The Good, the Bad and the Not Necessarily Ugly Future of Investor State Arbitration. What will become of the investor-state dispute settlement system?

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Resumen: *El arbitraje de inversión se ha vuelto controvertido. Tanto es así, que muchos se preguntan por el futuro del arbitraje de inversión. Si bien muchos Estados han denunciado o dejado caducar a sus tratados de inversión, Estados Unidos, la UE y Canadá han buscado otras formas de abordar las críticas del sistema. Cada uno de estos esfuerzos tiene deficiencias importantes, principalmente su incapacidad para abordar directamente la tensión inherente al sistema entre la soberanía estatal y la protección de los inversores. Si bien grupos de trabajo internacionales están trabajando actualmente para mejorar aspectos procesales importantes del sistema, aún queda mucho por hacer en los aspectos sustantivos del sistema, para mejorar en lugar de deshacer el sistema de solución de controversias entre inversores y Estados. La mediación, que ya se ha abierto camino en muchos tratados de inversión y goza de nuevas reglas para las disputas entre inversores y estados, debe fomentarse, ya que aborda muchas de las deficiencias del sistema y podría conducir a resultados más exitosos de las disputas internacionales de inversión.*

Introduction

Investor-State Arbitration (hereinafter "ISA") has become controversial. So much so, that recent ADR conferences have openly polled audiences of practitioners on their opinions on the continued viability of investor-state dispute settlement (hereinafter "ISDS"), as a preferred means of international investment dispute resolution. While most of those polled are positive about the future, a good number are not.[1] As positive as many are on this question, there clearly are criticisms and issues that must be addressed.

ISDS is a creature of public international law, designed to provide investors (by virtue of the ISA provisions of an international investment treaty), an independent forum where they may seek redress from the countries who hosted their investments and are alleged to have breached protections promised by those very same treaties. Countries have surrendered a degree of their sovereignty, to give foreign investors assurances and guarantees. It is this perceived degree of surrender of sovereign rights that has driven controversy.

> "No *country wants to have its normal functions circumscribed by the threat of having to compensate foreign investors simply because a government alters a policy to respond to changing circumstances, such as financial crises or new scientific findings relating to the environment or health, or to respond to public demands that lead to the democratic creation of new laws of general application.*"[2]

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1 See Miami Arbitration Week 2023, Debate on Future of ISDS Moderated by B. Cremades. It was reported that 78% disagree that ISDC will no longer exist in 20 years. Available at https://www.linkedin.com/feed/hashtag/?keywords=mias2023, *See also* 2020 *International Arbitration Survey: Investor-State Dispute Settlement (ISDS)*, Queen Mary University of London, which found that 73% of participants were satisfied with treaty-based ISDS.

2 Wallach, Lori, Global Trade Watch DT: September 5, 2012 RE: "*Fair and Equitable Treatment" and Investors' Reasonable Expectations: Rulings in U.S. FTAs & BITs Demonstrate FET Definition Must be Narrowed.* Available at https://www.citizen.org/wp-content/uploads/mst-memo.pdf.

In the event of an alleged breach of these protections, most ISA mechanisms call for the establishment of an international investment arbitral tribunal that grants standing to agreieved investors seeking redress, in most cases allowing them to bypass the local jurisdiction altogether. These panels are usually organized in a manner whereby both the investor and the host state engage in international investor-state arbitration (hereinafter "ISA"), where the parties select the arbitrators, the seat and applicable law. One can encounter cases where an independent arbitral tribunal, neither sitting in the host state, nor applying the law of the host state, is charged with determining whether the host state has breached protections that had been granted by way of an international investment treaty.

Such investors can obtain a final and binding award, enforceable in multiple jurisdictions. Unlike claims arising in the context of World Trade Organization (hereinafter "WTO") disputes, where only member states have standing, ISA allows qualified private investors a direct action and standing to bring claims under public international law against States hosting covered investments. Definitions of investors and investments in these treaties are quite broad as well. Sometimes the protections granted to investors are perceived to be greater than those granted to domestic competitors in the host state. It is inevitable that some awards are unpopular and raise political issues in host states.

This paper will first provide a brief overview of ISDS and its standard protections- (the "good"). It will then examine the criticisms of the ISDS system commenting on the reactions of developing countries; and then it will take closer look at the trends of the one-time champions of ISDS to alter if not dismantle the system (the "bad"). It will conclude with some ideas such as mediation, which should be seriously considered as we go forward, to improve, rather than undo, the ISDS system (the "future").

Background: The "Good"

Initially, most bilateral investment treaties (hereinafter "BITs") were signed between developed and developing nations. While this remains the case with most BITs, multilateral and bilateral international trade and investment treaties, such as the Energy Charter Treaty, often involve commitments among developed countries and contain dispute resolution provisions that include ISA. It is probably fair to say that back in the 1990s, there was not as much understanding of the implications of such agreements at the time they were negotiated, particularly on the part of developing countries. One can also say that there has been an erosion of the developmental imperatives at the heart of the traditional BIT.

Today, there are more than 3,000 BITs in existence globally, with the great majority having been concluded since 1990. Almost every country in the world has signed at least one BIT.[3] The EU alone has over 1300. According to the United Nations Conference on Trade and Development´s (UNCTAD's) Investment Dispute Settlement Navigator (as of January 2024),[4] the total number of publicly known investor-state arbitrations reached nearly 700.

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3 *Rethinking BIT* Available at https://www.madhyam.org.in/wp-content/uploads/2016/03/Rethinking-BIT-Book-PDF-15-March-2016.pdf.

4 *Bilateral Investment Treaties* (BITs): Available at https://investmentpolicy.unctad.org/international-investment-agreements.
UNCTAD Investment Policy Hub: Available at https://investmentpolicyhub.unctad.org/ISDS?status=100.
ICSID Convention: Available at https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx.

While there are significant differences in the drafting of BITs, it is fair to generalize the specific substantive protections offered qualified investments by these treaties. These usually include provisions on fair and equitable treatment[5] (legitimate expectations);[6] full protection and security; national treatment;[7] most-favored-nation treatment; protection against unjust expropriation and measures having equivalent effect[8] and an umbrella clause (obliging host states to honor their contractual commitments) as well as additional guarantees against any impairment of the management, maintenance, use, enjoyment or disposal of investment through unreasonable or discriminatory measures.

