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Lame White House Response to Sen. Warren's Warning about TPP Investor Privileges

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If you have not yet read Sen. Elizabeth Warren's (D-Mass.) spot-on Washington Post op-ed exposing the perils to public interest safeguards and our national sovereignty and solvency posed by investor-state dispute settlement (ISDS) in the proposed Trans-Pacific Partnership (TPP) "trade" deal, do so immediately.

The speedy response to Warren via a White House blog shows that the administration recognizes at least two perils of the TPP's expansion of the investor-state regime. First, Senator Warren making this confusing issue accessible to the public could derail efforts to obtain Fast Track trade authority to railroad the TPP through Congress. Second, exposing these poisonous provisions begs the question of what other dangerous terms lurk in the TPP text, and that spotlights the administration's refusal to publicly release the hundreds of pages of TPP text. TPP talks started in 2008 and the White House seeks to sign it within months.

The response was authored by National Economic Council director Jeffrey Zients, who leads the White House effort to convince Congress to enact the controversial Fast Track procedure. Fast Track would allow the TPP to be signed and entered into before Congress approves its contents and then force a vote on the done deal within 90 days with all amendments forbidden and limited debate.

Zients' response, which was framed as answers to "important questions" raised by Warren, recycles the litany of platitudes, half-truths and straw-man distractions that comprise the White House talking points on ISDS. But he failed to answer the fundamental question raised by Warren's oped: who will benefit from the TPP?

Admittedly, Zients would not want to answer that question. Even a cursory understanding of the investor-state regime makes clear it would not be American workers, taxpayers or small businesses, but rather the biggest multinational corporations in the world.

This is fact, not rhetoric: only U.S. investors in TPP nations or foreign investors in the United States could have access to the special TPP ISDS privileges and protections, or to the foreign tribunals where investors can "sue" governments for policies they claim undermine their expectations and demand taxpayer compensation for lost expected future profits. The range of policies being attacked in these extra-judicial tribunals is alarming, as a recent paper surveying some of the cases reveals.

So, what did Zients say? His arguments fall into five categories:

1. "ISDS has come under criticism because of some legitimate complaints about poorly written agreements." But our ISDS agreements are different. And, in recent years we have included even stronger safeguards in our ISDS agreements.

Actually, U.S. ISDS-enforced agreements have generated a string of outrageous rulings with governments being ordered to pay corporations for natural resource policies, land-use rules, environmental protections, financial stability measures, health and safety measures and more. Tribunals have ordered governments to pay investors almost four billion dollars in just the known ISDS cases occurring under U.S. agreements. Thirty eight billion dollars in additional claims are pending - from Eli Lilly's attack on the Canadian medicine patent system to Lone Pine's attack on a Canadian fracking moratorium - just under U.S. ISDS-enforced pacts.

And, the problem with the platitudes about how the TPP will further improve ISDS rules is that the United States already has included in past pacts the very "safeguards" that Zients touts will be in the TPP. ISDS tribunals have simply ignored new provisions. And, they do so with impunity because under the ISDS system, tribunal rulings cannot be appealed on the merits and there is no system of precedent. Indeed, because only investors can initiate cases, tribunalists have an incentive to twist the rules in investors' favor to gin up more business.

Consider the Central America Free Trade Agreement (CAFTA) RDC case against Guatemala: the tribunal simply ignored the very annex found in the leaked TPP text that ostensibly limits tribunals' discretion to cook up new reasons to make governments pay. And, then the tribunal dismissed instructions the CAFTA governments' instructions had submitted about the proper interpretation of certain obligations and provisions, declaring that the governments did not understand the ISDS rules - that the governments had written.

These same "safeguards" were also included in the 2012 U.S.-Peru Free Trade Agreement's (FTA) ISDS provisions. But they did not stop a U.S. company from launching an $800 million ISDS case because the Peruvian government decided to enforce the firm's contractual commitment to remediate environmental and health problems caused by its toxic metal smelting operation in one of the world's most polluted towns.

Zients also claims that the TPP will fix past ISDS problems by "narrowing the definition of what kinds of injuries investors can seek compensation for." But thanks to a leak of the TPP

investment text, we know it would do exactly the opposite: TPP's ISDS rules could expand the types of domestic policies that foreign corporations could attack. U.S. negotiators are pushing for certain government procurement decisions and contracts between the U.S. government and foreign firms over natural resource concessions on public lands to be added to the list of policies that would be exposed to ISDS attacks.

2. These investor provisions are just about ensuring foreign firms are not discriminated against and can get compensation when governments take their property in countries where domestic courts won't treat foreign firms fairly. They do not "grant any new substantive rights to multinational companies." And they ensure American businesses operating abroad enjoy "the same protections we provide to domestic and foreign investors alike in the United States."

