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Impacts of Investment Treaties on Health and Human Rights

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IMPACTS OF INVESTMENT TREATIES ON HEALTH AND HUMAN RIGHTS

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Abstract: While investment treaties could help protect health and promote human rights, they are rather often used as a means to discourage governments from taking action. The treaties allow foreign investors to initiate investor-state dispute settlement (or ISDS) proceedings against states for their legislative, executive, administrative, and judicial decisions at any level. Thus, they provide a powerful tool for "foreign" investors to frustrate state action in virtually any area, including health and human rights. This article describes how ISDS provisions have impacted health-related decision-making by states and, in so doing, weakened their abilities to fulfill their human rights obligations.

Keywords: ISDS, foreign investor, investment treaty, NAFTA, MMT, fair and equitable treatment

INTRODUCTION

Investment treaties could play a positive and direct role in protecting health and promoting human rights by establishing enforceable international standards of conduct for governments and foreign investors in these fields. Yet, they have been designed instead to discourage governments from taking action to protect health or achieve other public priorities, where such actions may run afoul of the special protections granted in the treaties to foreign investors. The protections are far-reaching, partly because of the broadly defined concept of investment in the treaties to include, for example, "intangible" property, a "concession...to search for...natural resources," and "rights in relation to undisclosed information."[1] The resulting breadth of the treaties' coverage, in turn, makes the protections for foreign investors more powerful as a deterrent against governments and legislatures, especially for firms and individuals that are able to plan their ownership structure in ways that allow them to acquire "foreign" nationality creatively, even in relation to their home country, and who are wealthy enough to finance costly litigation under the treaties. Most importantly, the treaties allow foreign investors to initiate investor-to-state arbitration proceedings (also called investor-state dispute settlement or ISDS) against states for their legislative, executive, administrative, and judicial decisions at any level. Thus, the treaties provide a powerful tool for "foreign" investors to frustrate state action in virtually any area, including health and human rights. This chapter aims to shed light on how the tool works and how foreign investors and ISDS tribunals have used it to oppose health-related decisions by states.

FOREIGN INVESTOR PROTECTION IN INVESTMENT TREATIES

Investment treaties take two main forms. First, since the late 1960s and especially since the early 1990s, states have concluded over two thousand bilateral investment treaties (or BITs). These treaties are "bilateral" because they apply between two states; they are "investment" treaties because they serve to protect and promote foreign investment, broadly defined. Over the decades, BITs were concluded almost exclusively between: Western-developed countries on the one hand; and developing or transition countries, on the other. Additionally, they were concluded among developing and transition countries themselves. There are no BITs between major Western-developed countries. The premise behind earlier BITs was that the lack of independent judicial systems in developing countries could allow uncompensated nationalization of foreign investors' assets, thereby harming the economic interests of foreign investors and capital-exporting states.

Second, states, driven especially by US negotiating objectives, have concluded several dozen trade

[1] *Comprehensive Economic and Trade Agreement*, Canada and the European Union, 30 October 2016, art 8.1 (provisionally entered into force 21 September 2017).

agreements that contain a chapter on investment providing for ISDS.[2] Since the 1990s, and marked especially by the suite of World Trade Organization (WTO) agreements, the scope of trade agreements has been expanded to cover topics going well beyond conventional areas of trade quotas and tariffs reductions. The topics deal with food and product safety; allowance of gambling; operation of water and sewage systems; requirements for domestic content and diversity in cultural industries; creation of intellectual property rights; subsidies in agriculture and environmental industries; regulation of banking and insurance (including healthcare); and, as discussed in this paper, protection of foreign investors' assets from laws, regulations, and other state decisions that may reduce their profitability. This expansion of the realm of "trade" has been so multi-faceted and deep in its penetration of domestic law and policy that it has been characterized by some academic analysts as a form of constitutional reform at the international level.[3]

Even so, many trade agreements, including the WTO agreements, have not gone so far as to include an investment chapter allowing for ISDS. In this paper, only those trade agreements that take this step are characterized, along with BITs, as investment treaties. Within this group of trade agreements, the investment chapter of the agreement usually mimics a BIT. In particular, they usually mimic the US model BIT, as in the case of the North American Free Trade Agreement (NAFTA) of 1994.