Altogether, these protections are designed to provide investments protection against unfair surprises, once they are on the ground, resources have been committed, and works have commenced, etc. ISDS protects investments from States who seek to change the rules of the game, while the players are still playing. ISDS does not prohibit countries from regulating for valid public policy reasons, but rather, it serves as a shield against populist or protectionist measures, put forward as public policy (i.e., health or environmental protection) measures. ISDS is also a means of ensuring that specific State commitments to attract investment are kept. Enforcement through a truly independent arbitral tribunal, comprised of nonpartisan professionals, is essential to the workings of the system.

Some of the most famous ISDS cases, used to illustrate the alleged "abuse" of the system are on closer examination no more than a tribunal determining that a measure was, in reality, protectionist in nature, designed to protect the local market at the expense of the foreign investor and was therefore found to be at odds with the international commitments of the host state. In the SD Meyers case, for example, the tribunal considered the Canadian restriction on the export of PCBs, a means of protecting the then nascent Canadian PCB waste recovery business, and not an environmental protection measure.[9] In the Pope & Talbot case, it was not so much the Canadian export quotas on softwood, but rather the complicated verification procedures, only applicable to foreign investors, that the tribunal found to violate the nondiscrimination provisions of the treaty.[10]

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5 Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36On 4 May 2017, the Tribunal awarded the Claimants compensation amounting to EUR 128 million having found that the State's removal of price support was a breach of the fair and equitable treatment (FET) standard.

6 Glamis Gold Ltd v United States, Award, IIC 380 (2009), 14th May 2009, despatched 8th June 2009, Ad Hoc Tribunal (UNCITRAL) "[m]ere restrictions on the property rights do not constitute takings"...."a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons...or the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations...In this way, a State may be tied to the objective expectations that it creates in order to induce investment."

7 Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345, 1410-12 pt. III, ch. A, 1-2 (NAFTA Ch. 11 Arb. Trib. 2005), available at http://www.state.gov/documents/organization/51052.pdf. Methanex was entitled only to be compared to U.S.-based manufacturers of methanol regarding a non-discriminatory regulation for a public purpose, and therefore the measure was not deemed expropriatory and compensable unless specific commitments had been given to the company, that the government would refrain from such regulation.

8 Tecnicas Medioambientales Tacmed S.A.("Tecmed") v. Mexico, Int'l Centre for Settlement of Investment Disputes, ICSID Case No. ARB (AF)/00/2, Award, 43 I.L.M. 133 (2004).Regulatory violations and community opposition (Spanish company). (Revocation of the Permit as Expropriation). See also: Metalclad Corp. v. United Mexican States, Case No. ARB(AF) 97/1 (2000) (Denial of the construction permit due to Ecological Decree).

9 S.D. Myers, Inc. v. Canada, and Attorney General of Canada v. S.D. Myers, Inc., [2004] F.C. 38.

10 Pope and Talbot Inc. vs. Government of Canada UNCITRAL Case (Award, April 10, 2001).

The "Bad": General Criticism

Critics of ISDS have voiced concerns about ISDS that include a perception that ISDS is weighted in favour of Western companies and states. Critics also cite the potential for conflicts of interest as tribunals are often comprised of arbitrators whose double hatting as investor-state dispute practitioners, make their opinions predictable and may make them sympathetic to investors. This plays into the concern that the system favours foreign investors over states and impedes sovereigns' rights to legislate and regulate in the interests of their citizens. This has given rise to several myths about ISDS that one may try to debunk as one proceeds.

Myth 1: The claim that ISA unduly interferes with state sovereignty is grossly exaggerated and any shortcomings of the ISDS system can be best dealt with through procedural improvements

The truth is that ISDS impinges on state sovereignty because the investment treaties that contain this dispute settlement mechanism, specifically call for surrenders of sovereignty on issues pertaining to foreign investment protection. Sometimes the international comittments of host countries through their accession to investment treaties run squarely counter to local interests. What can appear to be a creeping expropriation, discrimination or a failure to provide fair and equitable treatment, can be no more than a host government attempting to balance the interests of local stakeholders in a manner that avoids destabilizing the local political balance.

ISA has always existed in the midst of the tension that exists between a host state's interest in attracting foreign investment and the very real domestic issues of local stakeholders, who support that government with the expectation that their issues will be managed optimally and to their benefit. ISDS is designed to ensure that host states honor international commitments, and therefore forces governments into a delicate balancing act as they try to serve local interests, without violating international commitments.

Because of the interplay of various and often conflicting local interests in host states, this balancing act is more complicated than it may seem from the outside. A complete understanding of the domestic situation in the host state is usually only barely visible to the foreign investor. Of course, larger, well resourced multinational investors, may indeed have that level of understanding, and the leverage to negotiate their own protections. The ISDS system allows the lesser resourced investor to invest without such visibility because that investor can benefit from an investment treaty providing a collection of protections it considers essential to safeguard planned investments.

For these reasons, investor-state disputes are different from international commercial disputes between private parties. Indeed because of the complexity of host state stakeholder management, ISA may in many cases be too blunt a tool to achieve optimal dispute resolution. Investment mediation, on the other hand, may in many cases be a more suitable tool for investor state disputes precisely because it can serve as a platform to consider all interests of all the stakeholders involved in the dispute. While an ISA case would consider whether a host state regulatory measure constitutes a creeping expropriation, or an instance of discrimination, or a breach of fair and equitable treatment obligation, a mediation would focus on the underlying needs and interests of all the stakeholders involved in the dispute and then brainstorm a solution that addresses the interests of all. One thing is winning or losing a case (which in many instances only addresses part of the problem), while another is resolving a dispute in its entirety without impairment of the parties' relationship going forward.

One can see how the efforts to fix ISDS by the the US, EU and Canada seem to overlook the reality of this inherent tension, and therefore propose fixes that, while possibly helpful, do not address the core problem. Excepting of course, mediation, which I believe most approximates the heart of the matter. Only a mechanism as flexible as meditation can truly begin to reconcile state sovereignty to serve its domestic stakeholders with the state's commitments to international investors. It comes as no surprise that meditation provisions have worked thier way into many investment treaties, probably for this very reason.

