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In This Issue

Comments from the Chair

Members of the International Law Section and Readers,

You would have noticed in the last issue of the *Michigan International Lawyer* the repeated thanks and gratitude expressed for many of the hard-working members and friends of this Section. This was not gratuitous or overdone but, rather, reflective of the extensive work and time needed for the quality of programming the Section has been able to organize and present over the recent years.

While one of our goals was to continue large-scale quarterly presentations linked to Council meetings and buttress these with intermittent shorter presentations and updates on international law issues, we have, as you know, been cast asunder by the gale forces of the COVID-19 outbreak and shut-down. But no more about that – I promise.

Most recently in June, the ILS, together with the U.S. Commercial Service presented a Webinar on Mitigation of international Contract Problems in the Wake of the Global Crisis – a Force Majeure topic. The speakers were John J. Walsh, CEO and President of the Michigan Manufacturers Association, also a lawyer and former State Representative, Holly Swanson, General Counsel of ZF Group's Active Safety Division, ILS Council Member and Senior Adviser to the German American Chamber of Commerce of the Midwest, Reinhard H. Lemke, and Foster, Swift Collins & Smith Lansing partner Jean Schtokal, also an ILS member and West Michigan District Export Council representative. These speakers were no less than fantastic in presenting a high-level academic but down-to-earth guide for managing in the midst of supply chain interruptions, worker absences, and other circumstances causing contract performance gaps and breaches.

I would especially like to single out ILS Council member Eve Lerman, International Trade Law Senior Specialist for the U.S. Commercial Service for making this Webinar possible and the Service's Senior Specialist in the office of Digital Initiatives Ms. Linda Abbruzzese for bringing this program to our screens and monitors. This program was excellent and upon request I

Continued on the next page

Michigan International Lawyer Submission Guidelines

The *Michigan International Lawyer,* which is published three times per year by the International Law Section of the State Bar of Michigan, is Michigan's leading international law journal. Our mission is to enhance and contribute to the public's knowledge of world law and trade by publishing articles on contemporary international law topics and issues of general interest.

The Michigan International Lawyer invites unsolicited manuscripts in all areas of international interest. An author is encouraged to submit a brief bio and a photograph for publication. An article, including footnotes, should contain between 1000 and 3000 words.

Articles can be submitted for consideration in hard copy or electronic format. Manuscripts and photographs cannot be returned unless accompanied by a $5 check or money order made payable to Wayne State University Law School for shipping and handling.

The Michigan International Lawyer will consider articles by law-school students and may publish student articles as part of a regular column. A student should submit the article either through a law-school faculty member or with a law-school faculty member's recommendation.

Submissions should be forwarded to:
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will be pleased to make the slides shown at the Webinar available to those ILS members who contact me with their e-mail addresses.

Please enjoy another timely and fascinating issue of the *Michigan International Lawyer*! We have great topics, including one related to cross-border M&A under COVID interruption and a fabulous piece on the emerging international law issues related to drones. Finally, I alert you to the piece by MIL outgoing student editor, now Miller Canfield Associate Vera Hansen regarding dispute provisions of the USMCA and EU-Canada treaty in relation to arbitration. Congratulations and good luck, Vera. We must always thank Professor Greg Fox and Wayne State Law School for hosting our publication and for the editing process and to WSU Law students Nancy Maarraoui and Jessica Davidova for undertaking this endeavor to the benefit of the State Bar's International Law Section.

Sincerely,

James Y. Rayis, Chair

International Law on Drones: Legal Justifications and Implications of the Soleimani Case

By Robin El Kady

Drones are increasingly becoming the weapon of choice for states seeking to eliminate individuals abroad. These new weapons offer a resort from heavy military involvement across borders. The United States, especially, has made extensive use of drones since 9/11 to counter terrorist groups abroad in operations that continuously claim innocent civilians' lives as collateral damage.[1] While the U.S. has referred to the counter-terrorism doctrine to legally justify drone strikes against non-state actors who belong to terrorist organizations, the drone strike killing of Qasem Soleimani on January 3, 2020, is a unique case. Soleimani was the Major General of the Islamic Revolutionary Guard Corps (IRCG) of Iran, which presents a novel challenge to international law since the U.S. has attacked a military official of a state actor. Even though the U.S., unlike other states, has classified the IRCG as a terrorist organization, the IRCG is still a part of the military of a sovereign state recognized by the United Nations.

