

ISDS in the TTIP:
How It Can Affect the Development,
Interpretation and Application of US Law

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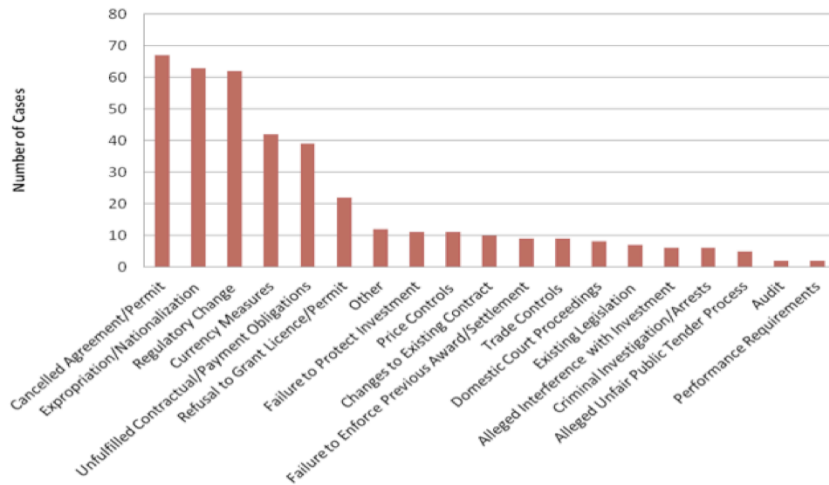
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Government Actions Subject to Claims

- ◆ Investor-state dispute settlement (ISDS) cases filed to date show they can be used to challenge local, state and national government action to develop, apply, enforce, and interpret the law:
 - ◆ Legislation
 - ◆ Policies and practices
 - ◆ Administrative rules and decisions
 - ◆ Enforcement actions
 - ◆ Court decisions
 - ◆ Government performance of contracts



Government Action Triggering Claims: The Data



Source: Zoe Phillips Williams, Investment Treaty News, vol. 5, August 2014 3



This research shows the government actions and inactions that have given rise to ISDS claims. The cases have involved challenges to a range of actions and omissions involving judicial action, administrative action, executive action, and legislative action. (Note that claims of expropriation/nationalization include not only allegations of outright takings, but of regulatory expropriations, which can include cases in which the investor challenges that a government has impacted its profits or plans to such an extent that it has expropriated the investment).

Notably, this research of claims filed to date also shows that one of the core factors that appears particularly relevant to whether a country will be sued under ISDS is the amount of foreign investment received. As the NAFTA shows, if the mechanism is there, foreign investors will use it even if the government has a relatively stable and well-functioning domestic court system. This should be of particular importance to the US and EU given the amount of foreign investment that would potentially be covered by this treaty.

The important question when considering the role and impact of ISDS in the TTIP is not whether governments are being challenged for these types of actions and inactions (as challenges to these types of government actions already happen through domestic law), but rather what the implications are for domestic law and policy that these challenges can be brought under the investment treaty and through ISDS.

Claims Against Governments:
The Same Complaints under Different Standards

US Domestic Law Claims	Treaty Claims
Takings	Expropriation
Substantive due process	Expropriation Fair and equitable treatment Umbrella clause
Procedural due process	Fair and equitable treatment
Contract breach	Expropriation Fair and equitable treatment Umbrella clause
Challenges to administrative actions	Expropriation Fair and equitable treatment Umbrella clause
Tort claims	Fair and equitable treatment



This chart roughly shows the parallels between domestic law claims and treaty claims. Domestic law allows challenges to government actions, but under different causes of action than under treaties. Takings claims under US federal law could be raised, for example, as expropriation claims under a treaty; claims of substantive due process under US law could be framed as expropriation claims, fair and equitable treatment claims, or “umbrella clause” claims under a treaty.

If investors are covered by an investment treaty, they can choose whether to bring the claim in US courts under domestic law or through ISDS under the treaty. That choice will likely reflect and impact their chances of success and the remedies that can be obtained. The venue and law applied also determine how public and private rights are balanced in the dispute and resulting determination, award or remedies. It is therefore important to have a good understanding of how and why the rules of the game, chances of success, and remedies differ from one forum to another.

Components of Domestic Law that Affect Viability of Claims and Scope of Government Liability

- ◆ What causes of action are available and what rights do they protect? (e.g., claims under federal or state constitution, APA, tort, breach of contract)
- ◆ Who can bring claims? (e.g., doctrines of standing)
- ◆ Under what circumstances? (e.g., when claims are ripe, when agency action is final, when exhaustion requirements are complied with)
- ◆ When will a court abstain from hearing cases? (e.g., *Burford*, *Colorado River*, *Younger*, and *Pullman* abstention)
- ◆ When will cases be deemed non-justiciable? (e.g., political question doctrine)
- ◆ Before what courts or tribunals? (e.g., agency proceedings; lower court, intermediate court, or supreme court; state court or federal court; Article I or Article III court; where one goes depends on statutes, constitution, and doctrine (e.g. *Rooker-Feldman* doctrine))
- ◆ What level of scrutiny or deference must the court or tribunal accord? (e.g., “rational basis test”, intermediate scrutiny, or strict scrutiny of constitutionality depending on the right at issue; “arbitrary or capricious” review of agency action; de novo review of lower court decisions on issues of law or “clear error” review of lower court decisions on issues of fact)
- ◆ What rules of evidence and privileges apply? (e.g., rules on taking and reliability of evidence; “deliberative process privilege”)
- ◆ What defenses are available? (e.g., sovereign acts defense; discretionary function exception; action consistent with domestic law)
- ◆ What remedies are available? (e.g., removal of the measure, declaratory relief, compensatory damages, or punitive damages)

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Domestic US investors who are aggrieved by actions of government officials at the local, state or federal level will consider various questions about their claim, the answers of which are based on US law, reflecting a host of policy considerations that have been developed and refined over time.

