ISDS In The TPP: Is The Recent Uproar In The US Merited? – Part II

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In recent weeks, criticism of the TPP has been increasingly focused on the Investor-State Dispute Settlement (ISDS) mechanism contained in its Chapter Nine. Massachusetts Senator Elizabeth Warren initiated the charge against the TPP's ISDS mechanism, and her attacks were recently supported by more than two hundred economists and law professors, who addressed a letter to members of Congress opposing to the TPP's ISDS chapter.

Three major criticisms have been put forward. **Part I** of this blog post examined the supposedly undemocratic nature of the TPP's ISDS system. In **Part II**, we will examine the alleged impact of the TPP's ISDS system on State sovereignty, and whether or not the system is transparent and provides sufficient means for third-party participation.

Impact on State Sovereignty

One of the biggest critiques of ISDS in recent years has centered on the system's alleged tendency to infringe on the sovereign rights of States. Critics allege that ISDS "threatens domestic sovereignty, and weakens the rule of law"[fn]Laurence Tribe et al., "220+ Law and Economics Professors urge Congress to reject the TPP and other prospective deals that include Investor-State Dispute Settlement (ISDS)", 7 September 2016, p. 2[/fn]. This is the case given that many of the largest cases in recent memory have seen States face claims for sensitive issues such as decisions in times of emergency, measures taken in the name of public health, or the use of natural resources.

The TPP addresses this growing concern by curtailing the amount of investor protection available under certain substantive provisions, and by clarifying the confines of others.

Power to regulate

Several provisions in the TPP make clear that social welfare objectives are relevant and should be given proper weight when assessing whether a substantive obligation has been breached by a State. For example, the definition of expropriation contained in Annex 9-B makes it clear that "non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives … do not constitute indirect expropriations, except in rare circumstances". This is a clear response to concerns regarding States' power to regulate.
In the same vein, Articles 9.4 and 9.5 provide that "legitimate public welfare objectives" shall play a role in assessing whether or not like treatment is being accorded to investors and investments under National Treatment (NT) and MFN provisions, respectively. Article 29.5, contained in the chapter

covering exceptions, also provides that "a Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure."

The will of TPP parties is clear: when public welfare objectives are involved – like with the regulation of tobacco packaging – States should have more leeway to act and regulate, and these powers should be protected.

Minimum Standard of Treatment

Article 9.6, Minimum Standard of Treatment, represents perhaps the most modern version of such a provision, by laying to rest many of the growing concerns about a wide-ranging and unwieldy Fair and Equitable Treatment (FET) standard, which is the most common ground on which investors have obtained awards in recent years[fn]UNCTAD World Investment Report 2016, p. 115[/fn]. This is the case for three main reasons.

First, Article 9.6 "prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments", and makes explicit that "the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights." The TPP thus follows along the lines of a 2001 interpretive note of the NAFTA Commission, which provided for such an interpretation of FET, thereby curtailing the substantive protection available to investors[fn]*North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions*, NAFTA Free Trade Commission, 31 July 2001[/fn].

Second, Article 9.6(3) provides that breaches of other provisions of the Treaty, or of other international agreements, do not automatically qualify as breaches of the minimum standard of treatment. This should discourage investors from submitting claims under this standard whenever they allege that other provisions of the Treaty have been breached (as has been standard practice in the past decades).

Third, and as an innovation, Article 9.6(4) explicitly and "[f]or greater certainty" provides that "the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article". This is, again, a response to concerns regarding an unwieldy FET standard, and a clear message to investors that inconsistency with expectations is insufficient, in and of itself, to hold a State liable.

The TPP also provides for the establishment of its own NAFTA-inspired Commission to issue binding interpretations of the Treaty. This will help ensure that States maintain influence over the interpretation of provisions – whether FET or others – and thereby guard against overly expansive interpretations.

Transparency and Public Participation

Another line of criticism of the TPP's ISDS system focuses on its allegedly opaque nature, and supposed negative impact on many stakeholder groups. These criticisms have previously been leveled against ISDS, and led to the 2014 adoption of the Mauritius Convention and its accompanying UNCITRAL Transparency Rules.

Chapter Nine of the TPP reflects these modernizations of the ISDS system. It includes provisions for greater transparency of proceedings and documents, and for the participation of *amici curiae*. In fact, Article 9.24(2) of the TPP goes even further than the UNCITRAL Transparency Rules in terms of public access to hearings, as it does not provide for exceptions on the basis of "infeasibility" or difficulties

providing public access for “logistical reasons”[fn]Article 6(3) of the UNCITRAL Transparency Rules[/fn].

It is thus misleading to say that “TPP is an unfair trade deal that will expand a secret court system”[fn]David Dayen & Ryan Grim, “There’s a new front in the battle over the Trans-Pacific Partnership”, p. 3[/fn], or that “[t]here are no mechanisms for domestic citizens or entities affected by ISDS cases to intervene in or meaningfully participate in the disputes”[fn]Laurence Tribe et al, id., p. 3[/fn].

Conclusion

ISDS is far from perfect. As correctly noted by its critics, it is a relatively young system that still has some kinks to be worked out. However, it is also a sophisticated and highly responsive system that has evolved significantly since the early 1990s. Chapter Nine of the TPP represents a big leap forward in this evolution. American lawmakers, media, and civil society should not fall prey to the alarmist criticisms of ISDS. When *valid* criticisms exist, they should translate into proposals to improve the system rather than to cast it aside.

In any case, critics should bear in mind that the ISDS system, warts and all, is an objective improvement on prior methods for dealing with investor-State disputes, such as diplomatic protection, and that it provides foreign investors (notably, Americans doing business abroad) with a neutral forum to air international law grievances.

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