To start with, ISDS is all about discrimination - in favor of foreign corporations and against domestic companies and governments. It provides foreign firms alone substantive rights to obtain compensation for their gripes with domestic laws that apply equally to domestic and foreign firms. And, it provides them alone access to an adjudication system designed to favor foreign investors' interests.

If the U.S. government enacted new automobile safety standards and automakers believed that the rules were unfair, U.S. companies could take their claims to the U.S. court system. Foreign automakers could turn to U.S. courts also. But if the TPP were to go into effect with ISDS, Japanese automakers with plants in the United States, like Honda, Toyota and Nissan, would be granted additional recourse to ISDS arbitration panels that are entirely outside of the U.S. legal structure. There, the foreign firms alone could demand taxpayer compensation for the lost profits that could ensue from complying with the same laws that also apply to U.S. firms.

And, neither domestic firms nor governments can sue foreign investors in these tribunals. Governments must pursue cases concerning foreign investors' environmental violations, tax cheating or other bad acts in domestic court.

From the leaked TPP investment chapter, we know that the new substantive rights that foreign firms would obtain go well beyond compensation for a government's expropriation of an investment. This includes a requirement that governments ensure a "minimum standard of treatment" for foreign investors in addition to treating them no less favorably than domestic firms. This provision has been interpreted by ISDS tribunals to include a right for foreign investors to enjoy a "stable and predictable regulatory environment." Under this standard, governments have been ordered to pay foreign corporations simply because changes were made to domestic regulatory and tax policy after the investment was established. To date, more than 70 percent of successful corporate ISDS attacks under U.S. agreements have relied on this provision.

Also included in the TPP is a guarantee that a foreign investor can transfer money in and out of the country without limit. Thus, when Singapore, with which the United States has a free trade

agreement with ISDS, tried to counter speculation in the housing market to avoid the sort of bubble that can lead to a financial crisis, the surcharge on investments in that sector could not be applied to U.S. investors because it was equivalent to a limit on investment inflows. The leaked TPP text also includes broad requirements to compensate for "indirect expropriation" - a government policy or action that does not involve seizing land or a factory, but that has the effect of limiting an investor's operations. Under U.S. law, it is almost impossible for a company to obtain government compensation for the costs of complying with a policy unless it destroys all value for all time of all of a real estate investment.

As far as what these rules means for American companies, the Cato Institute put it best in a blog agreeing with Warren's critique of ISDS: "As a practical matter, investment is a risky proposition. Foreign investment is even more so. But that doesn't mean special institutions should be created to protect multinational corporations from the consequences of their business decisions. Multinational companies are savvy and sophisticated enough to evaluate risk and determine whether the expected returns cover that risk. Among the risk factors is the strength of the rule of law in the prospective investment jurisdiction. MNCs may want assurances, but why should they be entitled to them? ISDS amounts to a subsidy to mitigate the risk of outsourcing. While outsourcing shouldn't be denigrated, punished, or taxed - companies should be free to allocate their resources as they see fit - neither should it be subsidized."

3. The tribunals simply provide a neutral arbitration venue for disputes between investors and governments just like the arbitration businesses frequently use to settle disputes. The tribunalists are independent and more frequently side with governments than investors. This "impartial, law-based approach" is better than relying on local courts or diplomatic interventions.

Perhaps Zients missed the Bloomberg exposé on the inherent bias in the investor-state system, so let's review the facts. At issue is not settling disputes between two private business entities. Rather, ISDS elevates individual foreign corporations to equal status with a sovereign nation's government to privately enforce the terms of a public treaty by suing governments in foreign tribunals about domestic policies and even domestic court rulings.

ISDS tribunals are comprised of three private sector attorneys, unaccountable to any electorate. Many of the tribunalists rotate between serving as "judges" and bringing cases for corporations against governments, creating inherent conflicts of interest. In the small "club" of international investment tribunalists, 15 lawyers have been involved in 55 percent of all ISDS cases known to date.

Tribunals operate behind closed doors, lack basic due process guarantees and have absolute discretion to set compensation amounts, order payment of compound interest and to allocate costs. Decisions are not bound by precedent.

And, there is no appeal mechanism, which is why Zients' notion that altering the rules can control the outcomes in cases is absurd. Tribunals regularly ignore changes to the actual

agreement texts and also make up new obligations to which governments never agreed. Governments can only seek annulment of the rulings for limited procedural errors, but not appeal the merits of cases. And annulments are rare.

