

BRUSSELS FORUM

1

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Some alternatives on specific topics

- A. Reforms beyond investor-state arbitration
- B. Reforms within investor-state arbitration
- C. Problems with exceptions, carve-outs, rights to regulate, side agreements, etc.

A. BEYOND INVESTOR-STATE ARBITRATION

2

- 1. return to customary international law?
 - diplomatic resolution of investor-state disputes
 - state must consent to international adjudication after the dispute has arisen
 - duty to exhaust local remedies prior to claim on behalf of an individual
- 2. rely on market mechanisms?
 - investors should purchase private or home state insurance
 - investors should pay host state for access to investor-state mechanism
 - investors should negotiate access investor-state arbitration in specific contracts

A. BEYOND INVESTOR-STATE ARBITRATION

3

- 3. rely on compulsory state-state arbitration?
- 4. move to a genuine judicial model?
 - refer disputes domestic courts of host state/ home state
 - refer disputes to courts of another state or region
 - establish an international investment court

B. WITHIN INVESTOR-STATE ARBITRATION

4

- note: as a public and mobilizing position, investor-state arbitration should be the top focus of opposition
- but there are reforms within investor-state arbitration that would also be major achievements:
 1. a duty of the investor to exhaust reasonably-available local remedies
 2. a right of the host state to defend against a claim by demonstrating that local remedies are reasonably-available

B. WITHIN INVESTOR-STATE ARBITRATION

5

3. screening mechanisms by an independent officer (not an investor-state lawyer, arbitrators, etc.) to block investor claims that are abusive, frivolous, or lack a reasonable prospect of success

4. a right of the host state to object to a claim by showing that the investor has not abided by (specified) standards of good corporate conduct in its activities related to the dispute or the underlying investment

B. WITHIN INVESTOR-STATE ARBITRATION

6

5. safeguards of independence that would "judicialize" arbitration

(i) a state roster of arbitrators from which all arbitrators must be chosen

- gender/ regional representation
- criteria of juristic eminence and expertise in international law, human rights, health, environment, development, trade, or investment

(ii) an objective method of case assignment from the roster

(iii) requirements that arbitrators cannot work as lawyers or experts before, during, or after service on the roster

(iv) a binding code of conduct of arbitrators

C. EXCEPTIONS ETC.

7

- example 1

NAFTA Art 1101 (4) :

"Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter."

C. EXCEPTIONS ETC.

8

- example 2

EU-Korea Services, Establishment & E-Commerce Chapter, ARTICLE 7.1(4)

"Consistent with this Chapter, each Party retains the right to regulate and to introduce new regulations to meet legitimate policy objectives."

C. EXCEPTIONS ETC.

9

- example 3

NAFTA Art 1106 (6):

"Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:

- (a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
- (b) necessary to protect human, animal or plant life or health; or
- (c) necessary for the conservation of living or non-living exhaustible natural resources."

C. EXCEPTIONS ETC.

10

- example 4

EU-Korea Trade & Sustainable Development Chapter, ARTICLE 13.3 :

"RIGHT TO REGULATE AND LEVELS OF PROTECTION

Recognising the right of each Party to establish its own levels of environmental and labour protection, and to adopt or modify accordingly its relevant laws and policies, each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental and labour protection, consistent with the internationally recognised standards or agreements referred to in Articles 13.4 and 13.5, and shall strive to continue to improve those laws and policies."

C. EXCEPTIONS ETC.

11

- example 5

EU-Korea Trade & Sustainable Development Chapter, ARTICLE 13.15:

"PANEL OF EXPERTS

1. Unless the Parties otherwise agree, a Party may, 90 days after the delivery of a request for consultations under Article 13.14.1, request that a Panel of Experts be convened to examine the matter that has not been satisfactorily addressed through government consultations....

C. EXCEPTIONS ETC.

12

2. Unless the Parties otherwise agree, the Panel of Experts shall, within 90 days of the last expert being selected, present to the Parties a report. The Parties shall make their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of this Chapter. The implementation of the recommendations of the Panel of Experts shall be monitored by the Committee on Trade and Sustainable Development...."

ARTICLE 13.16: DISPUTE SETTLEMENT

"For any matter arising under this Chapter, the Parties shall only have recourse to the Procedures provided for in Articles 13.14 and 13.15."

C. EXCEPTIONS ETC.

13

- example 6

Belgium/Lux-Zambia BIT, Art. 9(3):

"In case of international arbitration, the dispute shall be submitted for settlement by arbitration to one of the hereinafter mentioned organizations, at the option of the investor:

- an ad hoc arbitral tribunal set up according to the arbitration rules laid down by the [UNCITRAL];
- the [ICSID]...;
- the Arbitral Court of the International Chamber of Commerce in Paris;
- the Arbitration Institute of the Chamber of Commerce in Stockholm."

C. EXCEPTIONS ETC.

14

- BIT: all exceptions, etc. often have these problems:

- they depend greatly on the arbitrators for their interpretation
- they put the onus on the state to demonstrate their application
- they concede implicitly that the excepted subject is otherwise covered by the treaty
- they often have major limiting language
- they do not address the "war of attribution"/ regulatory chill problem with TNCs