Like BITs, trade agreements that have an investment chapter tend not to apply among developed countries, albeit with three important exceptions: (1) NAFTA applies between Canada and the US; (2) the Comprehensive Economic and Trade Agreement (CETA) would potentially apply between Canada and Western European countries, although it is not yet in force in this respect;[4] and, (3) the Energy Charter Treaty of 1994 provides for ISDS among Western European and former Soviet Bloc states in the energy sector only. Since the late 1990s, foreign investors have brought ISDS claims under investment treaties approximately 800 times, with a threat of such claims presumably invoked or identified even more frequently in internal state decision-making. Also, considering that about 25 percent of known treaty-based ISDS claims have been filed under NAFTA and the Energy Charter Treaty alone, there is a significant prospect for a major further expansion of ISDS in the event that ISDS provisions are included in new trade agreements between major developed states.

CASE-BASED ILLUSTRATIONS

In this section, two ISDS cases are presented as examples of how foreign investors have used investment treaties, and how ISDS tribunals have applied the treaties in ways that challenge or frustrate health-related initiatives. The first case, *Ethyl Corporation v Government of Canada*,[5] is discussed to show how governments have faced pressure to change decisions due to ISDS. The second, *Eureko BV v Republic of Poland*,[6] demonstrates how ISDS arbitrators have expanded their powers of review, and in turn, the compensatory promise of the treaties for foreign investors and corresponding risks and costs for states, by their rulings on what the treaties' ambiguous language should be taken to mean.

ETHYL CORPORATION V GOVERNMENT OF CANADA

The *Ethyl* claim under NAFTA was launched against Canada in 1997. Ethyl Corporation, based in the US, brought the claim after the Canadian federal government proposed to ban a gasoline additive called MMT, which Ethyl manufactured. The proposed ban

2 There are bilateral, regional, and multilateral trade agreements. Most trade agreements that permit ISDS are bilateral; a few are regional, e.g. the North American Free Trade Agreement (NAFTA) and the US Central American/Dominican Republic Free Trade Agreement (USCAFTA-DR).

3 See David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008); Stephen Clarkson & Stepan Wood, *A Perilous Imbalance: The Globalization of Canadian Law and Governance* (Vancouver: UBC Press, 2010).

4 Key provisions of the CETA's investment chapter, including its ISDS provisions, were not approved for entry into force alongside the rest of the agreement and remain in limbo.

5 (1998), Award, 38 ILM 708 at 723 (United Nations Commission on International Trade and Law) [*Ethyl*].

6 (2005), Partial Award, IIC 98 (United Nations Commission on International Trade and Law) [*Eureko*].

responded to concerns from North American automobile manufacturers that MMT was incompatible with new automobile emissions control technology that had cost billions to develop. Also, health researchers had identified risks, especially for children, due to inhalation of MMT in gasoline fumes. At the time, MMT was banned or otherwise not in use in nearly all of the US for health or environmental protection reasons.

Ethyl promoted the use of MMT as a substitute for lead additives in gasoline that were eventually prohibited in North America, starting in the 1970s, on public health grounds. In the US, through the 1980s, Ethyl lobbied unsuccessfully for MMT to be approved in the US. The Canadian federal government took a less cautious approach by approving MMT in the 1980s on the basis that there was insufficient evidence to deny approval. When the federal government moved to ban MMT in the 1990s, based on new information about its health and its environmental risks, Ethyl lobbied actively against the proposed ban. Ethyl was joined in this respect by Canadian oil refineries, which balked at the cost, reportedly around $120 million, to re-tool refineries so that they could accommodate MMT substitutes. Ethyl and the refineries were in turn supported by several provincial governments, especially Alberta, which mounted a campaign against the proposed ban. In contrast, the automobile industry, environmental groups, and specialist health researchers advocated for the ban.

Ethyl's push for MMT was helped by two trade agreements: NAFTA, and an internal Canadian deal called the Agreement on Internal Trade (AIT) that was itself modeled on NAFTA. Both agreements came into force in the early 1990s and both provided new options for Ethyl or provincial governments to oppose or frustrate the federal government's plans. Ethyl (and its enterprising lawyers at the time) invoked NAFTA's little-known ISDS mechanism to challenge the proposed ban, arguing essentially that its NAFTA status as a US company that had invested in the manufacture and sale of MMT entitled it to compensation for its economic loss arising from the proposed ban, including lost profits and harm to its reputation. In a decision that reportedly surprised Canadian officials,[7] the NAFTA tribunal of three lawyers (sitting as arbitrators) that was established to hear the claim, permitted it to proceed. It became the first formal ISDS claim against Canada and one of the first under any investment treaty.