Myth 2: Foreign investors enjoy better legal protection than domestic competitors because ISDS prohibits host states from regulating foreign investors. And this leads to ISDS being no more than a tool of big business used to bully developing countries[11]

On its face, it seems an extraordinary level of protection to afford foreign investors fuller legal protection than their host state competitors. As one can see further on, ISDS does not prohibit host states from regulating foreign investors. It merely examines whether host state measures are treaty compliant, for example measures driven by populism or protectionism. Even in the rare case where this charge would seem to be true, it would only be so in cases where the rule of law, equal protection and due process (substantive and procedural) were not commonplace or, at a minimum, were not applied in a coherent fashion. It was because of this disparity that ISDS came about. It is of little assurance to foreign investors that they will be treated as arbitrarily as their domestic competitors. Nevertheless, it is the very notion that an independent arbitral body, should sit in judgement over one country's notion or application of fairness or due processes, that drives so much push back and controversy.

The "bullying" argument was among the list of criticisms lodged against the Trans-Pacific Partnership (TTP) and Trans-Atlantic Trade and Investment Partnership (TTIP), when those agreements were under negotiation with the US several years ago. ISDS cases are very expensive (in terms of legal fees and resources).[12] The fact that any investor can afford to bring these cases does not always mean it is bullying anyone, if it is in good faith spending resources to seek redress for a breach of a promised treaty protection. Reasonable minds may however differ as to who the bully, if any, really is in any given circumstance.

Due to my involvement in the tobacco plain packaging battles, I take issue with the charge of bullying. One of the biggest concerns at the table when deciding whether to proceed with ISDS is the potential of harming the relationship with the host country. It's worth noting that in highly regulated industries, businesses must have fluid communication and a good working relationship with the administration because of shared interests (in the case of the tobacco industry, excise tax, illicit trade, employment, etc.). Keep in mind that the majority of the sales price of tobacco is comprised of excise tax, making the government (like it or not) the principal stakeholder in the industry. So, taking to task a country's public health policy decisions in an independent forum administered

11 The tobacco industry was a particular target of this criticism when ISA was employed to challenge regulatory measures that threatened very valuable IP rights when governments threatened plain packaging measures or large graphic health warnings covering over 80% of the pack. See e.g. Philip Morris v Uruguay, supra.

12 One study shows that, on average, parties spend four years in an investment arbitration; investors and States spend at least US$6 million and US$4.8 million, respectively, on representation fees. In addition, the average cost for a three-member tribunal amounts to at least US$920,000. IMI Support, Investor-State Taskforce, *What is investor-state mediation?* 17th August 2020 Available at https://imimediation.org/2020/08/17/what-is-investor-state-mediation/.

by ICSID (a member of the World Bank group), risks destroying relations with the public administration of the country. These are relationships that, most likely, took considerable time and resources to build and are essential for a company to operate in that market. Taking a decision that risks poisoning the operating environment is not a decision taken lightly.

While controversy over ISDS has grown, governments have over the years also worked to slowly introduce mediation into their investment treaties, albeit in different shapes and forms.One of the benefits of mediation is its emphasis on maintaining relations between the parties. In many cases, those relationships transcend the particulars of any one dispute. The IP expropriation issues at the heart of the tobacco plain pack dispute ran counter to important public health policy issues. In hindsight, I speculate that mediation could have perhaps converted years of international litigation into a genuine public policy discussion facilitated by able mediators. I believe that was what many on both sides wanted more than anything else—the real goal being an independent, depoliticized forum where all stakeholders would have been heard and afforded an opportunity to build a coherent tobacco control policy, rather than the very costly zero-sum litigation that ensued.

Myth 3: As investment treaties almost always favor developed countries, developed countries are the most compliant to ISA awards

The truth is that majority of cases referred to ISDS have been successfully defended by investment host states. Take environmental and health cases, for example. Leading commentators have stressed that "No ISDS tribunal has ever found a legitimately environmental or health law or regulation of a State to have breached a BIT or a multilateral investment treaty".[13] The results of the tobacco labeling cases—Philip Morris Brands Sàrl, et al. v. Oriental Republic of Uruguay and Philip Morris Asia Limited v. The Commonwealth of Australia—serve as powerful examples of how health-protection legislation or regulation was not found to have breached any provision of any investment treaty.[14]

Indeed, as a veteran of the tobacco plain packaging battles, I can attest to how poorly cases are often reported even in the specialized press. For example, in the tobacco plain packaging cases, what is often not reported is that those plain packaging labeling measures were proposed in a regulatory environment where all advertising and promotion, both direct and indirect, were banned and where product visibility at the point of sale was also prohibited. This left the pack face itself as the last remaining touch point with the consumer. And only a portion of the pack face was available, when you consider the size of graphic health warnings that covered more than half its surface. In that context, removing all branding from what remained of the pack face rendered it extremely difficult for consumers to distinguish one brand from another (the most basic function of a trademark).

To say that a fight to maintain that one remaining touch point, was bullying, fails to see the whole picture. This is particularly the case where any evidence suggesting that the plain pack would reduce tobacco consumption, rather than brand choice and switching, was speculative at best. No weight was given to arguments demonstrating

13 Brower, Hon. Charles N; Jawad Ahmad, *From the Two-headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court*, Fordham International Law Journal Volume 41, Issue 4 2018 Article 2 p 814.

14 Id at 817 see also Philip Morris Brands Sàrl, et al. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶ 590 (July 8, 2016); Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, sec. VII (Dec. 17, 2015).

that the measure would incentivize illicit traders by removing all premium elements of legal products. Those cases were lost by the industry because those health measures were considered proportionate restrictions in light of the perceived health risks of the product. The WTO panels considering the same issues ruled likewise.[15]

That those cases were lost by the industry illustrates that health concerns are not always trumped by trade and investment commitments under the treaties. In simple terms, plain packaging was considered a legitimate and proportionate public health measure. There was no bullying, just an industry fighting for its last consumer touch point. Those remaining IP rights were specifically protected by the WTO and the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Agreement and the BITs at issue in those cases. Had the plain packaging battles been mediated (perhaps by WIPOs mediation service) rather than litigated before national courts, investor-state arbitration and WTO panels, I'm sure the matter would have been resolved differently. Perhaps in a manner that looked to address the needs and interests of all the stakeholders involved in the dispute.

