Investment in an era of mega-regionals

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投資家対国家仲裁改革に関する諸提案

Proposed reforms of investor-State arbitration

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Statement by the Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, on the upcoming signing the Trans-Pacific Partnership

"Trade is not an end in itself, but must be seen in the context of the international human rights regime, which imposes binding legal obligations on States. Trade agreements are not 'stand-alone' legal regimes, but must conform with fundamental principles of international law, including transparency and accountability. They must not delay, circumvent, undermine or make impossible the fulfilment of human rights treaty obligations.

I am concerned that notwithstanding enormous opposition by civil society worldwide, twelve countries are about to sign an agreement, which is the product of secret negotiations without multi-stakeholder democratic consultation. The Trans-Pacific Partnership (TPP) is fundamentally flawed and should not be signed or ratified unless provision is made to guarantee the regulatory space of States.

2 February 2016
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17005&LangID=E>

根本的批判：「投資家対国家仲裁は民主主義を制約する」

A/70/285

Report of the Independent Expert on the promotion of a democratic and equitable international order

Indeed, investor-State dispute settlement poses a particular challenge to the democratic order, particularly when Governments that have been democratically elected to carry out specific social policies have been sued by investors precisely because of those democratically mandated policies.

Report by Alfred-Maurice de Zayas on 5 August 2015

実体規定に関する批判:「投資家保護は公益を害する」

Observers are concerned that these treaties and agreements are likely to have a number of retrogressive effects on the protection and promotion of human rights, including by lowering the threshold of health protection, food safety, and labour standards, by catering to the business interests of pharmaceutical monopolies and extending intellectual property protection.
There is a legitimate concern that both bilateral and multilateral investment treaties might aggravate the problem of extreme poverty, jeopardize fair and efficient foreign debt renegotiation, and affect the rights of indigenous peoples, minorities, persons with disabilities, older persons, and other persons leaving in vulnerable situations. Undoubtedly, globalization and the many Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) can have positive but also negative impacts on the promotion of a democratic and equitable international order, which entails practical international solidarity.

Mr Alfred de Zayas, Independent Expert on the promotion of a democratic and equitable international order, and other nine UN Special Rapporteurs on human rights, Geneva, 2 June 2015.

解釈に関する批判:「拡大解釈により国家権限が制約される」

E/CN.4/Sub.2/2003/9

REPORT OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS ON HUMAN RIGHTS, TRADE AND INVESTMENT

35. Such broad interpretations of expropriation provisions could have direct consequences for regulations intended to promote and protect human rights. While these two cases focused on environmental protection, government action in relation to chemicals and toxic wastes has flow-on effects in relation to the enjoyment of human rights such as the right to health or the right to water. The decisions raise questions about the assumptions of responsibility - moral or legal - for actions that could negatively affect human rights or the environment.

"these two cases" = Ethyl v. Canada and Metalclad v. Mexico

→条約実体規定の変更／reform of substantive treaty provisions

「投資家対国家仲裁には手続的・制度的欠陥がある」

What is abnormal is for an investor to demand a guarantee of profit, to create a parallel system of extrajudicial dispute resolution, which often is not independent, transparent, accountable, or even appealable, and to seek to usurp the function of the State and encroach on government regulation of fiscal and budgetary matters in the public interest.

Report by Alfred-Maurice de Zayas on 5 August 2015

→本報告での検討対象

→Will be discussed in this presentation

制度的欠陥１：

「投資家対国家仲裁は利益相反の問題を抱える。」

Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice* (2012)

制度的欠陥2:「投資家対国家仲裁は透明性に欠ける」

General Assembly

Distr.
GENERAL

A/HRC/11/13
22 April 2009

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*

34. When an investor brings a claim regarding a bilateral investment treaty or host Government agreement to binding international arbitration, depending on the rules incorporated into the agreements, little or nothing about the case may be made public. This is at variance with precepts of transparency and good governance.

Report by John Ruggie

制度的欠陥3：

「単一であるはずの紛争から複数の仲裁が申し立てられ得る」

David Gaukrodger, “Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency”, *OECD Working Papers on International Investment*, 2013/03, p. 42.

制度的欠陥4:「投資家対国家仲裁には上訴制度がない」

[T]he principal negotiating objectives of the United States regarding foreign investment are […] to secure for investors important rights comparable to those that would be available under United States legal principles and practice, by

[…]

(G) **seeking to improve mechanisms** used to resolve disputes between an investor and a government through—

[…]

(iv) providing for **an appellate body** or similar mechanism **to provide coherence** to the interpretations of investment provisions in trade agreements […].