Meanwhile, Alberta pursued another option, newly available under the Agreement on Internal Trade, by challenging the proposed ban before an AIT panel on the grounds that it barred inter-provincial trade and was therefore impermissible. Before the NAFTA tribunal issued a ruling on the merits of Ethyl's ISDS claim, a majority of the three-member AIT panel decided in Alberta's favour.[8] Basically, the tribunal's majority objected to how the proposed ban was designed to limit trade in MMT, thus making its use infeasible, instead of banning MMT outright. Using a trade measure to achieve health and environmental purposes was, for the majority, an impermissible restraint on inter-provincial trade. In contrast, the dissenting member of the AIT tribunal concluded that a simple ban on MMT was not possible for the federal government because "on the evidence MMT, while noxious in large amounts, did not appear to be dangerous in small quantities" and MMT's environmental effects "are cumulative and indirect.".[9] Indirectly, then, the AIT decision appeared to highlight the limitations of Canada's legal framework for addressing chronic and uncertain health and environmental risks, with the AIT being used by the tribunal's majority to frustrate the federal government's attempt to use economic measures instead to address health and environmental risks. The dissenting tribunal member would have dismissed Alberta's claim, concluding that the federal government took action that "was necessary for air quality and the improvement of the environment" and that the AIT's purpose "was not to dilute the ability of responsible governments to improve the environment of Canadians."[10]

Having lost the AIT case and still facing Ethyl's ISDS claim under NAFTA, the federal government decided to drop the proposed ban and to settle with Ethyl partly on that basis. Also as part of the settlement, the federal government provided a statement to Ethyl that MMT was not a health or environmental threat and paid Ethyl about $19.5 million in compensation, which at the time

7 Interview of former federal minister (24 February 2014) (further reference information omitted to preserve author confidentiality).

8 See Canada, *Agreement on Internal Trade: Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act*, (Winnipeg, 1998).

9 *Ibid* at 14.

10 *Ibid.*

exceeded the federal environment department's budget for enforcement and compliance programs. In exchange, Ethyl withdrew the ISDS claim. Although some commentators and ISDS promoters do not regard the *Ethyl* case as an example of regulatory chill,[11] it was the existence of two trade agreements, and in particular the ISDS provisions under NAFTA, that led to the Canadian government decision.

MMT was eventually phased out of gasoline in Canada in 2004, about six years after the *Ethyl* case was settled. MMT had never been used widely in the US, where other additives replaced lead. Thus, it appears reasonable to conclude that NAFTA, for a substantial period, contributed to a policy decision that exposed Canadians to MMT and to the associated health, environmental, or economic costs of compromising automobile emissions control systems. Even if they have not been identified clearly, these costs are nonetheless an outcome, in significant part, of NAFTA and its ISDS provisions.

EUREKO BV V REPUBLIC OF POLAND

The *Eureko* claim against Poland provides a window into how, by bringing ISDS claims, foreign investors can require countries to subject their national health policy decisions to review by ISDS arbitrators and how the arbitrators, in turn, are empowered to interpret the treaties in expansive ways that enlarge their own review powers, expand foreign investor's access to compensation, and heighten the corresponding risks for states. Eureko (now Aecon) was a Dutch insurance company that negotiated an agreement with the Polish state treasury to buy into Poland's national health insurance provider, known as PZU. Facing a public outcry after 30 percent of PZU was sold to Eureko and another company, the Polish government declined to sell any more shares in PZU. In response, Eureko sought compensation under the Dutch-Polish BIT, while also bringing claims in Polish courts under its privatization contracts with the Polish treasury.

After hearing Eureko's BIT claim, two of the ISDS tribunal's three arbitrators allowed the claim to proceed and decided ultimately that Poland had violated the treaty by not proceeding with the further sale of PZU shares. Both of the arbitrators, Canadian Yves Fortier and American Stephen Schwebel, have been appointed repeatedly in ISDS cases and have tended to take expansive, pro-claimant approaches to various issues under the treaties.[12] The outcomes in the *Eureko* case were themselves premised on three claimant-friendly conclusions reached by Fortier and Schwebel, as follows.

