International Law Experts Respond to Alliance for Justice ISDS Letter

April 8, 2015. Around the middle of March, the Alliance for Justice (AFJ) circulated a letter signed by law professors encapsulating their objections to the inclusion of investor-state dispute settlement (ISDS) in international economic law treaties. See http://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf.

As the majority of signatories of the AFJ letter were not scholars of international law and may therefore be unfamiliar with the subtleties of international dispute settlement, a group of over forty international law professors have mobilized to provide a counter-point to the AFJ letter.

The counter-point is not provided to provide a definitive conclusion about the proper form of dispute settlement, as negotiating those boundaries is the province of states. Rather, the letter is designed to frame the discussion, to offer accurate information to inform the public, and to enable policy makers to make well-informed choices. http://www.mcgill.ca/fortier-chair/isds-open-letter

Core aspects from this letter address sovereignty, the rule of law, the procedural protections offered in investment treaty arbitration, and opportunities for transparency and public participation during investment treaty arbitration. These include:

- It is a hallmark of the rule of law that states must justify their acts and take responsibility for improper conduct. Far from undermining the rule of law, investment treaty arbitration ensures that states honor their obligations, thereby reinforcing the rule of law. Experience to date suggests that *bona fide* government conduct will pass muster and not generate state liability.

- All systems of justice, whether national courts or international courts and tribunals, are capable of improvement. It is essential, however, that the current debate be based on accurate information and not focus on perceived, isolated shortcomings that are present in some form in any and every adjudicative body.

- Both investors and states have won and lost cases, though states have won in a greater proportion than investors. At current rates, states have won roughly three cases for every two cases won by investors.

- Investment treaty arbitrations are procedurally complex and involve the gathering of evidence, the submission of expert testimony, the making of legal arguments, and the submission of briefs. Awards are subject to review either in national courts or by ad hoc annulment committees composed of representatives drawn from rosters created by states.

- The United States and Canada have been key proponents of transparency in investor-state arbitration and have made all documents in their cases readily accessible to the public; other countries have started to follow suit.

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