ISDS AT A CROSSROADS: HOW THE SETTLEMENT OF INVESTOR-STATE DISPUTES IS BEING TRANSFORMED

This panel was convened at 11:00 a.m., Friday, April 6, 2018 by its moderator Andrea Menaker of White & Case LLP, who introduced the panelists: Charles N. Brower of 20 Essex Street Chambers; Colin Brown of the European Commission; Kekeletso Mashigo of the South African Department of Trade & Industry; Natalie Morris-Sharma of the Singapore Ministry of Law; and Lisa Sachs of the Columbia Center on Sustainable Investment.

ISDS at a Crossroads

doi:10.1017/amp.2019.56

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Let us understand what we are talking about. The standard investor-state dispute settlement (ISDS) system: Claimant appoints an arbitrator, Respondent appoints an arbitrator, and through various means there is an agreement or appointment of someone to chair the proceedings. This has been going on for years.

Henry Ford manufactured the Model-T automobile way back when and then came the Model-A, and now we have a series of models since. They all have four wheels, a steering mechanism, an engine, an exhaust system and seats for the driver and the passengers. None of that has changed. They may not have drivers in the future, but the vehicle has not changed. There is a reason why ISDS has changed and improved. Over the last ten years I think it is generally understood that there have been significant changes in it due to changes in rules of the institutions and changes, to some extent, to treaties concluded by parties. Why do people not like that? Well, if you are an investor from State X and you invest in State Y, neither State Y nor the investor from State X wants the dispute to be decided in the other's court. This goes for Western European nations as well, as this gets it out of what it is called in sports "the home court advantage." Everybody feels they will be as fairly treated as is humanly possible.

So why change? I am not against change. I have never been against change. I do not want to drive a Model-T. I do not collect classic cars. But the question is: revolution? Throw the baby out with the bathwater, or try and improve things? As Judge Donoghue said the other day,[1] and Sundaresh Menon, the chief justice of Singapore, who has been involved in this field, has also said,[2] and I paraphrase: "It cannot be revolution; it must be evolution." Treaties are not what makes the difference. The distinction between commercial and investor-state arbitration is totally artificial. The reality is: On the one hand, are you arbitrating with a state, with a sovereign, or an organization

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[1] Joan E. Donoghue, *International Adjudication: Peaks, Valleys, and Rolling Hills*, 20th Annual Grotius Lecture held by the 112th American Society of International Law Annual Meeting (Apr. 4–7, 2018) (video recording accessible here: https://www.asil.org/resources/video/2018-annual-meeting) [hereinafter Donoghue].

[2] Sundaresh Menon, *The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions*, Second Annual Charles N. Brower Lecture on International Dispute Resolution, 108 ASIL Proc. (2014).

made up of sovereigns, or do you have a strictly contractual relationship with a sovereign? Or on the other hand, are you instead arbitrating as a strictly private commercial entity with another totally private commercial company. I have been party to two relevant awards: one against the Nigerian National Petroleum Corporation,[3] the other against the Kuwait Petrochemical Corporation.[4] Two and a half billion dollars in claims in each case were based on contracts, and those arbitrations involved public issues as much as treaty-based cases. If you believe there is a political difference between treaty-based cases against sovereigns or sovereign entities and contract-based cases against such respondents, then you are living under an illusion. You have not seen enough of these cases. That is the way it works.

Now, why throw out the present ISDS system and have a forum which is entirely determined by states or organizations of states? If you think there is any way of getting politics out of that—I do not know how long you have been on this earth or what organizations you have been with, whether it is the PTA, the church, or a university faculty—politics are everywhere. And when you get states involved, and particularly if they are democracies, you may have heard Judge Donoghue, who said the other day, one of the problems people perceive with the International Court of Justice, which you would think would be the holiest of the holies, believe me, tradeoffs are made, votes are not bought and sold but they are exchanged in-kind—it happens.[5] I have been watching this in the 21–22 years I have been a resident of The Hague, and also in other capacities in which I have been following this process for years. There is no way on God's green Earth that politics will not be a part of this. As soon as there are politics, you cannot guarantee a decent quality of the judges who will be there. That is not the way politics work. And those who are familiar with our nominations to the federal bench in the United States, all the way from the District Courts to the Supreme Court, you know that is true.