First, it was questionable whether Eureko had invested anything in Poland as a basis for the BIT claim. Eureko's rights to buy shares in PZU involved an alleged contractual right to something that Eureko did not yet own, making its ownership hypothetical. Yet Fortier and Schwebel determined that Eureko acquired an "investment" under the BIT based on Eureko's hoped-for "ability to exercise substantial influence on the management and operation"[13] of PZU after purchasing further shares. This conclusion seemed to assume that Eureko's purchase of more shares would proceed, despite terms in the privatization contracts that limited the Polish treasury's obligation to sell the additional shares. The dissenting arbitrator in this case, who has not emerged as a repeat player in ISDS arbitrations, opposed Fortier and Schwebel on this point, describing their approach to the concept of investment as "completely novel."

Second, Fortier and Schwebel permitted Eureko to bring a BIT claim even though Eureko had previously agreed, under the privatization contracts, to resolve disputes regarding the contract in the Polish courts. Thus, Fortier and Schwebel took a permissive approach in allowing parallel BIT claims in circumstances where the dispute related to a contract with its own dispute settlement provisions. While this liberal approach to parallel treaty claims was contentious among ISDS tribunals at the

[11] Christian Tietje, Freya Baetens & Ecorys, "The Impact of Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership", online at 43–44: Minister for Foreign Trade and Development Cooperation and the Ministry of Foreign Affairs of the Netherlands <http://media.leidenuniv.nl/legacy/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf>.

[12] (Further reference omitted to preserve author confidentiality). Both arbitrators are usually appointed by foreign investors rather than states, although in *Eureko*, Fortier was the presiding arbitrator after having been appointed to that role by Schebel, as *Eureko's* chosen arbitrator, and by Poland's arbitrator.

[13] *Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments*, 7 September 1992, at 9 (entered into force 1 February 1994).

time of the *Eureko* award, thanks to another ISDS tribunal decision over which Fortier presided,[14] it has since become well-entrenched among ISDS arbitrators and has been a key factor in expanding the remit of ISDS tribunals over foreign investor claims.[15]

The third claimant-friendly ruling by Fortier and Schwebel also dealt with Eureko's privatization contracts with the Polish treasury. Fortier and Schwebel decided that statements in the preamble to one of those contracts, which called on the Polish state treasury to make its "utmost efforts" to sell the further PZU shares to Eureko, amounted to a binding obligation that was frustrated by the Polish government's decision not to proceed with the further sale. Having pulled back from this step in the privatization process due to concerns about foreign private companies owning the country's national health insurer, Poland was said by Fortier and Schwebel to have acted "for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character"[16] and to have violated Eureko's BIT right to "fair and equitable treatment". Further, Fortier and Schwebel decided, based again on an expansive interpretation of the relevant concepts, that Poland's conduct was an "expropriation" of Eureko's contractual rights and a violation of the BIT's complex "umbrella clause," which Fortier and Schwebel interpreted as having elevated Poland's contractual obligations in domestic law to the status of an international obligation under the BIT with the Netherlands.

Opposing this ruling, the dissenting arbitrator pointed to the fact that Eureko had not negotiated a binding right in its privatization contracts to purchase the further shares in PZU. The relevant contract between Eureko and the Polish treasury did not include a specific deadline for the treasury's best-efforts pledge to sell the shares. Also, the statements relied on by Fortier and Schwebel were found in the contract's preamble, which in Poland and many other jurisdictions, is understood to be aspirational rather than obligatory or binding. According to the dissenting arbitrator, Fortier and Schwebel clearly were "not satisfied with the clear content" of the actual contract and, to resolve the matter, resorted instead to "an interpretation bordering on manipulation" that was "incompatible with basic rules applicable under Polish law" (the law governing the contracts). Fortier and Schwebel had "not once referred to any relevant provisions of Polish civil law when interpreting the contracts" and this left "the impression that the Tribunal treats them as contracts "*sans loi*"—which facilitate their free interpretation."

Faced with the majority's award in *Eureko*, Poland agreed to settle the case and paid approximately 2 billion Euros to Eureko for not proceeding fully with the privatization of PZU. Therefore, by acting as a party to a privatization contract, Eureko was able to obtain a very large amount of public compensation based on two arbitrators' claimant-friendly approaches to: (1) vague language in an investment treaty; (2) the role of such treaties in relation to contractually-agreed dispute settlement forums; and, (3) Poland's conditional commitments to sell a controlling interest in PZU. More broadly, the case illustrates how the treaties give broad powers of review to ISDS arbitrators, and corresponding financial and political risks in the area of national healthcare policy.

