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# How Protections under International Investment Law Expand Investors' Rights and States' Potential Liabilities as Compared to US Law

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The USTR has stated that investor-state arbitration is important because it will provide investors operating in foreign countries with a basic set of legal protections, while ensuring that the US and its partner countries are able to regulate in the public interest as they see fit. The USTR has also stated that its investment chapters and investor-state arbitration do not provide foreign investors any more substantive rights than are available under domestic law.

But evidence from actual cases shows something different.

Far beyond giving companies the basic right to protect themselves against egregious conduct or discrimination based on their foreignness, investor-state arbitration grants individuals and enterprises additional substantive protections, greater than those found in domestic law and enjoyed by domestic investors; and it allows private arbitrators, who are not accountable to the public or even to any significant oversight mechanism, to make important decisions about how to balance public and private interests in ways that differ from how domestic legal systems have carefully struck that balance.

One important way through which investor-state arbitration erodes the balance of public and private interests struck in domestic law is through decisions finding expansive government liability for regulatory change.

Under US law – we have strong doctrines that generally protect the right of government to modify the legal framework over time – to update laws and regulations based on new information, circumstances, and challenges. We also have provisions that prevent the government from going too far and undoing specific commitments that it has made. To balance, on the one hand, the need to maintain government flexibility over time and, on the other, the need to protect existing commitments, US courts have developed two important rules: those of "sovereign acts" and "unmistakability".

First, the sovereign acts doctrine states that the government will typically not be liable to private parties for economic harms suffered as a result of general regulatory change.

The doctrine of "unmistakability" operates as an exception to that rule, stating that the government ***may*** have to compensate a private individual or company for costs imposed by general regulatory change, but only if the government has *promised* – in a legally binding and unmistakably clear way – not to make those changes.

To give an example, if an official has promised a company that it won't need to abide by new environmental regulations, then that company may be able to hold the government to that promise but *only* if the promise meets certain criteria.

1. First the promise to waive future legal powers must have been clearly and unambiguously made.
2. Second, the government must have actually intended to make that promise. These are rules of strict construction, meaning that courts have said they will not find that the government has implicitly or accidentally ceded its powers to make, interpret and apply the law. Those powers must be clearly, unmistakably, and intentionally contracted away.
3. Third, the promise must have been made by an official who had the actual authority to make it. A rogue or negligent official who wrongly assures a company that it does not have to abide by the law cannot bind the government to that purported promise.
4. Fourth, and crucially, the promise must be substantively and procedurally legal. It must be substantively legal in that the nature of the agreement cannot violate the law or public policy; additionally, it must be procedurally legal, in that it must be made through proper processes that are meant to prevent corruption and ensure accountability.

Finally, there generally is no rule of estoppel against the government. If a promise does not meet these criteria, but an investor acts in reliance on it, the government still will not be bound. The effect of this rule is to impose a due diligence requirement on investors, preventing them from benefiting by negligently or intentionally ignoring questions about the validity of alleged commitments.

Bringing these rules together, we see a framework in which the government ***may*** have to pay a private company for changes in the law impacting that company's profitability, but that requires the company to first establish that it had a right –clearly and legitimately given to it by the government – to be protected from those changes.

These safeguards, however, are absent in investment treaty arbitration. In contrast to US domestic courts, arbitral tribunals have been much more willing to find that governments have implicitly or explicitly promised investors legal stability.

More specifically, in a number of cases, tribunals have required governments to pay companies for the cost of complying with legal change even when the government made no express commitment to exempt the company from having to follow the law. Rather than requiring promises to be clear and unmistakable as is required under US domestic law, tribunals have ***inferred*** the existence of an enforceable promise of stability simply by looking at the state of the legal framework that existed when the investor established its business, and concluding that the investor had the right to expect that framework would remain unchanged over time.

Additionally, tribunals have required governments to pay compensation for the cost of complying with regulatory change even if the person giving the alleged promise of legal stability had no actual authority to do so, or if the promise was illegal under domestic law. Indeed, tribunals have expressly said on a number of occasions that whether a government's purported promise to the investor was legitimate is irrelevant to whether they will hold the government accountable for it.

Tribunals have also disregarded whether the government intended to exempt the investor from future regulatory change, or whether proper processes were followed.

This approach taken by tribunals has a number of important policy consequences.

First, it represents a fundamental shift in the question of who bears the risk of legal change. As compared to US law, it makes it much easier for investors to claim that they have a "right" to not to have to comply with (or to be compensated for) new or amended laws that raise the cost of doing business. This, in turn, raises the cost for governments to enact and enforce laws in the public interest.

Second, this system allows investors to enforce otherwise unenforceable promises, sidestepping procedural and substantive rules of public policy that have been domestically defined and accepted.

There is no reason to believe that an investor-state arbitration provision in the T-TIP would yield any different results than what we have seen in the cases filed under existing investment treaties concluded by the US and others.

The crucial concern thus remains that these treaties – and the way that they are being interpreted – have elevated investor-state arbitration so that it is not just a tool for protecting against discriminatory conduct and egregious procedural harms, or ensuring smooth access to justice. Rather, it allows private actors to evade complex and important domestic rules regarding how to strike the proper balance between private rights and the government's power to regulate in the public interest. Unless it can be ensured that foreign investors and arbitral tribunals cannot use investor-state arbitration to circumvent that balance, then that mechanism should not be included in this or other agreements.