However, foreign investors covered by an investment treaty with investor-state protections who feel aggrieved by the same government action will consider all of these same questions, but will arrive at different answers under US law versus under investment treaty law. Foreign investors can then pick which route to take – domestic law or treaty law.

The differences between the two systems are significant.

Differences in Procedure and Substance: Some Examples		
Issue	US investors	Foreign investors
Bringing claims	Must comply with requirements to exhaust local remedies	Claimants are not subject to requirements to exhaust local remedies. Can proceed directly to arbitration.
Causes of action and defenses	Claims against government defined by domestic law (APA, takings claims, due process challenges, breach of contract, tort, etc.)	Claims against government brought under treaty standards. <u>Legitimacy of the government action under domestic law is not a defense.</u>
Abstention for policy purposes	Federal courts may abstain from taking jurisdiction for various policy reasons. Under the <i>Burford</i> doctrine, for example, federal courts may abstain from taking the case when it deals with a sensitive matter of state or local policy.	<u>There is no doctrine of abstention for policy grounds.</u> Tribunals with jurisdiction hold they must hear claims irrespective of the domestic policies at issue.
Evidentiary issues	For policy purposes, statutory and judicial doctrines like the “deliberative process privilege” have been created to guard against discovery and use of certain government information	Tribunals may apply, but are <u>not bound by domestic rules on privilege or taking or admission of evidence</u>

Some examples of the ways in which the legal systems differ:

Bringing claims: Exhaustion requirements are often justified on the ground that they promote administrative autonomy, preserve the separation of powers, promote judicial economy, give administrative entities power to remedy their own errors, and permit courts to benefit from an agency’s own review of the facts and the agency’s expertise. Tribunals routinely say there is no requirement to exhaust local remedies.

Causes of action and defenses: An act may be perfectly legitimate under domestic law, surviving takings, substantive due process, or other challenges, but nevertheless fail under the treaty on the ground that it violates the FET or other standard. As pleadings filed to date show, it is relatively easy for creative lawyers to frame contract and domestic law issues as treaty breaches to get the claims before a treaty tribunal; and tribunals have held in numerous cases that legitimacy of the action under domestic law is not a defense.

Abstention: Abstention doctrines are usually relevant where the same issues are being brought or may be brought in different court systems (e.g., state or federal), and there is a question about the proper place for it to be heard.

Under the *Burford* abstention doctrine, for example, where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies:

- (1) when there are “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar”; or
- (2) where the “exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.” (New Orleans Public Service, Incorporated v. Council of City of New Orleans, 491 U.S. 350, 361 (1989) (quoting *Colorado River*)).

A similar doctrine, though not necessarily an abstention doctrine, is *Rooker-Feldman*. This reflects the principle that federal courts won’t take jurisdiction over actions that are merely intended to challenge state court judgments.

These doctrines reflect and protect the importance of forum, and deference to local decision makers and preferences. The principles they safeguard are particularly relevant for situations when a federal court is considering whether to review a state action, or an international tribunal is considering whether to review a national or sub-national action. There is, however, no doctrine of abstention for similar policy grounds in ISDS. Rather, tribunals have routinely declared that if they have jurisdiction, they must exercise it.

Evidentiary issues: Issues of evidence and privilege can also be very important for shaping claims and defenses. The deliberative process privilege is an example of one privilege embodied in domestic law that is especially relevant for claims against government actors. It protects from compelled disclosure an administrative agency’s deliberative materials created as part of the agency’s decision-making process. The privilege is thought to encourage candid discussions of policy options within government agencies, protect against premature disclosure of proposed policies, and ensure officials are judged only by their final decision. The privilege, however, is qualified and can be overcome by a showing of need that outweighs the need for confidentiality. While tribunals *may* determine that issues of evidence and privilege are determined by the respondent state’s law, they are not bound under the treaties or arbitration rules to do so.

Implications

- ◆ For entirely “domestic companies”, the status quo remains: the grounds and means of challenging government action are limited by well-defined and refined rules that balance policy prerogatives and private/corporate rights, and that can continue to be shaped through democratic and transparent channels.
- ◆ For European shareholders, European companies invested or seeking to invest in the US, ISDS would provide, *at their election*,
 - ◆ a new set of substantive and procedural norms that can be used to challenge administrative, judicial, and legislative actions;
 - ◆ that is not tethered to domestic US law; and
 - ◆ that overrides that domestic law and the policy choices that it reflects.

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A 21st century trade agreement should not undo policies and legal frameworks that have been developed and fine-tuned, and continue to be developed and fine-tuned through democratic processes, transparent courts and administrative systems checked and balanced by separation of powers. And a 21st century framework especially should not undo those frameworks for a specific set of actors based solely on their nationality. If indeed that were the intention or effect of the TTIP, the implications would be quite alarming.