EXCEPTIONAL ADVANTAGES FOR FOREIGN INVESTORS

Compared to domestic law and other areas of international law, investment treaties are extraordinarily powerful in their protection of foreign investors.[17] The extraordinary character of this protection, from a legal point of view, arises from the treaties' broad scope, far-reaching and often loosely-worded protections, and exceptional means of enforcement through ISDS.

In terms of scope, the treaties cover a very wide range of foreign-owned assets, including tangible assets like land and machinery, but also intangible assets like resource concession rights, patents, and other intellectual property rights. They usually define which investors are "foreign" liberally and apply to a very wide range of potential action or inaction of states, such as legislation, regulation, permits and approvals, standard-setting, and

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14 *Compañía de Aguas del Aconquija SA & Vivendi Universal v Argentine Republic* (2002), Annulment Decision, (International Centre for Settlement of Investment Disputes).

15 [Reference omitted to preserve author confidentiality].

16 *Eureko*, *supra* note 6 at 233.

17 [Reference omitted to preserve author confidentiality].

even judicial decision-making. Virtually any sovereign or regulatory activity, by any branch or at any level of the state, may be subject to the treaty's constraints.

Investment treaties also provide broadly-framed protections for foreign investors. They include, for example, rights to "fair and equitable treatment," "full protection and security," and to protection of a foreign investor's "legitimate expectations," all of which have tended to be interpreted in claimant-friendly ways by ISDS arbitrators.[18] The treaties have also been interpreted as entitling foreign investors to compensation where the assets are significantly reduced in value by the state's regulatory activities, referred in the treaties as "indirect" expropriation. Foreign investors are also entitled to no less favourable treatment than that which is given to domestic investors, thus precluding a range of programs that give preferences to local businesses and requiring compensation for foreign investors even if the state did not intend to treat the foreign investor less favourably. The treaties finally give foreign investors a right to move assets freely in and out of a state; different treaties limit this right in different ways, but in general, the right applies even in the context of a dire financial crisis that may call for controls on capital inflows or outflows. Although investment treaties usually include reservations and exceptions that protect, to a degree, aspects of the state's regulatory authority, the general principle is foreign investor protection, while the state's responsibility to protect its people is secondary, which depends on exceptions to the general principle.

When finding a violation of an investment treaty by a state, ISDS tribunals have relied most heavily on the standards of "fair and equitable treatment" (FET) and compensation for "indirect" expropriation. ISDS arbitrators have tended to interpret both of these protections as broad entitlements to compensation, despite qualifying terms or exceptions in some treaties that purport to protect health or environment measures. To illustrate, in a review of all ISDS awards from 1990 to 2010,[19] in 56 instances, ISDS arbitrators were found to have encountered the issue of whether FET was limited to the meaning of its most evident legal antecedent, the customary minimum standard of treatment for foreign nationals in international law, which is deferential to a state's regulatory choices. In these 56 instances, 73 percent of the arbitrators resolved this issue expansively, in favour of the position of ISDS claimants, by characterizing FET under the treaties as autonomous from customary international law and its well-established deferential position. Similarly, in 83 percent of 137 instances where they were found to have resolved the issue, ISDS arbitrators interpreted the meaning of "fair and equitable treatment" in language that went beyond the customary minimum standard of treatment, again with the effect of expanding the treaties' compensatory promise for foreign investors. On the issue of "indirect" expropriation, arbitrators in 72.5 percent of 120 instances took an expansive approach to the concept in one of two ways by: (1) focusing exclusively or primarily on the effect of a law, regulation, or other state decision on the foreign investor instead of other factors such as the public purpose of the state's decision; or, (2) adopting a relatively low threshold of impact on a foreign investor in order to find that a state decision qualified as a compensable indirect expropriation instead of a non-compensable general regulation.

Perhaps most importantly, the protections granted by the treaties are enforceable, not just in conventional forms of dispute settlement between states (where states have both rights and responsibilities across a range of issues), but also directly by foreign investors through ISDS. This option of direct enforcement, through international arbitration, leads to a range of extraordinary advantages for foreign investors. That is, beyond the treaties' broad scope, generous protections, and their allowance for direct ISDS claims, the treaties also empower foreign investors:

- to invoke the treaties' protections without having corresponding responsibilities that are enforceable, in an equivalent way, by states or by victims of a foreign investor's misconduct;
- to have their claims resolved by a tribunal whose members are not independent judges but rather for-profit arbitrators who, if they seek re-appointment, have an objective financial interest in the frequency of ISDS claims under the treaties (in a circumstance where only foreign investors can bring the claims);
- to appoint and pay repeat arbitrators in ISDS as counsel or experts in other ISDS cases;
- to control or influence 50 percent of the

[18] [Reference omitted to preserve author confidentiality].

