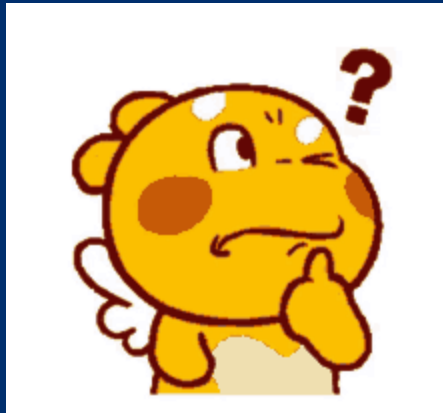


Arnold & Porter

Future of Bilateral Investment Treaties & Consequences for Terminating BITs

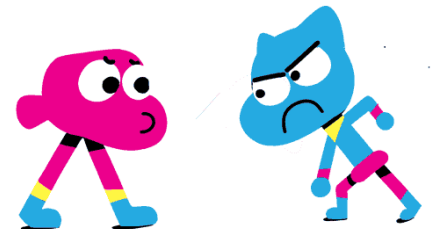


Dr. Kabir Duggal

November 27, 2020

Origins of Investment Protection

- Historically, aliens had no rights or legal capacity under international law
- Investor disputes handled through diplomatic protection, if at all, through a species of **gunboat diplomacy**
- Beginning of the modern era: protection of aliens' rights to travel and trade
- Investor protections in treaties emerged as a substitute to diplomatic protection
 - Origin was **mixed claims commission**



Coming to foreign investment protection?

- **Notion of cross border investment.**
 - Distinction between capital-importing and capital exporting countries: does it still exist?
- **Need for security for foreign investors.**
 - Provisions in contracts;
 - Political risk insurance;
 - Guarantees from the Government;
 - Treaties (bilateral or multilateral);
 - (Domestic) foreign investment law.



Deconstructing a BIT/MIT

Jurisdictional requirements

- Defines “investor” and “investment”

Substantive protections:

- Expropriation
- Fair and Equitable Treatment
- Full Protection and Security
- Arbitrary and Discriminatory Measures
- National Treatment
- Most Favored Nation
- Umbrella Clause

Compensation in the event of the breach of the obligations.

Vague rules, more disputes

There is a whole range of investment protection clauses embedded in investment agreements. The alleged breach of one or more of these provisions by the host state gives companies the right to sue. When clauses lack precision, they open the door for companies to sue in a variety of situations that would otherwise not be allowed. The United Nation Conference on Trade and Development (UNCTAD) has noted that “many IIA [international investment agreements] provisions are loosely phrased”. As a consequence, the only thing that stands between the vague rules of investment treaties and a claim from an investor is how the clauses are interpreted by the arbitrators¹²¹. If the provision is not precise, it is open to wide interpretation. This shows how important their role is.

Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the People's Republic of Bangladesh

The Government of the Kingdom of the Netherlands
and
the Government of the People's Republic of Bangladesh,

(hereinafter referred to as the Contracting Parties),

Desiring to strengthen the traditional ties of friendship between their countries, to extend and intensify the economic relations between them particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party,

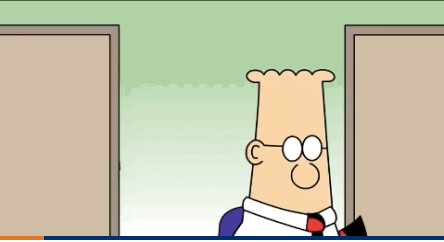
Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable,

Have agreed as follows:

Article 1

For the purposes of the present Agreement:

- (a) the term “investments” shall comprise every kind of as set and more particularly, though not exclusively:
 - i. movable and immovable property as well as any other rights in rem in respect of every kind of asset;
 - ii. rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
 - iii. title to money and other assets; and to any performance having an economic value;
 - iv. rights in the field of intellectual property, technical processes, goodwill and know-how;
 - v. rights granted under public law, including rights to prospect, explore, extract and win natural resources.
- (b) the term “nationals” shall comprise with regard to either Contracting Party:
 - i. natural persons having the nationality of that Contracting Party in accordance with its law;



Problem with ISDS: *Prioritizing certain rights over others?*

- ISDS often implicates broader rights for a state:
 - *Philip Morris v. Uruguay*: Intellectual property v. public health
 - *Urbaser v. Argentina*: Investor right versus right to water
 - *Bearcreek v. Peru*: Investor right versus indigenous people rights

Implications for a state:

- ISDS can result in a “regulatory chill” (fear of lawsuit; reputation harm)
- States must meet “all” international obligations
- No consensus on whether it increases foreign investment
- Investors often “structure” investments to take BIT protection
- Net consequence is certain rights (investment rights) are prioritized over other rights (human rights)
- All this has resulted in backlash for ISDS and there are major calls to reform ISDS.