Public Law 107-210, "Trade Act of 2002", Sec. 2102 (United States)

制度的欠陥1への対応：利益相反の克服
Reform #1: To avoid conflicts of interest

稳健派：利益相反に関する規則を条約に導入
Moderates: Incorporation of rules on "ethics" into treaties

6. The Parties shall, prior to the entry into force of this Agreement, provide guidance on the application of the Code of Conduct for Dispute Settlement Proceedings under Chapter 28 (Dispute Settlement) to arbitrators selected to serve on investor-State dispute settlement tribunals pursuant to this Article, including any necessary modifications to the Code of Conduct to conform to the context of investor-State dispute settlement. The Parties shall also provide guidance on the application of other relevant rules or guidelines on conflicts of interest in international arbitration. Arbitrators shall comply with that guidance in addition to the applicable arbitral rules regarding independence and impartiality of arbitrators.

TPP, Art 9.24

制度的欠陥1への対応：利益相反の克服
Reform #1: To avoid conflicts of interest

急進派：裁判官（仲裁人）・弁護人の兼任禁止
Radicals: Outright prohibition of “wearing double hats”

The Members of the Tribunal shall be independent. They shall not be affiliated with any government.[10] They shall not take instructions from any organisation, or government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article 8.44.2. In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.

CETA, Art 8.30.1

参考までに……
FYI…

S18 Arbitrators who appear on the CAS list may serve on Panels constituted by either of the CAS Divisions.

Upon their appointment, CAS arbitrators and mediators shall sign an official declaration undertaking to exercise their functions personally with total objectivity, independence and impartiality, and in conformity with the provisions of this Code.

CAS arbitrators and mediators may not act as counsel for a party before the CAS.

Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (2016 version).

This clause was introduced in the 2013 version.

CAS = Court of Arbitration for Sport

制度的欠陥2への対応:手続の透明性確保
Reform #2: To ensure more transparency

Article 9.24: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:

(a) the notice of intent;

(b) the notice of arbitration;

(c) pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 9.23.2 (Conduct of the Arbitration) and Article 9.23.3 and Article 9.28 (Consolidation);

(d) minutes or transcripts of hearings of the tribunal, if available; and

(e) orders, awards and decisions of the tribunal.

条約への透明性規則導入

Incorporation of rules on transparency into treaties

TPP

制度的欠陥2への対応:手続の透明性確保
Reform #2: To ensure more transparency

CETA

Article 8.36

Transparency of proceedings

1. The UNCITRAL Transparency Rules, as modified by this Chapter, shall apply in connection with proceedings under this Section.

UNCITRAL UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL
Arbitration Rules
(with new article 1, paragraph 4, as adopted in 2013)

UNCITRAL
Rules on Transparency
in Treaty-based
Investor-State Arbitration

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

制度的欠陥3への対応：並行手続の抑制
Reform #3: To reduce concurrent proceedings

Article 9.28: Consolidation

1. If two or more claims have been submitted separately to arbitration under Article 9.19.1 (Submission of a Claim to Arbitration) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

TPP

→同一の条約から生じる紛争に限定

→Applicable only to disputes arising out of the same treaty

制度的欠陥3への対応:並行手続の抑制
Reform #3: To reduce concurrent proceedings

Article 8.22

Procedural and other requirements for the submission of a claim to the Tribunal

1. An investor may only submit a claim pursuant to Article 8.23 if the investor:

   (f) withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim; and

   (g) waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim.

2. If the claim submitted pursuant to Article 8.23 is for loss or damage to a locally established enterprise or to an interest in a locally established enterprise that the investor owns or controls directly or indirectly, the requirements in subparagraphs 1(f) and (g) apply both to the investor and the locally established enterprise).

CETA

制度的欠陥3への対応:並行手続の抑制
Reform #3: To reduce concurrent proceedings

United Nations A/CN.9/881*

General Assembly

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United Nations Commission on International Trade Law
Forty-ninth session
New York, 27 June-15 July 2016

Concurrent proceedings in international arbitration

Note by the Secretariat

国連国際商取引法委員会において検討開始

制度的欠陥4への対応:上訴手続の創設
Reform #4: To establish an appellate tribunal

Article 8.28

Appellate Tribunal

1. An Appellate Tribunal is hereby established to review awards rendered under this Section.

2. The Appellate Tribunal may uphold, modify or reverse a Tribunal's award based on:

   (a) errors in the application or interpretation of applicable law;

   (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law;
   (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).

CETA

市民に理解される必要

Not only must justice be done, it must also be seen to be done.

II.1. Why further improve the EU approach in this area?

Currently, arbitrators on ISDS tribunals are chosen by the disputing parties (i.e. the investor and the defending state) on a case-by-case basis. The current system does not preclude the same individuals from acting as lawyers (e.g. preparing the investor's claims) in other ISDS cases. This situation can give rise to conflicts of interest – real or perceived - and thus concerns that these individuals are not acting with full impartiality when acting as arbitrators. The ad hoc nature of their appointment is perceived by the public as interfering in their ability to act independently and to properly balance investment protection against the right to regulate. It has also led to perceptions that this provides financial incentives to arbitrators to multiply ISDS cases.

European Commission, Concept paper: Investment in TTIP and beyond, 5 May 2015