[19] [Reference omitted to preserve author confidentiality].

membership of the tribunal by appointing one of three members and by having the right to require that appointment of the presiding arbitrator be referred to an outside appointing body;

- to benefit from awards by ISDS tribunals which are subjected to limited or no review in any court;

- to benefit from ISDS tribunals' favourable interpretations of ambiguous language in investment treaties, particularly in the case of the largest companies (with over USD10 billion in annual revenue), whose claims were allowed to proceed and led to a finding of a violation of the treaty by the state in 71 percent of 48 cases, compared to 42 percent of 166 cases for other foreign investors;[20]

- to determine which arbitration rules will apply to the foreign asset owner's claim against the state, thus determining the degree of openness of the proceedings and the degree to which the tribunal's decisions can be reviewed;

- to bring claims without resorting first to the state's courts and without having to provide any evidence that the courts have limitations which would justify allowing an international claim;

- to bring claims under the treaty when the underlying dispute relates to a contract that has its own agreed requirements to resolve disputes in another forum;

- to avoid doctrines of deference or balancing that often apply in domestic law when courts review decisions by elected legislatures or more expert regulators;

- to receive uncapped amounts of public compensation for state action, benefitting especially large companies (with over USD1 billion in annual revenue) and very wealthy individuals (with over USD100 million in net wealth) who, as claimants in eighty-six ISDS awards that favoured a foreign investor, received about 95 percent of the ordered compensation;[21]

- to receive public compensation in circumstances where, in domestic law and other areas of international law, a private party could only obtain non-monetary remedies or less than market-based compensation, out of respect for the state's regulatory authority and to preserve the ability of legislatures and executives to plan for the costs of their decisions;

- to receive public compensation on a retrospective basis, where other international forums, such as the World Trade Organization, give states an opportunity to avoid financial penalties or economic sanctions by bringing their decisions into compliance with a WTO ruling after the ruling has been issued;

- to seek enforcement of awards against a state's assets in other countries, where domestic courts and other international tribunals' decisions are not internationally enforceable in this way; and

- to avoid a right of standing in the process by any other affected party, except the state's national government, where principles of fair process would warrant full rights of participation by the other party.

In these respects, investment treaties go beyond domestic law and other treaties that seek to protect people from mistreatment or abuse, whether by states or foreign investors themselves, and that call for state action to protect health, human rights etc.

BROADER IMPACTS ON HEALTH AND HUMAN RIGHTS

Due to the extraordinary protections they provide to foreign investors alone, investment treaties give foreign investors a powerful tool with which to pressure states. The tool is not available to other affected actors and constituencies, thus putting them at a disadvantage in state decision-making. Faced with the prospect of a potentially vast, retrospective compensation order and the financial and reputational risks of litigation in ISDS, governments may pull back from decisions they would otherwise pursue. Even when the risk of violating an investment treaty is deemed to be low, if the amounts at stake are high enough, ISDS can serve as a powerful

[20] [Reference omitted to preserve author confidentiality].

[21] [Reference omitted to preserve author confidentiality].

deterrent for the state.

For states, the risks and costs of ISDS fall into four categories: awards, litigation fees, opportunity costs, and reputational or political costs. The first category includes the cost of compensation orders against the state, which in some ISDS cases have reached hundreds of millions and even billions of dollars. The second category includes the state's fees for ISDS arbitrators, lawyers, and experts, which usually run into millions and sometimes tens of millions of dollars per case and are typically paid by the state even if the foreign investor's claim ends up being dismissed. The third category includes the internal costs of vetting internal proposals for compliance with investment treaties and managing ISDS litigation, both of which require re-direction of staff and other resources away from other tasks. The fourth category accounts for the potential reputational or political costs of ISDS, which could affect a government's ability to attract foreign investment, its relations with other states and international organizations, or its ability to retain public support at home. Facing these complex risks carrying, in some cases, potentially severe consequences, it is reasonable to expect that states will alter their decision-making to downplay priorities of health or human rights protection in favour of avoiding the risk of foreign investor claims.

