



Why Elizabeth Warren is declaring war on an obscure trade policy

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Populist crusader Massachusetts Sen. Elizabeth Warren has picked her next big fight, and this one could create real problems for the Obama Administration.

Her beef is with a piece of the massive Trans-Pacific Partnership trade deal that the Obama Administration is promoting. It's called investor-state dispute settlement, and it gives a foreign corporation the power to fight a government outside of the normal judicial system.

"The name may sound mild, but don't be fooled," Warren wrote in a Washington Post op-ed. "Agreeing to ISDS in this enormous new treaty would tilt the playing field in the United States further in favor of big multinational corporations. Worse, it would undermine U.S. sovereignty."

This is a big deal, not least because TPP is huge; its members account for 40 percent of the world's economy. Add in the Transatlantic Trade and Investment Partnership being negotiated with European countries — which also has investor-state dispute settlement provisions — and you have a majority of the global economy. That means the ISDS provisions in these trade agreements could affect a sizable share of the world's corporations.

So even though this might sound like a political fight over a complicated bit of trade policy, the implications — particularly for corporations — are big.

What is ISDS?

Investor-state dispute settlement is a provision included in many trade deals, and it allows a company to fight a foreign government through a route other than that country's court system.

As one example, let's say Company X is invested in a foreign country. If the laws in that country change in a way that Company X thinks violates its rights as part of a treaty — say, by banning a product Company X makes — Company X can go into an arbitration proceeding to seek damages. That proceeding is not run by the host country; rather, the case faces three arbitrators — one picked by each side and one they either agree upon or that an independent third party chooses.

ISDS was first used in 1959, in a trade agreement between Germany and Pakistan, according to the Economist. The broad idea is to protect the investor from unfair treatment by foreign countries' court systems. Since then, it has become an incredibly common feature of trade agreements — ISDS is a feature of more than 3,000 trade agreements worldwide, and the US is party to around 50 of them, according to a White House blog post posted on Thursday.

What's the case for ISDS?

In an e-mail, an official from the the US Trade Representatives' office put the case for ISDS this way: "Governments put ISDS in place for three main reasons: to resolve investment conflicts without creating state-to-state conflict, to protect citizens abroad, and to encourage investment by signaling to potential investors that the rule of law will be respected."

The centrist think tank CSIS points out that the largest number of ISDS cases have been brought in Venezuela and Argentina, countries that rank low on the World Economic Forum's assessment of how efficient countries' legal systems are at challenging regulations. That, CSIS argues, suggests that ISDS is working.

Still, it's easy to argue that a country can function just fine in global trade without it. Brazil, the Economist points out, attracts plenty of foreign investment while still refusing to sign pacts featuring ISDS. And since the idea is to make a fair playing field, when both parties have well-functioning and fair legal systems, ISDS becomes unnecessary, as Columbia Law Professor Thomas Johnson has written.

Indeed, Germany has used this line of argument in fighting ISDS in trade deals with the US. Many opponents of ISDS often ask not whether it's good but whether it's necessary, or even democratic, as it takes place outside of a government's formal court system.

There's also the question of whether in trying to fight discrimination against foreign companies, ISDS goes too far and gives foreign corporations a special advantage. The libertarian Cato institute has argued that it's unfair that a foreign company that doesn't like the US's laws could choose to use ISDS or the US court system while a US company could only use the US court system.

Why is Elizabeth Warren upset about it?

Warren lists a few reasons in her op-ed: one is that it could potentially be bad for US taxpayers. The idea is that if a foreign company feels a US law is unfairly discriminating against it or hurting its business, it could sue the US, with damages coming out of Americans' pockets. She also worries that the arbitrators are biased, as they change hats often — that is, someone who might be an arbitrator in one case might serve as counsel in another. She also adds that ISDS claims are rising, which she presents as a troubling sign of corporations taking advantage of what she considers a corporate-friendly policy.

But to be clear, it's not at all just Elizabeth Warren who's opposed to ISDS. Former Secretary of Labor Robert Reich has blasted it, as have Nobel-winning Joseph Stiglitz, many labor unions, and nonprofits like Public Citizen. But it's not just a liberal cause; the libertarian Cato Institute has also railed against it. And high-ranking officials have voiced their opposition lately — government officials in Germany and France have said they oppose the inclusion of ISDS in TTIP, Euractiv has reported.

Is she right?

Frustratingly, the answer is "Yes...sort of." One thing Warren does is highlight a hypothetical case in which ISDS could work out very badly for Americans.

For example, Warren's op-ed presents a case in which US taxpayers could end up footing a huge bill to a foreign corporation:

Imagine that the United States bans a toxic chemical that is often added to gasoline because of its health and environmental consequences. If a foreign company that makes the toxic chemical opposes the law, it would normally have to challenge it in a U.S. court. But with ISDS, the company could skip the U.S. courts and go before an international panel of arbitrators. If the company won, the ruling couldn't be challenged in U.S. courts, and the arbitration panel could require American taxpayers to cough up millions — and even billions — of dollars in damages.