In addition to inherent bias in the structure of the ISDS regime, there are no meaningful conflict of interest rules. For instance, annulment was denied in a case in which one of the tribunalists ruling that Argentina had to pay Vivendi $105 million for reversing a failed water privatization served on the board of a bank that was a major investor in Vivendi. In contrast to salaried judges, tribunalists are paid by the hour at a high rate, creating an incentive for cases to go on and on, even when a case will ultimately be dismissed.

Investors alone choose if and when to initiate cases, creating a structural incentive for tribunalists to decide in investors' favor and thus attract future business. The entire process is cloaked in secrecy so it is difficult to track the rulings. But a recent UN report reveals that investors won two out of three cases decided in 2014. Zients repeated the usual White House line about governments winning more cases than corporations. But the trick to that figure is it excludes cases settled in favor of the investor, which is most of the 28 percent of cases that settle. So, it does not count, for example, the NAFTA water rights (Abitibi-Bowater) or toxics ban (Ethyl) cases that resulted in Canada paying these U.S. firms $122 and $13 million respectively - as well as scores of cases with secret settlements.

4. The United States has "never lost an ISDS case because of the strong safeguards in the U.S. approach." "There have only been 13 cases brought to judgment against the United States in the three decades since we've been party to these agreements." And, ISDS "cannot require countries to change any law or regulation."

The United States has not lost an ISDS case because our past ISDS-enforced agreements have been with developing countries with few investments here. The exception in Canada under NAFTA, and Zients fails to mention that the United States has already nearly lost ISDS cases to Canadian firms and we only dodged the ISDS bullet because cases were dismissed on narrow procedural grounds.

But more importantly, citing the number of cases brought against the United States under existing deals says little about the ISDS liability to which we would be exposed under the TPP. Corporations based in TPP countries own more than 16,000 U.S.-based subsidiaries. Thus, a TPP with ISDS would increase our exposure to ISDS attacks, opening the door to a flood of new cases.

Zients also hides behind a familiar defense of ISDS - that the rulings handed down by three private lawyers against our health, environmental and financial policies cannot force governments to roll back those policies. Zients appears to take solace in the fact that taxpayers just have to shell out hundreds of millions of dollars as "compensation" to foreign corporations. He assures us, for example, that we should not be concerned by the ISDS case that a Swedish

energy firm launched against Germany's decision to phase out nuclear power after the Fukushima nuclear disaster. He says that case was not about "whether Germany can change its national energy policy to do away with nuclear power, but whether Germany needs to provide compensation for abrogating its existing commitments." But why would a Swedish firm have rights to go to an ISDS tribunal to demand up to $4.7 billion from German taxpayers, when German firms operating nuclear plants must pursue their compensation claims under German law in German courts?

And, often when ISDS cases are brought, the mere filing of a case chills the establishment of the policy in question, or leads to its rollback as part of a "settlement." Canada did not only pay Ethyl Corporation $13 million in a settlement resulting from the firm's NAFTA ISDS case against Canada's ban on a toxic gasoline additive that is also banned from U.S. reformulated gasoline - Canada also lifted the ban. In 1994 when Canada's Parliament started to consider the enactment of plain packaging policies for cigarettes to curb smoking - similar to the policies that Philip Morris is now targeting in ISDS cases against Australia and Uruguay - the tobacco industry responded by threatening a NAFTA investor-state case in an attempt to forestall the regulation. R.J. Reynolds Tobacco Company sent a letter to the Canadian parliamentarians that the policy would constitute a NAFTA-prohibited expropriation and "would give rise to a claim under the provisions of the NAFTA for hundreds of millions of dollars in compensation." The Parliament never acted on the plain packaging plan, and analysts credited the NAFTA ISDS threat for helping to bury the proposed public health measure.

5. The TPP won't threaten environmental and labor protections; it will improve them by including strong new standards.

It is worth noting that labor and environmental organizations in the TPP countries do not share Zients' cheery perspective. To start with, the investment rules in the TPP could expose countries to investor claims for compensation in ISDS tribunals if and when they strengthen labor or environmental policies.

But also the "new" labor and environmental standards that the administration seeks for the TPP are those that congressional Democrats forced George W. Bush to include in his last four FTAs. These "May 10, 2007" standards were considered a useful first step - as far as a GOP president could be pushed. Unfortunately, a November 2014 U.S. Government Accountability Office (GAO) report found broad labor rights violations across surveyed FTA partner countries, regardless of whether or not the FTA included the "enhanced" labor provisions. GAO found in each of the five surveyed U.S. FTA partner countries "persistent challenges to labor rights, such as limited enforcement capacity, the use of subcontracting to avoid direct employment, and, in Colombia and Guatemala, violence against union leaders."