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On ISDS, for the Record.

Monica Chong (WongPartnership LLP) · Saturday, November 7th, 2015 · YSIAC

"ISDS" (short for "investor-state dispute settlement") was a less-known acronym some years back. Now, it has been given an increasingly bad name, no doubt fuelled by Vattenfall's claim against Germany following the shutting down of its nuclear plants after the 2011 Fukushima disaster, tobacco giant Philip Morris' high profile claims arising from Australia's plain-labelling laws, and other like claims brought by corporations affected by domestic regulations that are seen as being in the public interest.

Indeed, those who were loudly opposed to the inclusion of any ISDS mechanism in the TTP (and its European counterpart, the TTIP, which is still undergoing negotiations) had relied on these examples to support their indictment of ISDS as a one-sided, democracy-destroying evil that would enthrone corporate interests over that of the people.

The fallacies in such anti-ISDS rhetoric would be obvious to those familiar with investment law, and one notes with relief that that such rhetoric (fortunately) did not derail negotiations on the TTP which was concluded in Atlanta earlier this month. But congratulations are still premature – the TTP must still be ratified by its 12 signatories before coming into force, and the debate on ISDS can be expected to rage on as the TTP embarks on a potentially long and rough road to ratification.

Insofar as these anti-ISDS rhetoric continue to threaten to drown out fact-based discourse? when the debate reaches this part of the world, they cannot therefore be ignored. For a start, it may be useful for the record to be set straight on the 3 most common charges made against ISDS.

1. "ISDS is a one-way street which only investors can have recourse to"

ISDS is often cast as a one-sided mechanism giving investors (but not States) the right to arbitrate their claims before an international tribunal. But it is simply not the case that States cannot institute ISDS proceedings; while indeed less common, States can (depending on the wording of the relevant dispute resolution provision on which the tribunal's jurisdiction is based), and do claim or counterclaim in ISDS proceedings. The institution of claims and counterclaims by States is also expressly provided for in Articles 36 and 46 of the ICSID Convention, under which a large portion of investor-state arbitrations is conducted.

2. "The value of ISDS is suspect as views are divided on whether its inclusion in bilateral investment treaties would increase capital inflow for host States (as often claimed)"

Professor Schreuer had provided the short answer to this in the following terms: *"Is the existence*

of a functioning non-coercive method for the settlement of dispute not enough justification? I have never heard anyone trying to justify the work of the Law of the Sea Tribunal in terms of additional volume in international shipping." Indeed, ISDS fulfils an important access to justice function, i.e., the creation of a neutral and depoliticised dispute resolution forum for the adjudication of investor-state claims. Without this, foreign investors are invariably stuck between a rock and several hard places, namely, the unattractive alternatives of diplomatic protection (which is subject to the political discretion and will of their home States), suing in the host State's court system (which gives rise to partiality concerns, and which is also not viable where the complaint relates to legislation which the domestic court would be bound to apply), or suing in other court systems (where the investor would then have to contend with the state immunity defence, act-of-state doctrine, and other jurisdictional issues).

States, conversely, have other legal / non-legal means of exerting pressure upon foreign investors – in Judge Schwebel's words, the State has muscle to *"prescribe, delay, enjoin, renegotiate, renege, decree, tax, incite, strangle"*. ISDS goes some way to right this imbalance.

3. "ISDS subverts the sovereignty of States who are forced to defend claims before unelected tribunals and forced to rewrite their national policies and laws"

Hyperboles of this nature fail to recognise important realities of ISDS proceedings.

First, as with international commercial arbitration, ISDS proceedings can only ever take place with the consent of all parties. By agreeing to an ISDS clause (whether in a BIT, a national legislation or subsequent agreement), a host State, in its exercise of sovereign power and in light of its own policy judgment, freely and deliberately accepts some curtailment of such power vis-à-vis its future conduct towards the foreign investor. In doing so, it is also up to the State to legislate or negotiate for clear parameters of the clause so as to delineate or reduce the power of a tribunal it may subsequently come before. As the Legal Adviser of the US Department of State, Catherine Amirfar, observed at the 4th Annual GAR Live New York that took place in September this year, investment treaties have gone from being *"three pages long in the early days to 30 pages long in recent times"* as countries seek a bigger say over how their treaty obligations are interpreted. Based on what has been disclosed of the TPP's text, the dispute-settlement clause that has been negotiated also contains an express carve-out which effectively bars tobacco companies from suing under the TPP. The image of an unwilling and powerless sovereign being hauled before an investment tribunal, to answer obligations that were foisted upon it, is therefore fallacious.

Second, investment tribunals do not order States to amend their policies or laws. The typical order vis-à-visa State who is found to be in breach of its obligations towards the foreign investor is, instead, an order for damages. The concerning notion of an unelected 3-men tribunal having the power to decree a change in national laws is therefore also unfounded.

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The indictment of ISDS on these fundamentally misconceived bases seems indeed to miss the mark, coming after 50 years of the ICSID Convention and the signing of close to 3000 BITs worldwide. Let the record on ISDS be set straight, and airtime be given to fruitful, fact-based discourse when the debate reaches our shores.

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