EUROPEAN PROPOSAL

The Court Proposal (CETA)

Replace ISDS with a Court Structure

Proposal

Creation of a “Tribunal of First Instance”

- 15 Judges (5 EU, 5 Canada, 5 “third countries”)
- 5 years terms renewable once
- Hear cases in divisions of 3 judges



Creation of “Appeal Tribunal”

- No number specified but TTIP says 6 Members (2 EU, 2 Canada, 2 “third countries”)
- 6 years terms renewable once
- Hear appeals in divisions of 3 judges





Judges Brower & Schwebel on the Proposal

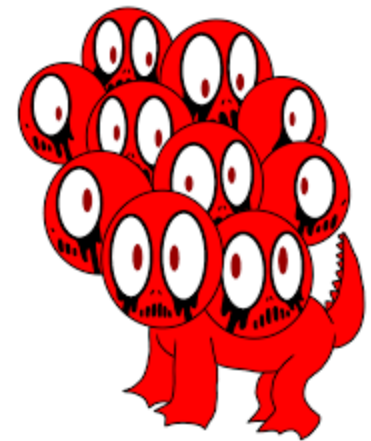


- Brower describes proposal a “*monstrous 15-headed hydra*”
- Says misplaced criticisms:

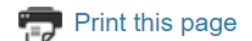
The reason for all the uproar about the current system of ISDS is the unfounded fear that the system might be used to impede states' ability to implement environmental and health regulations in the public interest, he suggested. But he said he did not know of a single investor-state case in which a tribunal found such regulations to be in breach of a treaty.

- Critical of Professor Kauffman Kohler-Potesta views on reform system: “Why do these acknowledged leaders of investment dispute arbitration as we know it *bring termites into our wooden house* of investor state dispute settlement?”
- Judge Schwebel says proposal is “appeasement of critics which creates a *risk of bias in favour of states.*”

[What lead to the proposal despite years of criticisms from developing world?]



STOP PRESS



New treaty spells end of intra-EU BITs

06 May 2020 Cosmo Sanderson



The European Commission building in Brussels (Credit: Shutterstock/olrat)

Two years after the *Achmea* ruling, a majority of EU member states have signed an agreement to terminate their intra-EU bilateral investment treaties, in what has been called the end of an era for investor-state arbitration in Europe.

The termination agreement, signed yesterday, is available [here](#). It provides for the termination of some 130 intra-EU BITs and declares that these cannot serve as a legal basis for arbitration proceedings. It also contains “transitional measures” to facilitate settlement of pending intra-EU BIT arbitrations or have disputes transferred to national courts.

The treaty does not cover intra-EU investment disputes under the Energy Charter Treaty, which will be dealt with “at a later stage”.

According to the European Commission, the agreement implements the European Court of Justice’s March 2018 judgment in the *Achmea* case, which [found](#) that investor-state arbitration provisions in the Netherlands-Slovakia BIT were incompatible with EU law.



U.S. Position: Unclear Position



Donald J. Trump ✓
@realDonaldTrump



The Trans-Pacific Partnership is an attack on America's business. It does not stop Japan's currency manipulation. This is a bad deal.

4:56 PM - Apr 22, 2015

- **September 2016:** Under the election campaign, Donald Trump described NAFTA as the “Worst Trade Deal the U.S. Ever Signed.”
- **January 2017:** Shortly after the US elections, President Trump signs executive order withdrawing from TPP.



Donald J. Trump ✓
@realDonaldTrump

Follow

We are in the NAFTA (worst trade deal ever made) renegotiation process with Mexico & Canada. Both being very difficult, may have to terminate?