The case of the drone strike on Soleimani thus poses several questions with regards to its legality under international law and its legal impact. This article critically examines the legal justification put forward by the U.S. and assesses its rationale from the perspective of public international law. In particular, this article argues that the Soleimani case presents legal challenges with regards to 1) self-defense as the legal justification for the strike, 2) the consent of Iraq, where the drone strike took place, and 3) the killing of other individuals in the strike. Finally, the article engages with the potential legal ramifications of the drone strike on international law, discussing whether it epitomizes the erosion of, or the continuous compliance with, international law regarding the use of force. Presently, the discussions surrounding the Soleimani case seem mainly focused on questions regarding self-defense. This article will attempt to provide a sorely needed systematic investigation of each dimension of the drone strike's legal challenge and an analysis of its legal impact.

Legal Justifications of Soleimani Case

Self-Defense

Robin El Kady

Drone strikes constitute a use of force and are regulated by the UN Charter, humanitarian international law (HIL), international human rights law (HRIL), and customary international law involving state practice and opinio juris with regards to military conduct. Since the drone strike in the Soleimani case was directed against a state actor, Article 2(4) of the UN Charter is explicit in that regard, clearly prohibiting the "use of force against the territorial integrity or political independence of any state."[2] However, the UN Charter lists two exceptions to the prohibition of the use of force. The first exception is when the use of force is authorized by the Security Council, as regulated in chapter VII, and the second is when the use of force is used in self-defense, as codified in Article 51. Self-defense is recognized as an inherent right by Article 51 if "an armed attack occurs against a Member of the United Nations."[3]

Therefore, for the U.S. drone strike on Soleimani to be lawful under international law, it has to be compliant with one of the exceptions to Article 2(4). The U.S.'s legal justification for the drone strike clearly refers to Article 51 of the UN Charter. In its statement submitted to the Security Council on January 8, 2020, as mandated under Article 51 following the use of force, the U.S. claims that is has acted in self-defense in accordance with Article 51.[4]

However, this justification consists of a number of glaring inconsistencies. Article 51 clearly refers to the occurrence of "an armed attack" in order for states to invoke self-defense. In its statement to the Security Council, the U.S. speaks of "an escalating series of armed attacks in recent months by the Islamic Republic of Iran and Iran-supported militias on U.S. forces . . . "[5] The U.S. does not fully elaborate on the nature of the armed attacks, making an assessment of the U.S. drone strike's proportionality and necessity on the basis of customary

international law impossible. Several questions arise from the narrative presented by the U.S., namely, the questions of what constitutes an armed attack in general and whether Iran's past actions and the actions of its backed groups constitute an armed attack.

Two cases of the International Court of Justice (ICJ) provide guidance on the aforementioned questions. In *Nicaragua v. U.S.*, the ICJ found that an armed attack is characterized by "certain scale and effects," which are distinguished from a "mere frontier incident," and consist of a certain gravity.[6] The ICJ found that the support of rebel groups by a state does not amount to an armed attack by the state. Therefore, in reference to *Nicaragua v. U.S.*, attacks against U.S. forces by Iranian backed militias, as stated in the U.S. report to the Security Council, cannot constitute an armed attack. Additionally, in the *Oil Platforms* case, the ICJ once again referred to the requirement of gravity in order for an act to constitute an armed attack.[7] Iran's "threat to the amphibious ship USS BOXER on July 18, 2019" and its destruction of "an unmanned U.S. Navy MQ-4 surveillance aircraft," as stated in the U.S. report to the Security Council, raise doubts with regards to meeting the high-gravity threshold.[8]

Anticipatory Self-Defense

Besides the occurrence of an armed attack to invoke self-defense under Article 51, there is support in legal opinion and state practice for the argument that anticipatory self-defense, which responds to an imminent attack, is lawful under international law. Article 51's referral to "an inherent right" of self-defense can be read to signify customary international law that continues to apply. As asserted in the UN Secretary General's *High-Level Panel on Threats, Challenges and Change*, "a threatened State, according to long-established international law, can take military action as long as the threatened attack is imminent . . . "[9] The criteria for imminence were laid out in the famous *Caroline* case as threats that are "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[10]

The legal justifications put forward by the U.S. with regards to anticipatory self-defense are rife with inconsistencies. In its official statements after the drone strike, the U.S. made no mention of imminence at any point. In its statement from January 2, 2020, the U.S. Department of Defense claimed that Soleimani "was actively developing plans to attack American diplomats and service members in Iraq" and justified the strike as "deterring future Iranian attack plans."[11] The same was stated in its report to the Security Council, in which the U.S. justified that the drone strike sought to "deter the Islamic Republic of Iran from conducting or supporting further attacks against the United States."[12] Not only do the two documents not refer to an imminent attack, but they clearly depict the drone strike as deterring future attacks and thus as pre-emptive self-defense, which is prohibited under international law.

