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Beyond USMCA: ISDS à la carte

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Zooming out from the excellent analysis of Robert Landicho and Andrea Cohen on the specific changes that the USMCA as the intended successor of NAFTA will bring for investment protection and ISDS, this contribution will place the USMCA in a global perspective, in particular regarding the efforts of the EU to replace ISDS system with the ICS/MIC.

The à la carte approach of Canada and Mexico

Canada is an interesting example of the very flexible à la carte approach regarding ISDS provisions. When CETA was first finalized, Canada agreed to an old school ISDS approach with a few minor tweaks. However, after the backlash against ISDS in Europe, which was mainly focused on TTIP, Canada accepted – after a two year long 'legal scrubbing' process – the EU's proposal for the so-called investment court system (ICS). In parallel though, Canada accepted the old school ISDS system in the CTTP, whereas in the context of the USMCA, Canada was ready to give up ISDS with the US, while maintaining it in a restricted version regarding Mexico.

Also, Mexico has been applying the à la carte approach, depending on the demands of the other Contracting Parties. Like Canada, Mexico also signed up to the old school ISDS system in the CTTP and accepted to maintain it for the USMCA, whereas it recently signed up to the ICS proposal in the updated EU-Mexico FTA.

Thus, on the one hand, both Canada and Mexico have accepted the ICS as the purported successor of ISDS in their bilateral FTAs with the EU, while on the other hand, they are keeping ISDS in the CTTP – and as far as Mexico is concerned in the USMCA.

In contrast, US President Trump has been more consistent in withdrawing completely from the CTTP (formerly known as TTP) on his first day in office and successfully removed ISDS in USMCA regarding Canada. These steps reflect his apparent aversion against ISDS, despite the fact that the US never lost a NAFTA case and US investors have been heavy (and often successful) users of the ISDS system under NAFTA and other US FTAs and BITs.

The à la carte approach of the EU

Whereas the EU has successfully imposed its ICS proposal on Canada, Singapore, Vietnam and Mexico in its FTAs, thereby effectively making the ICS the blueprint for all its future FTAs, it failed to convince Japan to accept it in the recently concluded EU-Japan FTA. Moreover, the EU did not even bother to put it on the table for the currently on-going FTA negotiations with

Australia and New Zealand.

The reason for that is not so much that the EU does not want to include some sort of ISDS/ICS provisions in its FTAs, but rather due to the competence debacle after the CJEU determined in its Opinion 2/15 on the EU-Singapore FTA that the EU does not have exclusive competence over ISDS and the "Wallonia-drama" when Wallonia threatened to block the finalization of the CETA negotiations. In other words, the EU now prefers to conclude purely old school trade FTAs, leaving investment protection and ISDS chapters out of the FTAs unless all Member States sign up to them.

Nonetheless, the EU continues its efforts to create traction for a multilateral investment court (MIC), which is currently negotiated within UNCITRAL. In this context, it is interesting to note that Canada is a strong supporter of the EU in the UNCITRAL negotiations and coincidentally managed (together with the EU) to get a Canadian investment treaty negotiator to become chair of the UNCITRAL working group. In stark contrast to that, the US and Japan have been and continue to be the strongest critics of the MIC proposal. The next UNCITRAL negotiation round will take place at the end of October/early November in Vienna. After that, it will be clear to what extent the MIC is supported.

Thus, the bottom line is that far from creating uniformity and consistency with regard to ISDS provisions at a global level, States are in fact introducing different ISDS/ICS configurations and thus create more fragmentation and potential inconsistency. Indeed, the US, Canada and the EU are even dropping ISDS completely from their FTAs, which is exactly what many NGOs, academics, national parliaments and the European Parliament, are calling for.

Accordingly, the future ISDS menu, depending on the States involved, could look as follows (with various combinations possible):

• no ISDS
• ISDS light and restricted
• old school ISDS
• ICS
• MIC

Less Rule of Law and less access to justice

So what are the consequences of restricting or even completely eliminating ISDS?

Firstly, access to justice is limited and made more expensive because it will require – as rightly noted by Robert Landicho and Andrea Cohen – more sophisticated nationality planning and treaty shopping, which in turn means additional expenses to set-up and finance subsidiaries with actual or substantial business activities in countries like Switzerland or post-Brexit UK, which still maintain numerous BITs with old school ISDS provisions. Obviously, many SMEs, who hardly can afford the current ISDS system, will be completely shut out of the system, unless they bring Third Party Funders (TPFs) on board. In other words, increasingly only large multinationals will be able to go through the whole ISDS procedure, including the recognition and enforcement phase.

Secondly, States will increasingly be able to get away with behavior against foreign investors, which otherwise would fall foul of their legal obligations under their BITs and FTAs. Prudent investors are aware of that and will put a risk premium on their products and services, which

eventually will have to paid by the end consumers, including those in developing and transitional countries.

So, the main conclusion to be drawn from the above is that States, such as the US, Canada, the EU and its Member States, which used to be the champions of promoting ISDS and thus improving the Rule and access to justice worldwide are now the ones who actively undermine exactly those virtues.

Thus, in future the menu carte will be increasingly accompanied by a note of the Chef stating that "unfortunately, ISDS is not served anymore" or that "unfortunately, as of today, certain ISDS ingredients have been replaced by ICS/MIC ingredients".

In any event, one thing is certain: the food will not taste as good as it used to be and the bill will be much higher.

Bon appétit!

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