How do these special protections for foreign investors actually affect states and their populations in particular areas of policy, such as health? ISDS cases like *Ethyl v Canada* and *Eureko v Poland* that lead to a publicly-available settlement or award show us how investment treaties put pressure on states and give ISDS arbitrators profound authority over states' policy choices and budgets. The known impacts can be assessed for their corresponding health impacts where, as in *Ethyl*, the state's consent to an investment treaty allowing for ISDS was a significant factor in a related state decision to expose the population to health risks. As another indicator of how ISDS bears on health-related decisions, it was common in known ISDS cases, from 1990 to 2010, for foreign investors' claims to relate to health or environmental protection decisions.[22] Thus, in a review of 196 ISDS cases, it was found that 40 cases arose from state decisions on public health or environmental protection. The public health theme was evident in cases related to health insurance, drinking water quality, food safety, pharmaceuticals, environmental health, pesticides regulation, and anti-tobacco measures. The environmental theme emerged from cases related to state decisions on water, land, or biodiversity conservation, as well as pollution control, mining remediation, hazardous waste disposal, and liability for environmental contamination. A related group of 21 cases involved planning or permitting decisions by local governments. On this basis, we can conclude reasonably that cases like *Ethyl* and *Eureko* are not exceptional in ISDS and that foreign investors commonly bring ISDS claims that arise from states' health-related policy choices.

However, it is difficult to go further and draw comprehensive conclusions about ISDS' impacts on states and their human rights obligations in a context where the public is not given access to information about how a government dealt with ISDS risks in particular cases, and where states may have an interest not to reveal potentially embarrassing information about appeasement of a foreign investor at the expense of other actors. As a modest step toward addressing this research challenge, the author with a colleague carried out confidential interviews with 52 insiders—primarily current or former government officials in environment and trade-related ministries of the Ontario government—and found in summary that:

- Governments have changed their decision-making processes to account for trade concerns including ISDS, primarily by introducing new forms of internal vetting—by trade officials and government lawyers—of proposed decisions, with some insiders regarding the trade ministry and its regulatory assessment process as creating undesirable obstacles for environmental decision-making;

- ISDS puts pressure on government decision-making because of the financial and political risks, due to the opportunity costs that ISDS creates for government, and as a consequence of the career risks that it creates for individual officials. ISDS pressures may be overcome, especially if there is a strong political commitment to a proposed measure backed by legal capacity to scrutinize purported ISDS risks critically and throughout the policymaking process.[23]

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[22] [Reference omitted to preserve author confidentiality].

[23] [Reference omitted to preserve author confidentiality].

Assessments of trade or ISDS risks involve value choices and the changes to government decision-making we documented elevated the role of "trade values" over competing values associated with health and environmental protection and human rights.

CONCLUSION

Investment treaties are broad in scope, far-reaching in the protections they provide to foreign investors, financially risk-laden for states due to their reliance on market-based compensation as the primary remedy for unlawful conduct, and highly enforceable against a state's assets in many countries. They provide extraordinary protections for foreign investors, including the ability to:

- bring international claims directly against a state;
- sidestep the state's domestic courts without having to provide any evidence of the courts' failings;
- seek compensation for their rights and protections without equivalent responsibilities in situations of foreign investor misconduct;
- have significant control over the make-up of ISDS tribunal;
- have their claims heard by arbitrators who have an objective financial interest in the frequency of foreign investor claims under the treaties;
- enforce ISDS tribunal awards with limited or no opportunity for review of the award in any court;
- avoid contractually-agreed dispute settlement forums;
- avoid doctrines of deference and balancing that would apply in domestic judicial review of state action;
- access potentially huge amounts of retrospective public compensation for state action in situations where domestic law and other areas of international law would not allow that remedy; and
- avoid having to argue against other parties whose rights or interested are affected by the foreign investor's claim but who are denied any right of standing in ISDS.

Cases such as *Ethyl v Canada* and *Eureko v Poland* demonstrate that, whenever a foreign investor files a claim, the treaties give profound powers of review to ISDS arbitrators and that arbitrators have issued expansive rulings that enlarged their own powers of review, the treaties' compensatory promise for foreign investors, and the risks for states. In this context, ISDS provisions have impacted on health-related decision-making by states significantly, even if the impact is hard to uncover and measure in particular cases, and in doing so have weakened states' abilities to fulfill their human rights obligations.