Official statements given by President Trump and Secretary of State Pompeo seemed to seek to establish what the aforementioned documents were lacking: imminence that justified the drone strike. Both Trump and Pompeo spoke of Iranian plots of "imminent and sinister attacks on American diplomats and military personnel."[13] However, an assessment of various other official statements reveals inconsistency once again. While Trump asserted that Soleimani had targeted four embassies, Defense Secretary Esper's statement that he did not see evidence that Iran was planning to attack four embassies contradicted Trump.[14] Pompeo's claim that "we don't know precisely when and we don't know precisely where," when talking about the series of imminent attacks that Soleimani was supposedly plotting, casts further doubt on the imminence of the drone strike and its legal justification.[15]

Other Legal Challenges in the Soleimani Case

The drone strike on Soleimani poses several legal questions besides those surrounding self-defense. One legal issue that stands out is the location of the drone strike. The U.S. launched the drone strike on Soleimani while he was visiting Iraq. The drone strike targeted Soleimani's vehicle that was located at the Baghdad airport. The location of the strike raises questions with regard to Iraq's sovereignty, which is protected by Article 2(4) of the UN Charter.[16] While the drone strike did not seek to infringe upon Iraq's political independence, as specified in Article 2(4), it did violate its territorial integrity. Furthermore, as expressed in the *Corfu Channel* case, the ICJ emphasized that military force is illegal even if its objectives are not aimed at disrupting the territorial integrity or political independence of a state.[17]

In accordance with Article 2(7) of the UN Charter, which recognizes the sovereign equality amongst states, the U.S. would have needed Iraq's consent for such a military operation within its sovereign territory. In *Re-*

sponsibility of States for Internationally Wrongful Acts, the International Law Commission recognizes in Article 20 that "valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State . . . "[18] Therefore, if Iraq had given its consent, the operation would not have violated its territorial integrity under Article 2(4). However, Iraq did not seem to have consented to the drone strike conducted by the U.S. and, in fact, seemed disconcerted by the drone strike and its implications on Iraqi sovereignty.[19] While the U.S. might argue that Iraq has given consent to U.S. forces being stationed in Iraq as part of the U.S.-led coalition against ISIL and that this consent extends to the drone strike, the argument does not hold, considering *Democratic Republic of Congo v. Uganda*. The ICJ made explicit in its ruling that consent has to be clearly expressed rather than presumed and that consent cannot be "open-ended."[20]

Another element of the Soleimani case, which further complicates its legality, is the killing of other individuals with Soleimani. While the exact number varies, sources confirm that Iraqi nationals were killed in the U.S. strike, including the Iraqi deputy chief of the Popular Mobilization Committee, al-Muhandis, and its public relations chief, Jabri.[21] The Popular Mobilization Forces are sponsored by the Iraqi state and incorporated into its military.[22] The drone strike can, therefore, be seen as the use of force by the U.S. against Iraq, attacking its military and infringing upon its territorial integrity in violation of Article 2(4). In order for the drone strike to be lawful under international law, the U.S. would have to legally justify the killing of officials and personnel of Iraq's military, which is only possible by invoking self-defense.

The U.S., however, has not mentioned the killing of other individuals in its official documents, in which it expresses the legal justifications for the drone strike.[23] The killing of the other individuals constitutes a clear violation of international human rights law, in particular of Article 6 of the *International Covenant on Civil and Political Rights (ICCPR)*, which states that every "human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[24] The U.S. rejects the position of the UN Human Rights Committee that human rights treaties, including the ICCPR, also apply to states' actions outside of national boundaries.[25]

Legal Implications of the Soleimani Case

The U.S. drone strike on a military official of a sovereign nation raises questions with regards to its impact on international law. The legal impact of the Soleimani case has not been adequately discussed in the scholarly literature and legal discourse. The potential legal ramifications of the drone strike pose important questions in the scholarship on international law: Does the U.S. drone strike exemplify the erosion of international law involving the use of force, or are its legal justifications proof of the continuous compliance with international law?