6:51 AM - 27 Aug 2017





Unclear Position



- **September 2017:**

ELIZABETH WARREN

ABOUT

SERVICES

OVERSIGHT

LEGISLATION

NEWSROOM

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NEWSROOM / PRESS RELEASES

SEPTEMBER 19, 2017

Warren Urges U.S. Trade Rep to Remove ISDS Provisions During Next Round of NAFTA Negotiations

- **March 2018:** US trade representative Robert Lighthizer has defended US president Donald Trump's distrust for investor-state arbitration. *"Why should a foreign national be able to come in and have more rights than Americans have in the American court system? It strikes me as something that at least we ought to be skeptical of and analyze."*
- **April 2018:** GAR: "Trump lawyers invoke BIT in Panama hotel dispute."
- **August 2018:** Trump asked advisers to reconsider joining TPP. Apparently told Larry Kudlow (National Economic Council Chairman) *"go, get it done."*



NAFTA 2.0 USMCA

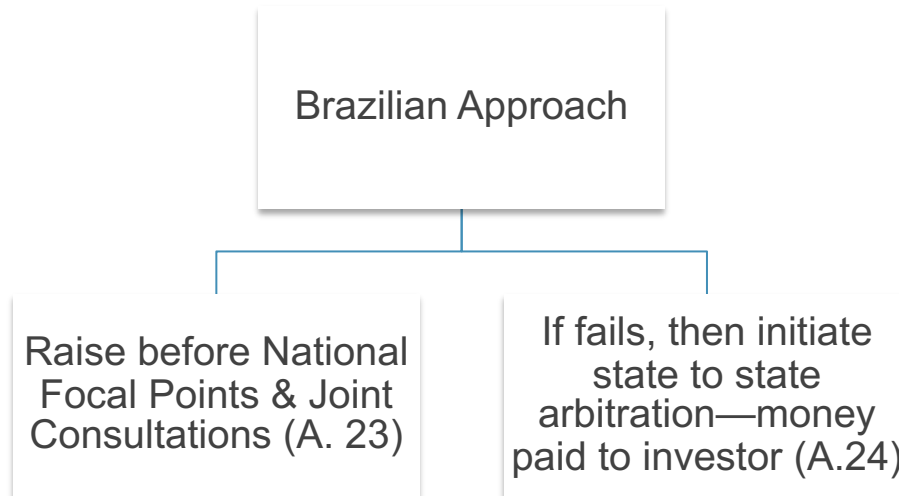
No (or very limited) ISDS



- New investment chapter (Chapter 14):
 - **Canada and Canadian investors will have no ISDS:**
 - With Mexico, the investors can rely on ISDS in CP-TPP.
 - US and US investors against Canada have to rely on domestic courts/state to state arbitration.
 - **US and Mexico will have a super limited form of ISDS:**
 - Restricted to NT, MFN and direct expropriation.
 - No protection of NT/MFN in the establishment of an investment
 - Exhaust local remedies for 30 months (2.5 years).
 - Statute of limitations: 4 years from when breach known (including 30 months exhaustion period).

Brazil: Diplomatic Protection

- 9th largest economy, 5th largest country—can fit Europe within it.
- After years of resistance, finally embarked on an international investment regime.
- Does not embrace investor-state arbitration:



- Brazilian approach revives a modified form of diplomatic protection.



India: Exhaustion of Local Remedies



- Large, developing country—18% of the world population.
- What does India say so on the Proposal (*The Hindu*, January 24, 2017).

“The EU and Canada have inked an investment pact that has incorporated the contentious ISDS. At the meeting (of trade ministers of select countries held on the sidelines of the recently held World Economic Forum in Switzerland), they wanted their investment pact to be the template for a similar multilateral agreement. India summarily rejected such an idea,” Commerce and Industry Minister Nirmala Sitharaman told reporters. Japan also opposed the idea on the grounds of the costs involved in international arbitration, she said.

- Indian approach: Exhaustion of local remedies—5 years:

15.2 Where applicable, if, after exhausting all judicial and administrative remedies relating to the measure underlying the claim for at least a period of five years from the date on which the investor first acquired knowledge of the measure in question, no resolution has been reached satisfactory to the investor, the investor may commence a proceeding under this chapter by transmitting a notice of dispute (“**notice of dispute**”) to the Defending Party.