Why is all of this happening? Why do the European Union and others wish to subject investors, including their own investors abroad, to a totally state-oriented or a combination-of-states-oriented system? Why do they want to do this? If you listened to the United States Special Trade Representative Robert Lighthizer the other day, he said that we are against foreign investment in the United States and that you do not want any of this because it leads people to invest abroad.[6] Well, I have news for that school of thought: we have had international trade and foreign investment since economics existed in this world; it goes back to ancient times. Another reason is that states, especially including the United States, are guilty of favoring protection of the national treasury from claims by foreign investors of mistreatment under treaties while abandoning the interests of your own investors abroad. If you do not protect foreign investors in your country, you cannot expect foreign countries to agree to protect your investors. There are lots of ways that this has happened and continues to happen. That is the reality, as Judge Donoghue said the

[3] Esso Exploration and Production Nigeria Limited v. Nigerian National Petroleum Corporation, Ad Hoc Arbitration, Award (Oct. 24, 2011), *available at* http://globalarbitrationreview.com/cdn/files/gar/articles/Esso_and_Shell_v_NNPC_final_award_2011.pdf. *See also* Damien Charlotin, *Analysis: $2.7 Billion Award by Fortier and Brower Surfaces as a Result of Shell and Exxon Entities Touched on Constitutional Questions, as Well as Tax Stabilization*, IA Rep. (Feb. 15, 2019), *at* https://www.iareporter.com/articles/analysis-2-7-billion-award-by-fortier-and-brower-surfaces-as-a-result-of-nigerian-efforts-to-block-enforcement-ruling-in-favor-of-shell-and-exxon-entities-touched-on-constitutional-questions-as-we.

[4] The Dow Chemical Company v. Petrochemical Industries Company of Kuwait, ICC, Award (May 24, 2012), discussion of award *available at* http://www.globalarbitrationreview.com/news/article/30567/dow-wins-us2-billion-cancelled-kuwaiti-venture.

[5] Donoghue, *supra* note 1.

[6] Phil Levy, *Critique of NAFTA Provision Highlights Team Trump's Misconceptions on Investment Abroad*, Forbes (Oct. 23, 2017), *at* https://www.forbes.com/sites/phillevy/2017/10/23/should-team-trump-encourage-investment-in-mexico/ - 3f1bf68670b4.

other day.[7] Also there are those with political ideological reasons who just want to scrap the whole business without really thinking about it or understanding it.

Politics not only makes strange bedfellows, in this case it leads to a very bad idea. It has been sold on the basis of what I have described as truly "fake news," in which I have been so quoted in *Global Arbitration Review*.[8] I will give you one example and this is the European Union: when the predecessor to the current European Union Trade Commissioner Cecilia Malmström paused the negotiations between, at that time, the United States and the European Union, a "consultation" was called for.[9] Now, Commissioner Malmström announced on January 13, 2015: "The consultation clearly shows that there is a huge skepticism against the ISDS instrument."[10] Reuters reported on that as follows:

> [O]ver 95 percent [of the 150,000 responses] were from supporters of a small group of organizations hostile to a deal with Washington and who submitted identical or very similar responses. … [This was a] hijacking of the online consultation. … Many responses to the EU survey appeared to be automated or generated by forms filled in on campaign websites, encouraging EU citizens to reject arbitration policy in [TTIP] (as it then was).[11]

I worked earlier in my life in the United States Senate, and in my government service I have dealt a lot with the Congress. This is what happens—campaigns go on, but we know usually where they come from and how to evaluate them. This is the basis upon which the European Union is operating. If you look at the facts and I have challenged many audiences to come up with a contradiction of this: there is no case in ISDS by any tribunal which has found a state to be in breach of a treaty due to legitimate environmental protection or health regulations. Look at the tobacco cases, look at *Chemtura*,[12] the NAFTA case in which I sat and voted against the party that had appointed me because Canada had acted correctly. I have never been contradicted on this and if anyone does now or in the future, I am ready to prove the contrary.

Now, I use the word "arrogant" advisedly when I say that the arrogant attitude of the European Union in respect of this is set forth in its negotiating directive to member states published on March 20, 2018. At paragraph 4, the European Union wrote that "[n]egotiations, based on preliminary analysis and discussions, should be conducted under the auspices of the United Nations Commission on International Trade Law (UNCITRAL)."[13] What is the organic connection between the European Union and the United Nations Commission on International Trade Law? Where does

[7] Donoghue, *supra* note 1.

[8] Alison Ross, *"Fake News" - Brower Blasts Investment Court Proposal*, GLOB. ARB. REV. (Mar. 1, 2018), *at* https://globalarbitrationreview.com/article/1166223/-fake-news-brower-blasts-investment-court-proposal [hereinafter Ross]. *See also*, Keynote Address at the 3rd European Federation for Investment Law and Arbitration Annual Conference on Parallel States' Obligations in Investment Arbitration, University of London (Feb. 5, 2018), *available* at https://efila.org/annual-conference-2018.