That's possible. But it's also true (as Warren points out) that no foreign company has brought a case against the US government and won yet. Seventeen cases have been brought against the US government in 25 years, with judgments passed in 13 (four are pending). The US has won all of those 13. That includes the case that Warren's example echoes — an early-2000s case called *Methanex v. United States*.

But that's not to say the US absolutely could not lose future cases, of course. Some opponents of ISDS, like Warren, worry that with huge treaties like TPP and TTIP in effect, there would be that many more avenues for suits against the US government, which means more potential opportunities for the US to lose cases.

What about her claim that ISDS cases are growing?

That's absolutely true.

According to some experts, it's because companies are misusing the policy. According to Howard Mann at the International Institute for Sustainable Development, it is "certain" that "investor–state arbitration has shifted from being a shield of last resort to a sword of first resort in many disputes ... between governments and foreign investors." In other words, companies are increasingly deciding that ISDS is how they want to fight their battles.

But then, you can attribute at least part of the increase to globalization. Centrist think tank CSIS, for example, argues that this increase naturally has tracked the increase in foreign investment. (They also point out that in the grand scheme of trade deals, ISDS arbitration is rather rare — of the 2,400 bilateral investment treaties out there, 90 percent have never seen an ISDS case, by CSIS's count.)

If you're an opponent of ISDS, the question is whether TPP and TTIP will cause this sort of arbitration to explode.

"Because of globalization, there are corporate headquarters in many different places now," says Daniel Ikenson, director of the libertarian Cato Institute's trade policy center. "And [the use of ISDS] is likely to increase more, and particularly if it's in TPP, because now you're talking about 40 percent of the GDP is going to be captured."

She says companies could challenge our minimum wage law. Could companies overturn other countries' laws?

They can argue that other countries' laws hurt their business. But an ISDS panel can't change a law; it can only award restitution.

That said, asking a government to cough up hundreds of millions of dollars could be a way of putting pressure on another country to change its regulations.

For example, when Peru tried to get US mining and industrial company Renco to curb the pollution one of its factories caused and clean up its waste, Renco used ISDS to sue the Peruvian government for \$800 million (this excellent Bloomberg investigation explains the case more thoroughly).

Opponents of ISDS, Bloomberg reported in conjunction with this story, argue that this sort of suit "can have a chilling effect on legitimate regulation." Consider that when Philip Morris attacked a tobacco law in Australia (more on that later), New Zealand — seeing that it could itself face litigation with its proposed tobacco laws — pulled back on one of its own initiatives, according to the UK's Independent.

So ISDS can't directly change a law. But it's easy to see how a huge company could use the threat of litigation to put pressure on a foreign government, particularly of a small country. This recent Jon Oliver segment discusses the Australia case:

So ISDS has caused problems in the past. Can TPP avoid all that?

This is really one of the big questions here. Let's use that Philip Morris example, in which the US brought that case through a Hong Kong subsidiary in order to take advantage of a treaty that allowed it to use ISDS against Australia.

Proponents of TPP and TTIP, including the US Trade Representatives' office, argue that these new treaties will cut down on this country-hopping. In an email, an official from the USTR office writes:

"U.S. trade agreements include numerous safeguards that deter and restrict the ability of investors to engage in country-hopping for purposes of accessing investment treaty protection. ISDS will exist with or without TPP and TTIP – it is a feature of over 3,000 agreements negotiated by 180 countries around the world, the vast majority of which contain none of the safeguards found in modern U.S. agreements. To the extent there are concerns about abuse of the ISDS process, TPP and T-TIP are an opportunity to improve global practice by establishing a higher standard for investment protection rules and ISDS procedures."

It's true that some parts of the new treaties look to be better than older ones. As Bloomberg also reported, there will also be tighter restrictions on the kinds of cases corporations can take than previous ISDS provisions have allowed, and there will be more transparency as well.

But the big question is this: can the latest treaties entirely perfect and loophole-proof ISDS? The Obama Administration seems to think so, but of course others have their doubts. Cato, for its part, fears that common ISDS clauses that define the "minimum standard of treatment" for foreign companies are too vague and leave the door open for ISDS misuse.

So is this the only part of the TPP Elizabeth Warren doesn't like?

Not at all. Elizabeth Warren and a host of other lawmakers, both Republican and Democrat, have some major problems with the trade pact. One is that, like other trade deals, it's negotiated in secret. But then, making negotiations public would also make negotiating much more difficult, as I wrote last year. As a member of Congress, Warren does get to read copies of the working text and can meet with the USTR, but the public doesn't get to read the documents that worry her.

It's also true that the trade pact could affect a wide range of areas, like the environment, intellectual property protections (which opponents, in turn, say could make for more expensive pharmaceuticals), and labor rights. Opponents fear rules being made for a huge swath of the global economy behind closed doors.

All of this takes place while the president hopes Congress will pass Trade Promotion Authority, legislation that would allow Congress to set basic guidelines for how the administration negotiates the TPP. But then, after the countries agree on TPP, Congress could only approve it with an up or down vote — no debate, no changes. That has a purpose — if a deal can be

changed after a hard-won compromise is struck, that could make negotiations fantastically difficult. But some members of Congress have said they want to "overhaul" how negotiations are done.