States win the majority of ISA cases that are tried to an award. From 1987 through 2017, 548 ISDS cases were concluded.[16] Of those cases, 37% were decided in favor of the State (the claims were dismissed either for lack of jurisdiction or on the merits) and 28% were decided in favor of the investor.[17] Furthermore, 23% of the 548 cases were settled, 10% were discontinued, and in 2% of the cases there was a finding of liability, but no damages were awarded.[18]

On a historical average over the past 50 years, the outcome of ICSID cases has been balanced between investors and states.[19] 48% cases have been decided in favour in investors (fully or partly) and 52% in favour of states. This continued in 2022 with 59% of the awards the tribunal upheld the claims in part or full, while in 41% of the awards the tribunal awarded the host state.[20]

A review of the most recent ICSID report shows that, of the arbitration proceedings under ICSID Convention:[21] 15% of awards dismissed all claims; 36% of awards upheld claims in part or full; 9% of awards declined jurisdiction; 2% of awards dismissing claims considered to be manifestly without any merit; 19% of proceedings were discontinued at request of both parties; 11% of proceedings were discontinued at the request of one of the parties; 4% were discontinued for lack of payment of advances; 2% were discontinued for failure of a party to act, and 2% ended by way of settlement agreement embedded in an award at parties´ request.

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15 Australia-Certain Measures Concerning Trademarks, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (DS434) and Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (DS435, DS441, DS458 and DS467) Available at https://www.wto.org/english/tratop_e/dispu_e/435_441abr_e.pdf.

16 UNCTAD, *Investor-State Dispute Settlement: Review of Developments in 2017*, at 5 (2018), Available at http://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf.

17 Id at 6.

18 Id.

19 Sewlikar, Akshay, *ICSID's caseload statistics for 2023 in review*, 13 September 2023 Available at https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2023/september/icsid-case-statistics-2023.

20 Id.

21 *ICSID Annual Report* 2023 (Sept 7, 2023) Available at https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR2023_ENGLISH_web_spread.pdf.

A review of these numbers illustrate that results are clearly not one-sided. Investors have not carried the day in most cases. It is interesting to note the very small percentage of cases that have settled. This can only make one wonder how many more would have settled with the help of formal mediation. If anything, these figures hint that mediation can and should play a more important role in ISDS.

As for compliance with awards, myths abound as well. The 2023 International law Compliance Index ranks countries by the number of unpaid ISA awards and the outstanding amount of compensation.[22] According to the latest ranking, Venezuela ranks number 1 in the world as the most non-compliant State, followed by Spain, Russia, Ukraine and Argentina. Spain leads the pack in noncompliance on Energy Charter Treaty cases currently owing over 1.5 billion Euros to investors. In addition, it is worth noting that within the top 20 non-compliant countries, Italy, Czech Republic, Croatia and Poland feature as well.[23]

Myth 4: Most devoloping countries are tearing up their bits[24]

While it would be an exaggeration to state that all developing countries are tearing up their investment treaties, it is also true that many have. But most are merely renegotiating. And many of these new treaties contain mediation and conciliation provisions.[25] One commentator has declared that "the investment regime is no longer growing, it's shrinking. In the last five years, states have terminated at least 250 investment treaties, and since 2017, the number of terminations exceeded the number of new treaties entering into force."[26] But it is equally true that there has also been a vote of confidence in the system as seen by the fact that 145 new investment treaties have been signed in the past year.

Those that have terminated their treaties claim to have done so due to concerns over sovereignty and the need for policy coherence.[27] For example, in the case of the EU and the Energy Charter Treaty, the argument is that ISDS stands in the way of governments' ability to fight climate change.[28] It seems that the truth is more that governments would like the freedom to pursue climate change policies, unfettered by

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22 See generally https://www.internationallawcompliance.com, see also *States comply less with investment treaty arbitration awards insights from a 2023 report on compliance* Available at https://arbitrationblog.kluwerarbitration.com/2023/11/26/states-comply-less-with-investment-treaty-arbitration-awards-insights-from-a-2023-report-on-compliance.

23 Id.

24 Brower, Hon. Charles N; Jawad Ahmad, *WHY THE "DEMOLITION DERBY" THAT SEEKS TO DESTROY INVESTOR STATE ARBITRATION?* Southern California Law Review, Volume 91, Number 6 (September 2018).

25 Customary international law, as embodied in the Vienna Convention on the Law of Treaties (VCLT), along with the clauses of the investment treaty itself, stipulates the process and timing for a state to terminate a BIT and when such termination takes effect. See Bernasconi-Osterwalder, N.; Brewin, S., *Terminating a Bilateral Investment Treaty*, (2020).

26 See UNCTAD, Investment Policy Hub, Most Recent IIAs.

27 OECD *Public Consultation* (2022) Available at https://www.oecd.org/investment/investment-policy/OECD-investment-treaties-climate-change-consultation-responses.pdf.

28 The Energy Charter Treaty. Eight EU member states have announced their withdrawal from the Energy Charter Treaty – the treaty that has generated the highest number of ISDS cases (157 cases). Meanwhile, a withdrawal of the EU itself from the ECT is increasingly likely and supported by the European Commission and the European Parliament claiming that its ISDS provisions will block needed European climate policies. Several EU and non-EU countries have already begun withdrawing from the ECT, arguing it constrains their ability to act against global warming. Letizia, V., *The EU Termination Agreement and Sunset Clauses: No 'Survivors' on the Battlefield*, Kluwer Arbitration (2022). See also Bernasconi-Osterwalder, N., *Energy Charter Treaty Reform: Why withdrawal is an option?*, IISD (2021); See also Zarowna, A., *Termination of BITs and Sunset Clauses*, Hogan Lovells, Kluwer Arbitration Blog (2017).

any general or specific commitments that they may have made in the past to attract investment in renewable energy.