[9] European Commission STATEMENT/14/85, Improving ISDS to Prevent Abuse - Statement by EU Trade Commissioner Karel De Gucht on the Launch of a Public Consultation on Investment Protection in TTIP (Mar. 27, 2014), *available at* http://europa.eu/rapid/press-release_STATEMENT-14-85_en.htm.

[10] European Commission Press Release IP/15/3201, Report Presented Today: Consultation on Investment Protections in EU-US Trade Talks (Jan. 13, 2015), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1234.

[11] Robin Emmott & Philip Blenkinsop, *Online Protest Delays EU Plan to Resolve U.S. Trade Row*, REUTERS (Nov. 26, 2014), *at* https://www.reuters.com/article/us-eu-usa-trade/exclusive-online-protest-delays-eu-plan-toresolve-u-s-trade-row-idUSKCN0JA0YA20141126.

[12] Chemtura Corporation v. Government of Canada, Award, (NAFTA Aug. 2, 2010), *available at* https://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf.

[13] Council of the European Union, Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes, para. 4 (Mar. 20, 2018), *available at* http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf [hereinafter Negotiating Directives].

the European Union get off telling its members that they are going to use or flood the process, in this case, Working Group III of UNCITRAL, to bring about the conclusion of such a treaty? If you look at the Working Group's mandate of last July,[14] it does not say anything like that. It says you have to find out what the problems might be and discuss them and see how they might be ameliorated and so on and so forth, and of course it foresees the possibility of such a court.[15] But again, in plain English, where does the European Union get off telling its members to use the UNCITRAL process to negotiate this court treaty? Next, "[i]n the event of a vote, the Member States which are Members of the United Nations Commission on International Trade Law shall exercise their voting rights in accordance with these directives and previously agreed EU positions."[16] So, members of UNCITRAL's Working Group III on important issues are to be deprived of the freedom of casting their votes in that forum. As I said, it is demonstratively arrogant.

The *Achmea* decision of the European Court of Justice[17] basically has said ISDS clauses in intra-European Union bilateral investment treaties are not consistent with European Union law, and that such issues must be judged basically within the European Union framework. This decision raises many questions and it is going to be very interesting. Are all the members of this court going to be appointed from European Union countries? If not, will it be by a new institution? Of course, the court does not tell you anything, so it is a gamble on what the court might say. The mandate also is to have a treaty which will set up this court to be accessible to all countries. Is that a European Union institution? If all the judges are appointed from European Union countries, why would people come? You think non-European Union countries are really interested in having their disputes with foreign investors judged by such a body?[18]

Finally, I think this court is destined to fail at one or two levels. One reason is because of the costs involved, which I have detailed in another speech,[19] that are to be distributed equitably among, according to the directives, states parties to the Convention that the European Union foresees.[20] We know what the financial arguments have been about the various courts in the Hague, the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, and so forth. Also, it is so complicated to put together an institution like this that it may fail, period.[21] But if it does come about, I think essentially it is clear that it would have to be opt-in. They have made that clear in the directive. Some states may not opt in. As I often say, the British Petroleums, Exxon Mobils, Totals and so on and so forth of the world will go back to the 1960s and 1970s and can cut their own contractual deals. They do not have to fiddle with this, but the people that get hurt are not the major corporations of the world and they may be forced by their home state into joining this business.[22]

[14] UN GAOR, Report of the UNCITRAL Commission Fiftieth Session (July 3–21, 2017), para. 264, UN Doc. A/72/17 (2017), *available at* http://www.uncitral.org/pdf/english/commissionsessions/unc-50/A-72-17-E.pdf.

[15] *Id.*

[16] Negotiating Directives, *supra* note 13.

[17] Case C-284/16, Slovak Republic v. Achmea B.V., Judgment, ECLI:EU:C:2018:158 (Mar. 6, 2018).

[18] *See generally,* Nikos Lavranos, *The Outcome of the UNCITRAL Meeting: The First Steps Towards a Multilateral Investment Court (MIC)*, OGEMID (Aug. 7, 2017).

[19] Keynote Address, *supra* note 8. *See also* Ross, *supra* note 8.

[20] Negotiating Directives, *supra* note 13.

[21] Charles N. Brower, *Why The "Demolition Derby" That Seeks to Destroy Investor-State Arbitration?*, Annual Justice Lester W. Roth Lecture, University of Southern California, Gould School of Law, Los Angeles (Oct. 12, 2017), published with Jawad Ahmad in 91 S. CAL. L. REV. 1140 (2018).

[22] *Id.*