful conduct if other wrongdoers were not similarly punished. In other words, investors are arguing for a "lowest common denominator" standard of treatment by government officials charged with enforcing laws and regulations, and tribunals are obliging. This is a new strategy for contesting regulatory action that should be stopped.
- Transparency provisions in the leaked draft of the TPP are weaker than in other post-NAFTA agreements and in the US's 2012 Model BIT: The draft text of the TPP contains a provision not included in other US texts. After giving the tribunal significant discretion to determine whether information is privileged or confidential, the agreement states that the parties should "endeavor to apply their laws in a manner sensitive" to the tribunal's determination. This could result in governments' resisting disclosure of information that the governments would otherwise be permitted under domestic law to release.

My fourth and final point relates to the negotiating objectives as set forth in the Hatch-Wyden-Ryan TPA bill. The negotiating objectives in that bill are the same as they were in 2002. They therefore fail to take into account the experiences of the past decade and represent a missed opportunity to advance current important priorities.