Myth 5: The EU has the most balanced approach to ISDS Reform

Rather than addressing the tension inherent in ISDS between sovereignty and investor protection, the EU proposes replacing the system with a multilateral investment tribunal. The EU would appear to see alleged arbitrator bias as the key defect of ISDS. Proponents argue that one key to addressing the shortcomings of ISDS is the removal of party autonomy as regards who will decide upon the dispute in favour of the permanent appointment of publicly appointed judges. This apparently can be traced back to an article by Jan Paulsson,[29] where he criticized the party's autonomy to name arbiters and argued that the process would be improved by having arbiters named by a separate institution.[30] This line of thought has taken hold in the EU. While this might address the criticism of arbitrators under the current ISDS system, this proposal does little to address the tension on sovereignty that the ISDS system creates.

The initial proposal[31] for setting up an Investment Court System (hereinafter "ICS") was made in the context of the Transatlantic Trade and Investment Partnership (hereinafter "TTIP") negotiations in 2015.[32] While the TTIP negotiations themselves failed the idea of the ICS survived and was subsequently included in agreement negotiated between the EU and Canada (Article 8.29 of the EU-Canada Comprehensive Economic and Trade Agreement (hereinafter "CETA"). Indeed, the agreement contains a clause calling for the the establishment of a multilateral investment tribunal and a multilateral appellate mechanism for the resolution of investment disputes."[33]

The EU Commission specifically received negotiating directives for a 'Multilateral Investment Court' (MIC) from the EU Council in March 2018. Thus, an EU Commission communication from July 2018 reads:

"*For the Commission, investor-to-State arbitration ... is a thing of the past and has been replaced by the Investment Court System (ICS), already included in CETA, the EU-Singapore, EU-Viet Nam and EU Mexico agreements and the negotiation basis for negotiations with 3rd countries.*" [34]

Another catalyst for the ICS appears to have come from judicial developments in Europe, with the decision of the Court of Justice of the European Union (hereinafter

29 Paulsson, Jan, *Moral Hazard in International Dispute Resolution*, 25(2) ICSID REVIEW: FOREIGN INVESTMENT L. J. 339 (FALL 2010); Albert Jan van den Berg, *Dissenting Opinions by Party- Appointed Arbitrators* in Investment Arbitration in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (Mahnoush Arsanjani et al. eds.) (11 Feb. 2011). For a comprehensive critique of Paulsson's and van den Berg's proposals, see Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson–van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 6(3) WORLD ARB. &MEDIATION REV. (2012).

30 Id.

31 European Commission, *EU finalises proposal for investment protection and Court System for TTIP*, Press Release, 12 November 2015. Available from https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6059.

32 EU Concept Paper, *Investment in TTIP and beyond – the path for reform*, May 2015. Available from https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

33 Jus Mundi, *Multilateral Investment Court*. Available from https://jusmundi.com/en/document/wiki/en-multilateralinvestment-court.

34 European Commission, *Commission provides guidance on protection of cross-border EU investments – Questions and Answers*, Memo, 19 July 2018. Available from https://ec.europa.eu/commission/presscorner/detail/fi/MEMO_18_4529.

"CJEU") in Slovak Republic v. Achmea BV,[35] which struck down ISDS under intra-EU bilateral investment treaties (BITs) due to the "adverse effect on the autonomy of EU law". Following this decision, the CJEU also issued an Opinion[36] in April 2019, confirming the "compatibility of an Investment Court System with EU Treaties."[37] That ICS is permissible under EU law does not logically lead to its being a superior form of dispute resolution in the EU. It is not surprising there is so little support for this outside the EU.

Indeed, The EU has tried to push this on to the agenda of the United Nations Commission on International Trade Law (hereinafter "UNCITRAL") Working Group III, focused on "Investor-State Dispute Settlement Reform"). One of the drivers for this was a public consultation undertaken by the European Commission in 2016-2017, resulting in the adoption of a Council negotiating directive on 20 March 2018, which concluded with its preference of "*having one, multilateral institution to rule on investment disputes covered by all the bilateral agreements in place*," rather than multiple bilateral investment courts.[38]

It is reported however that there is but tepid support for this initiative at the UNCITRAL working group. States such as the United States, Japan, Chile and Russia also objected to a systemic reform, preferring bilateral tools and drafting techniques to address defaults of the current system. Options different from the multilateral investment court are currently under discussions at UNCITRAL, including the creation of a multilateral advisory centre.[39]

The saving grace of the EU is that it has also included mediation procedures in its new generation trade deals. As previously discussed, this may very well work to deal more effectively with the tension between sovereignty and investor protection. CETA for example contains such a procedure. So do the agreements with Vietnam, Singapore and Mercosur. This is also the case for new deals currently under negotiation. One of the best examples is in the current working draft of the India-EU free trade agreement.

Myth 6: THE US remains very much in favor of ISDS in its present form

Principal US Measures

The US has also failed to deal effectively with the tension between sovereignty and investor protection. Indeed, the US has taken the lead in what the honorable justice

35 Slovak Republic v. Achmea BV, Case C-284/16, Judgment of the Court (Grand Chamber), 6 March 2018.

36 Opinion 1/17 of the Court, 30 April 2019. Available from https://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst &dir=&occ=first&part=1&cid=4976548.

37 European Commission, "Trade: European Court of Justice confirms compatibility of Investment Court System with EU Treaties", Press Release, 30 April 2019. Available from https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2334.

38 Submission of the European Union and its Member States to United Nations Commission on International Trade Law "UNCITRAL" Working Group III, *Establishing a standing mechanism for the settlement of international investment disputes*, 18 January 2019; Kaufmann-Kohler, G. and Potestà, M., *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards*, CIDS Supplemental Report, 15 November 2017. This report by the Centre for International Dispute Settlement (CIDS) submitted to the UNCITRAL in 2017, highlighted some procedural weaknesses of the existing ISDS *ad hoc* tribunals, as well as paths for potential improvement.

39 Howse, R., *Designing a Multilateral Investment Court: Issues and Options*, Yearbook of European Law, 2017, pp. 209-236. Taton, X. and Croisant, G., *Judicial protection of investors in the European Union: the remedies offered by investment arbitration, the European Convention on Human Rights and EU law*, Indian Journal of Arbitration Law, 2019, pp. 66-74.

