Remarks at the National Press Club Panel on the proposed inclusion of ISDS in the TPP

February 11, 2016

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With the TPP, we are currently at a crucial crossroads. We either take this time to thoroughly evaluate ISDS and its costs and benefits, which, I believe, would take us in a new and more thoughtful direction, or we simply move forward with the TPP, entrenching and expanding a failed experiment in economic policy.

I refer to ISDS as an experiment because, although it is commonly noted that there are 3,000 investment treaties around the world and, therefore, that 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 late 1990s and early 2000s. Thus, we really only have roughly 15 years of experience with this mechanism. 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, nor 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 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 – roughly 10% -- is currently protected by a treaty with ISDS. With the TPP, the percentage of covered investment will more than double; and if we continue the trend in the TTIP as well, the amount of covered FDI in the US will rise significantly to approximately 70%, and along with it, the US’s exposure to costly litigation and liability.¹

Now, the US has said that the experiment has not cost the Government anything, frequently highlighting the point that it has yet to lose an ISDS case. But there are a few reasons why I don’t think we should count on the past to predict the future:

• As I noted, the US’s exposure has been fairly limited; this will change with the TPP;
• Second, in the cases the US has defended, the US has had near misses in which even the government officials working on the case thought the Government would lose; one explanation given for why arbitrators have been reluctant to rule against the US is that, if the US were to lose, it would back away from the system to the ultimate detriment of the arbitrators and counsel who make their living from ISDS cases. Thus, at least while the future of ISDS felt uncertain, it has been in the best interest of arbitrators to take it easy on the US.
• Third, recent decisions reflect the significant delegation of authority under ISDS to arbitrators to interpret and apply the treaty, without any meaningful review or opportunity to appeal the arbitrators’ decisions. The tribunal in a recent case against the US, for example, stated that although all three NAFTA states unanimously agreed that the treaty meant “X”, it didn’t consider itself bound to that interpretation and proceeded to disregard it. This shows that there is no guarantee

¹ Data from the Bureau of Economic Analysis.
that tribunals will interpret treaty provisions in a way that is consistent with the US’s understanding of what treaty obligations mean.²

- Fourth, the US has lost on key issues that have resulted in an expansion of exposure to future claims and damages.³

Moreover, irrespective of data on wins and losses, the system of ISDS itself is fundamentally flawed in that it creates a privileged and powerful system of protections for foreign investors that is inconsistent with, and erodes, the power of domestic law and institutions.

The USTR has defended ISDS against such charges by saying that the standards of protection investors receive under it mirror, but do not go beyond, the protections provided under domestic law and that therefore ISDS does not represent any change or threat to domestic law as we know it.⁴ But there are two key problems with the USTR’s assertion. One is that it is not correct that investment treaties do not provide foreign investors any greater rights than are provided under domestic law. We’ve done significant research comparing the protections provided under domestic law with those provided under investment treaties, and conclude that the protections provided under investment treaties in fact give foreign investors greater rights than they or anyone else have under domestic law.⁵ In fact, this seems to be why TransCanada, which is suing the US


³ See cases discussed Id.


government as a result of the denial of the Keystone permit, is pursuing its major claim for $15 billion through the NAFTA as opposed to through domestic litigation.

But, even accepting the USTR’s argument that the substantive standards in investment treaties simply mirror substantive standards provided under US domestic law still does not address some of the significant concerns about ISDS. In this context, it is important to recall that ISDS allows investors to challenge actions of officials at any level of government – local, state, and federal, and conduct by any branch – executive, legislative and judicial. The fact that a measure is entirely consistent with domestic law is no defense or shield against liability.

What ISDS does is give private arbitrators the power to decide cases that, at their core, are merely questions of domestic constitutional and administrative law dressed up as treaty claims. Instead of recourse through local, state or federal 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.

One might ask: what does it matter if we permit foreign investors to bring their claims against the government before international arbitrators as opposed to before domestic courts if the substantive standards of protection are the same? The answer is that it matters a great deal.

- One, there is no route for a meaningful appeal. Even if a tribunal gets the law or facts wrong, its decision will likely stand;
- Two, the decision makers in ISDS are free of the requirements of independence, impartiality, and high ethical standards that are mandatory for US judges;
- Three, in domestic litigation, if a court issues a decision that is inconsistent with legislative intent, the legislature can pass a law correcting that decision; the legislature, however, has no power to undo or otherwise override an ISDS decision;
- Four, the procedural rules and remedies are significantly different depending on whether an investor brings its claims through ISDS or through domestic courts, with
meaningful impacts on the government’s potential exposure to claims and liability; and

• Five, even if the law looks the similar, it is not the same. So, for example, although the TPP incorporates what superficially looks like the US’s test on regulatory expropriations, tribunals are not in any way bound to apply that test in the same manner as US courts.

Fundamentally, the US has typically only agreed to supranational adjudication in exceptional and justified cases and after resolving a range of complex legal and policy concerns about the scope and depth of supranational review and authority over domestic policies and decisions, the role of public, private and affected stakeholders in the legal process, and the available remedies to aggrieved parties. Much more consideration of these issues is important before we inadvertently dilute constitutional protections, weaken the judicial branch, and outsource our domestic legal system to a system of private arbitration that is isolated from essential checks and balances. This is not to say that supranational adjudication has no place in the American legal system, but rather that ISDS is unnecessary, unjustified, over-reaching and discriminatory and will have undue negative effects on our domestic law and institutions.