Terminated
around 60
BITs

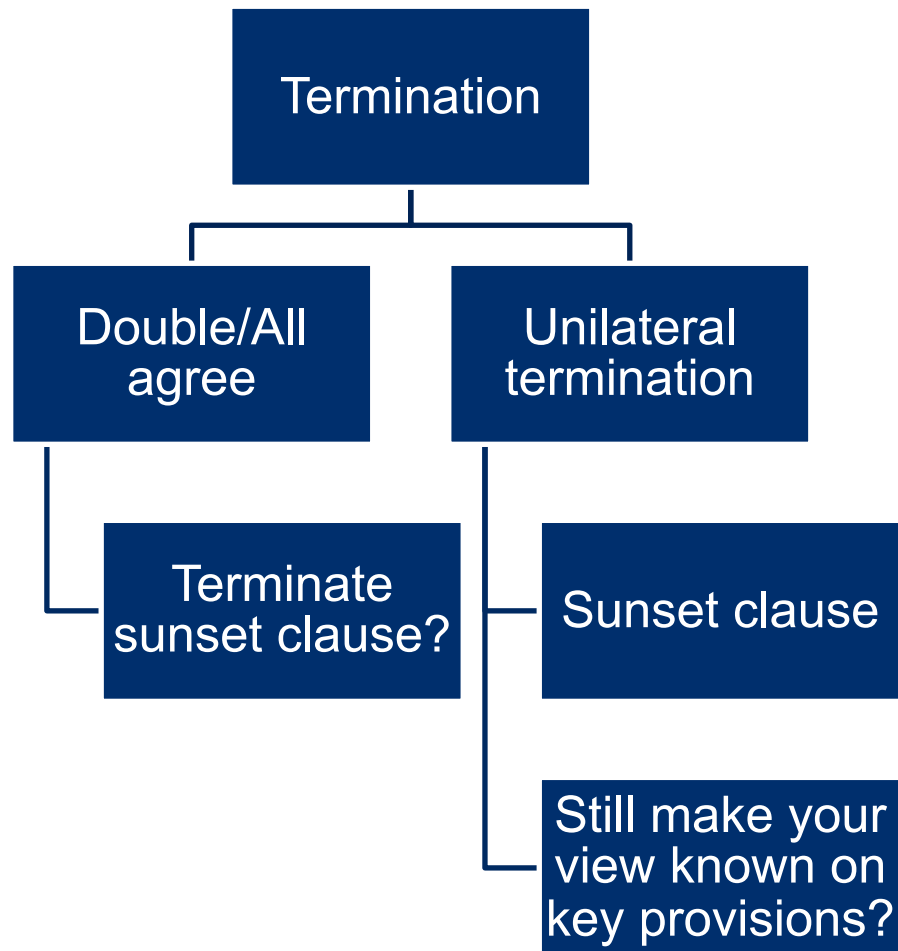
Withdrawal From the ICSID Convention

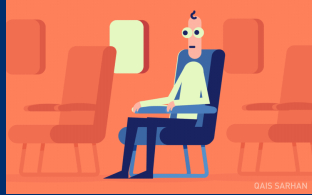
Withdrawing State	Notice Date	Effective Date
Bolivia	2 May 2007	3 November 2007
Ecuador	6 July 2009	7 January 2010
Venezuela	24 January 2012	25 July 2012

Termination

Terminating State	Year: Counter-Party
Venezuela	2008: Netherlands
Ecuador	2008: Cuba, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania, Uruguay
Bolivia	2011: United States
South Africa	2012: Belgium, Luxembourg 2013: Spain, Germany, Switzerland, Netherlands
Indonesia	2014: Egypt 2015: Netherlands, China, Laos, Malaysia, Italy, France, Slovakia, Bulgaria, Egypt
India	2016: 57 countries, including the Netherlands, United Kingdom, France, Germany, Spain, Sweden, among others

Options for Termination





Conclusions



- Turbulent time for ISDS more generally
- Remains to be seen if ISDS will exist in future
- Remains to be seen if the European court proposal will be adopted:
 - Brazil said no (adopted a modified form of diplomatic protection)
 - India has said no (The Hindu, Jan 24, 2017): Exhaustion of local remedy:

“The EU and Canada have inked an investment pact that has incorporated the contentious ISDS. At the meeting (of trade ministers of select countries held on the sidelines of the recently held World Economic Forum in Switzerland), they wanted the investment pact to be the template for a similar multilateral agreement. India summarily rejected such an idea,” Commerce and Industry Minister Nirmala Sitharaman told reporters. Japan also opposed the idea on the grounds of the costs involved in international arbitration, she said.

- Part of a global trend favoring nationalism and protectionism

THANK
YOU FOR
LISTENING



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