Brower calls the demolition derby against ISDS.[40] One of the most striking examples is seen in US abandonment of North American Free Trade Agreement ("NAFTA") Article 11. The US removed most ISDS provisions when the Trump administration replaced the NAFTA with the US-Mexico-Canada Agreement ("USMCA") in 2020. The saving grace here is also the inclusion of a mediation provision.

Under the USMCA's Investment Chapter, investors from Canada or the United States will no longer have access to ISDS mechanisms against each other's countries. Under the USMCA, investor-state arbitration is limited to the United States and Mexico. Access to ISDS for disputes involving Canadian or Mexican investors will be possible under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter "CPTPP"), which entered into force on December 30, 2018, but not under the USMCA.[41]

The same regime that was applicable under NAFTA will under the USMCA be limited to foreign investors who are "part[ies] to a covered government contract" *and* belong to five "covered sectors": (i) oil and gas; (ii) power generation; (iii) telecommunications; (iv) transportation; and (v) infrastructure. Investors under this privileged regime can enforce substantially the same investment protections available under NAFTA through the USMCA's ISDS procedures.

A less favorable regime will apply to all other foreign investors under the USMCA, who can only access the USMCA's ISDS system to enforce a limited number of claims and must first defend their claims in local courts before initiating arbitration. Nonprivileged investors can only access the USMCA's ISDS system to enforce claims for (i) direct expropriation and (ii) national treatment and most favored nation treatment (principle of nondiscrimination), with the broad exception of claims on "the establishment or acquisition of an investment." Claims for indirect expropriation (substantial interference without a direct taking of property) and minimum standard of treatment—which includes fair and equitable treatment and full protection and security—have to be advanced by the investor's home state using the USMCA's state-to-state dispute settlement mechanism or directly brought by the investor before the host state's courts.[42]

Nonprivileged investors must first obtain a final decision from the local courts of final appeal or defend their claims in local courts for 30 months before initiating arbitration, unless such action would be "obviously futile". Nonprivileged investors must submit their claims to arbitration within four years of having acquired either actual or constructive knowledge of the host state's breach and the loss or damage incurred.

THE US 2012 Model BIT

The US also rewrote its model BIT in a manner that significantly reduces the original protection provided under the FET principle, limiting it to the level of protection afforded any alien investor. This rewrite corresponds with the Pope & Talbot case where the US and Canada issued statements reinterpreting the FET standard of NAFTA, so as to limit its effect "to the extent set out under customary international law."[43]

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40 Bower, supra note 28.

41 Agreement between the United States of America, the United Mexican States, and Canada 7/1/20 Text Available from https://ustr.gov/usmca.

42 Nadakavukaren, R.; Polanco Lazo *Legal opinion on right to regulate*, 28.07.2023. E-Avis ISDC 2023, Available from https://www.isdc.ch/media/2375/23-016-e-avis.pdf.

43 US *Model BIT* 2012 Available from https://www.bilaterals.org/IMG/pdf/BIT_text_for_ACIEP_Meeting.pdf see also: Quinn Emanuel, At a glance: investment treaty practice in USA, Oct 25 , 2022 Available from https://www.lexology.com/library/detail.aspx?g=08498dd9-8094-4d94-9263-ce6f22dc5652.

The main modifications of the 2012 Model BIT include those that:

- clarified and narrowed the definition of covered investments;
- changed and added language to explain and constrain the meaning of the "minimum standard of treatment" and expropriation obligations and closely guide arbitral tribunals' interpretations of those provisions;
- provided for exceptions to the agreements' prohibitions on performance requirements;
- codified the stance adopted by the US government in other areas of international law and some earlier investment treaties by expressly declaring that the essential security exception is self-judging;
- added language to protect host-state authority to take measures relating to financial services; and
- modified some aspects of investor-state dispute settlement, such as adding a statute of limitations, and giving state parties to the treaty additional or clearer authority to determine issues of treaty interpretation and application that would be binding on investor-state tribunals.[44]

Some aspects of the 2004 Model BIT were also bolstered with the aim of addressing issues of broader public concern. These included, for example, language expressly giving investor-state tribunals authority to accept submissions from *amicus curiae* and providing for public disclosure of information regarding the disputes; articles on labor rights and environmental protection; and text in the preamble clarifying that investment protection aims to improve living standards and should be pursued consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights.[45]

US Supreme Court

Most recently, the US Supreme Court ruled that ISA (as well as all other international commercial arbitration tribunals) no longer qualify as "foreign tribunals" under section 1782 of the federal rules of civil procedure, thereby foreclosing ISA tribunals from the use of US federal courts for obtaining discovery for all such arbitral proceedings. The US Supreme Court literally overturned a 20-year-old precedent in doing so. I wrote about this last year and consider this yet another illustration of US hostility towards ISDS.[46]

Myth 7: The Canadian Approach is the most balanced in relation to ISDS Reform

Canada has also failed to address the sovereignty vs investor protection tension in ISDS. Indeed, Canada and the EU are responsible for giving life to the proposed Investment court system employing fifteen "Judges", all to be appointed by the state party to the

44 Akhtar, Shayerah Ilias ; Martin A. Weiss, *U.S. International Investment Agreements: Issues for Congress.* April 29, 2013. Available from https://sgp.fas.org/crs/row/R43052.pdf.

45 Id.

46 Nahmias, Peter, *ZF AUTOMOTIVE US INC. V. LUXSHARE LTD. El futuro del "discovery" En EE.UU. En apoyo al arbitraje internacional*, CEA Spain Arbitration Review, Vol 45 (December 2022); see also Nahmias, Peter, *The future of US discovery in support of international arbitration- The US Supreme Court settles the debate over the reach of Section 1782*, The Journal of International Arbitration, Mediation and Dispute Management, CIArb, Issue 88.5 (February 2023). Available from www.nahmiaslegal.com.

CETA. Canada perhaps goes further than the EU as can be seen in the positions it has adopted in connection with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter "CPTPP") negotiations.

The Canadian approach under CPTPP is revealing. Unlike certain other investment treaties concluded in the last few years (including all such treaties entered into by the EU, which has officially denounced ISDS), the CPTPP does include ISDS, but with several noteworthy modifications, clarifications and exclusions. For example, through the use of side agreements with other state parties, Canada has agreed to exclude the application of the ISDS provisions as between them.[47] The CPTPP also contemplates the potential future application of an appellate mechanism,[48] although none currently exists.

In regards to the regulatory chill, the CPTPP's Investment Chapter expressly preserves the parties' right to regulate in key areas:

— "*Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.*"[49]

Express directions are given in the CPTPP as to the agreed scope and meaning of certain substantive protections. As such, CPTPP governments can issue interpretations that bind tribunals. For example, it is expressly confirmed that MFN will not apply to dispute resolution mechanisms.[50] Indeed, under CPTPP, ISDS claims must relate only to breaches of the investment chapter and limited aspects of the financial services chapter.

Under CPTPP, provisions that confirm government action to implement legitimate public welfare measures are deemed unlikely to constitute indirect expropriation. Furthermore, any government action that is inconsistent with an investor's expectations will not in and of itself lead to a breach of the investment rules.

CPTPP also has procedures for throwing out frivolous claims and placing limits on monetary awards. It also imposes a 3-and-a-half year limitation period for claims as well as a waiver on bringing parallel legal domestic proceedings. CPTPP also contains transparency requirements for public hearings and the ability for the public and experts to make submissions. It also requires consultations and negotiations prior to bringing claims.

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US and Canadian moves towards addressing operational shortcomings of ISDS will no doubt be welcome improvements to the ISDS system. However, softening traditional substantive ISDS protections, is troublesome insofar as it may weaken an important check on arbitrary and discriminatory governmental actions against foreign investors. It does little to deal with the sovereignty vs investor protection tension.

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47 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Available from https://www.gov.uk/government/publications/comprehensive-and-progressive-agreement-for-trans-pacific-partnershipcptpp-conclusion-of-negotiations/conclusion-of-negotiations-on-the-accession-of-the-united-kingdom-of-great-britain-and-northern-ireland-to-the-comprehensive-and-progressive-trans-pac.

48 Art 9.23.11.

49 Art 9.16.

50 Art 9.5.3.

The unfortunate reality is that in the face of this, it is likely that major investors will no doubt find other ways to protect themselves when negotiating foreign investments, negotiating contracts that would provide satisfactory dispute resolution mechanisms for their investments. It is only smaller investors who, lacking the negotiating leverage to conclude such contracts with host states containing the protection of conventional ISDS clauses, would be materially disadvantaged by watered down investor protections or having little choice but to bring claims before international investment courts composed solely of state-appointed judges.

Myth 8: The UNCITRAL Working Group is hard at work, with a very ambitious mandate to fix ISDS. It is fair to assume therefore that all the controversy and push back should be contained once it finishes its mandate in 2026

The UNCITRAL Working Group III has a very ambitious plan to deal with many of the shortcomings of the ISDS system. Its most recent work on a code of conduct should prove very useful as it rolls out into use. While the work streams and issues addressed are ambitious, the working group has chosen to focus on procedural rather than substantive issues. This is probably a wise choice, given how hard it is to gain consensus on such a broad range of issues. They are currently tackling issues such as third-party funding, security for costs, frivolous claims and the creation of a multilateral advisory body. They however are not delving into substantive debates such as that of "fair and equitable treatment", which I believe has caused the greatest amount of controversy and debate in this field.

The fair and equitable treatment (FET) standard has been described as the standard in investment treaty disputes that is the most important,[51] most frequently adjudicated,[52] and most frequently found to have been breached.[53] It is the expansive interpretation of the FET provisions in investment treaties that has fueled the sovereignty vs Investor protection tension. While historically the expropriation standard was more prevalent, FET claims have grown in popularity.[54] The FET protection is a standard feature in investment treaties. It is estimated that only 125 out of the total number of investment treaties do not contain an FET provision (and even then, it may be possible to import FET into those treaties using the most-favoured nation clauses in them).[55]

The truth is that FET clauses are not uniformly drafted, and a new generation of model BITs contains a new type of FET clauses including an exhaustive list of measures which

51 Schreuer, Christoph, '*Fair and Equitable Treatment in Arbitral Practice*', 6 *J. World Inv. & Trade* 358–359 (2005), p. 357.

52 Álvarez, J, *The Public International Law Regime Governing International Investment* (Cambridge University Press, 2011), p. 177.

53 Blackaby, Nigel et al., *Redfern and Hunter on International Arbitration*, Sixth edition (Oxford University Press, 2015), Paragraph 8.96.

54 United Nations Conference on Trade and Development (UNCTAD), '*Fair and Equitable Treatment*: UNCTAD *Series on IIAs II*: A *Sequel*' (2012), available at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (UNCTAD Series), p. 10.

55 See UNCTAD, *Mapping of IIA Content*, available at https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping, accessed on 1 September 2021. See also P Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press, 2016), p. 145 (noting that in 2014, only 50 out of a total of 1,964 BITs did not contain an FET provision). See, e.g., *PAO Tatneft (formerly OAO Tatneft) v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014, Paragraphs 326–365 (where the Russia–Ukraine BIT did not contain an FET clause but FET was imported from the UK-Ukraine BIT through the most-favoured nation clause in the Russia–Ukraine BIT).

are considered to breach the FET.[56] Among situations giving rise to a violation of the FET standard, arbitral panels have identified.[57]

a. Lack of respect for the obligation of vigilance and protection;

b. Denial of due process or denial of justice;

c. Non-observance or frustration of investors legitimate expectations;

d. Coercion and harassment by the organs of a host state;

e. Failure to offer a stable and predictable legal framework;

f. Unjust enrichment;

g. Evidence of bad faith;

h. Absence of transparency;

i. Arbitrary and discriminatory treatment.

The sovereignty vs investor protection tension has been fueled by the fact that these FET interpretations have not been uniform, which has resulted in different investment tribunals interpreting FET differently. Some have sought to limit their interpretations while others have interpreted them more broadly. In many cases, tribunals have gone beyond the standard of protection under customary international law, drawing on the discretion they are afforded. This has given rise to considerable criticism and push back. In my view, clarification of FET, issued by UNCITRAL or ICSID would go a long way towards removing a large amount of the controversy surrounding ISDS. It would certainly eliminate the need for side letters and carve outs. A unified interpretation would provide a degree of certainty to party expectations and most likely avoid a substantial amount of the political fallout from rulings.

Myth 9: Mediation is not likely to offer much assistance in driving any long-term improvements to the system

Of all the myths, discussed this is the most important to debunk. It is perhaps for this reason that the UNCITRAL Working Group III is making good progress with its work on Mediation. In my view, this is probably the most important workstream in terms of addressing the sovereignty versus investor tension discussed herein.

Because it is not pleadings-intensive or dependent upon witness cross-examinations and document exchanges, mediation can produce results much less expensively than arbitration. Given the greater buy-in of parties in mediated settlement agreements, compliance is less costly as well (less post-award procedures such as annulment, setting-aside, and enforcement proceedings). Investment mediation is also beneficial to the preservation of relationship and long-term cooperation between the host states and the foreign investors, allowing better long-term opportunities for all involved.[58]

Mediation provides both parties with the opportunity to take control of their dispute and realize significant economic and non-economic benefits. It does so by leaving

56 U.S. *Model Bilateral Investment Treaty* (2012), Art. 5.

57 Knoll-Tudor Ioana, *Fair and Equitable Treatment*, Jus Mundi, 11 December 2023 https://jusmundi.com/en/document/publication/en-fair-and-equitable-treatment.

58 IMI Support, Investor-State Taskforce, *What is investor-state mediation*? 17th August 2020 Available from https://imimediation.org/2020/08/17/what-is-investor-state-mediation.

room to take into account actual stakeholder needs, relationships, socio-economic conditions, politics, and even cultural history. Mediation also has the advantage of allowing for outcomes that are unbound by precedent (as compared with arbitration).

Because of this procedural flexibility the range of remedies that can be included in mediated settlement arrangements far exceeds what is available in arbitration, which is limited usually too monetary damages. With mediation, remedies can include nonmonetary remedies such as the granting or renewal of licences, project modification , swaps of deals for other investment projects, renegotiation of contract terms, re-evaluation of investments as well as problematic governmental measures.

While enforcement of mediated settlements can be ensured through inclusion in an arbitral award, the hope is that more countries ratify the *United Nations Convention on International Settlement Agreements Resulting from Mediation* (hereinafter "Singapore Convention") which would enable the enforcement of mediated settlements worldwide in the same manner as the New York Convention does in regards to the recognition and enforcement of foreign arbitral awards.

State actors are however often wary of mediation. There are a number of reasons for this but mainly it has to with internal bureaucratic or political reasons in the host state.[59] The complexity of state bureaucracies can be overcome, through various strategies such as through either centralizing state negotiating authority or by using a multiparty mediation process.[60] The flexibility of the process will hopefully help overcome this as well.

The International Bar Association, ICSID, and others have also encouraged the use of mediation in this context[61]. ICSID introduced mediation rules specifically designed for investment-related disputes in 2022[62]. The ICSID mediation rules may be applied to disputes that relate to an investment, involve a State or a regional economic integration organization (REIO), and which the parties consent in writing to submit to ICSID (Mediation Rule 2(1)). The ICSID mediation rules therefore offer broad access to mediation with States, State entities or REIOs relating to an investment.

Some have critically raised alarm about the further risks to the public interest posed by mediation of investor-state disputes, such as reduced transparency and secrecy. There are ways of dealing with those concerns. For example, parties could agree to various forms of disclosure via procedural orders issued by the tribunal. The procedure offers the flexibility that even questions like that pose.

Conclusions

By debunking some of the myths, one can better understand the various positions in the debate. For example, one can see that a number of countries have denounced

59 Chew, Seraphina; Lucy Reed . J Christopher Thomas QC, *Report: Survey on Obstacles to Settlement of Investor State Disputes*, NUS - Centre for International Law Working Paper 18/01 (Sept 2018) Available from https://cil.nus.edu.sg/wp-content/uploads/2018/09/NUS-CIL-Working-Paper-1801-Report-Survey-on-Obstacles-to-Settlement-of-Investor-State-Disputes.pdf.

60 *MEDIATION OF INVESTOR-STATE CONFLICTS*, Harvard Law Review [Vol. 127:2543 (2014) Available from https://harvardlawreview.org/wp-content/uploads/2014/06/vol127_mediation_of_investor_state_conflicts.pdf.

61 Weinstein, Daniel, Manukyan, Musheg, *Making Mediation More Attractive For Investor-State Disputes* Kluwer Arbitration Blog, March 26, 2019 Available from https://arbitrationblog.kluwerarbitration.com/2019/03/26/making-mediation-more-attractive-for-investor-state-disputes.

62 *ICSID's Background Paper on Investment Mediation*. Available from https://icsid.worldbank.org/resources/publications/background-paper-investment-mediation.

ICSID and have either terminated or allowed investment treaties to lapse. The US has taken a dramatic about-face, significantly limiting the NAFTA chapter 11 protections, rewriting the US model BIT and barring ISA tribunals from US discovery. The EU is pushing for a standing investment court already inserting them into their newest generation of trade agreements such as CETA. The UNCITRAL Working Group is tepid about replacing the existing ISDS system and is more focused on operational issues such as codes of conduct. With so many "bad" developments, how should one approach the debate on changing the ISDS paradigm?

The trend seems to be towards what I consider an "ugly" model, where countries will submit to standing investment courts when dealing with the EU and then entertain side letters and carve outs. This is less than optimal, but no doubt will be the way forward for many countries who are either renewing expiring trade agreements or negotiating new ones.

These "bad" and "ugly" approaches are not optimal. Not only does it seem haphazard and inconsistent, but it doesn't seem likely to address the most important problems with ISDS, mainly the sovereignty vs investor protection tension. The efforts of the UNCITRAL working group are promising especially on operational issues, particularly the new code of conduct, security for costs, frivolous claims, appellate process, etc. Neverthless, unless UNCITRAL takes on substantive issues such as a standard definition of FET and truly promotes the use of investor mediation, problems should continue to arise.

All things considered, mediation may indeed be the most promising of the solutions proposed by the EU, US and Canada. Clearly, mediation in ISDS may very well offer the discretion of arbitration, and allow the parties the leeway necessary to navigate the political and commercial issues that usually arise in investor state disputes to reach workable solutions. While some would say the future of ISDS is uncertain, the promotion of investor mediation could well offer a future that is more "good" than "ugly".