An influential strand within the international law scholarship on the use of force has argued that continuous violations have led to the erosion of laws prohibiting the use of force. Thomas Franck has famously asked, "Who killed Article 2(4)?" and concluded that "the prohibition against the use of force in relations between states has been eroded beyond recognition."[26] This argument is supported by numerous other legal scholars notably including Michael Glennon who argues that international laws concerning the use of force "are no longer regarded as obligatory by states," since they do not reflect geopolitical realities.[27] Between 1945 and 1999, 126 states fought 291 interstate conflicts, showing the ineffectiveness of Article 2(4) and its gradual collapse.[28]

The U.S. drone strike on Soleimani can thus be interpreted as another case that epitomizes the erosion of Article 2(4), which the U.S. does not regard as obligatory. The U.S. used force without the unquestioned occurrence of an armed attack and violated Iraq's territorial integrity without even attempting to justify it legally. Furthermore, the U.S. did not mention an imminent attack in its official documents, which would justify anticipatory self-defense.[29] The U.S. administration apparently assumed it would suffice in its legal justification to refer to Soleimani, who "was actively developing plans to attack American diplomats and service members in Iraq."[30] The American justification of the drone strike could indicate that the U.S. now regards preemptive attacks as lawful in order to "deter the Islamic Republic of Iran from conducting or supporting further attacks against the United States."[31]

However, another strand within the international law scholarship disagrees with the arguments regarding the erosion of laws relating to the use of force. Notably, Louis Henkin, in reference to Thomas Franck's argument, calls the erosion of international law prohibiting the use of

force "greatly exaggerated."[32] He contradicts Franck, who arguably reduces the impact of international law only to its failures, by showing that Article 2(4) has been "a norm of behavior and has deterred violations."[33] Legal scholars such as Ian Johnstone argue that international law is part of a discursive process, during which states justify their actions on the basis of law.[34] States that feel the need to justify their actions from a perspective of international law can thus be regarded as seeking to be law-compliant and as having internalized international law. Therefore, states' references to international law and its invocation as part of their justification of actions can be interpreted as reaffirming international law.[35]

An analysis of the aftermath of the drone strike makes it apparent that the U.S. sought to align its actions with international law, arguably confirming it. Rather than not engaging in legal discourse and outrightly ignoring international law, the U.S. felt obliged to justify its actions on the basis of international law in order to appear as a law-compliant actor within the international community. First, the U.S. followed the procedures to make its drone strike lawful under international law. The U.S. submitted a report to the Security Council as required under Article 51 and justified its drone strike on the basis of self-defense, making a case for the occurrence of an armed attack. Even though the U.S. made a number of contradictory statements, President Trump and Secretary of State Pompeo sought to highlight the existence of an imminent attack, in an attempt to make the drone strike lawful, though controversial, with regards to anticipatory self-defense. Furthermore, President Trump submitted a report about the drone strike to Congress, which makes it compliant with the War Powers Resolution.[36] Even though the report is controversial due to its classified nature, it still sought to follow U.S. federal law in order to make the drone strike lawful.

Conclusion

The article has demonstrated that the U.S. drone strike confronts several challenges related to international law, undermining the strike's legality. While the U.S. has argued for self-defense, there are issues with regards to the existence of "an armed attack" or "an imminent attack." An analysis of the strike has also revealed issues with regards to Iraq's consent and its territorial integrity as well as challenges related to international human rights law considering the killing of other individuals besides Soleimani. While the U.S. has presented contradicting legal justifications for the drone strike and has not referred to the violation of Iraq's territorial integrity, the U.S.'s perceived obligation to justify its action on the basis of law and the observance of the procedures required under Article 51 can be interpreted as confirming international law and exemplifying that the U.S. still seeks to appear as a law-compliant actor within the international community. Ultimately, the legality and legal impact of the U.S. drone strike can only be determined as part of an ongoing legal discourse by international actors.

About the Author

Robin El Kady *is currently a PhD researcher at the University of St Andrews and an Associate Fellow at the Centre for Global Constitutionalism. He holds two master's degrees from the Fletcher School of Law and Diplomacy ('public international law') and from Harvard University ('religion, ethics, politics'). He has professional experiences at both national and international organizations including the United Nations Secretariat in New York, the German Council on Foreign Relations, the German Ministry of Defense and as a law teacher for the Oxford Royale Academy.*

Endnotes

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Cross-Border M&A Post-Pandemic: Is COVID-19 a Material Adverse Effect Under M&A Transactions?

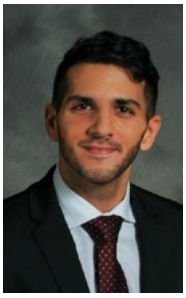
By Ryan M. Mardini and Alan K. Mardini

Introduction

Macroeconomic developments, new market access, and increased globalization are a few key drivers that fuel the proliferation of merger and acquisition (M&A) activity. In conjunction with the latest market trends of other countries worldwide, the U.S. has experienced a brisk surge in M&A activity in recent years.[1] At the outset of 2020, M&A seemed to continue to rise steadily as "[d]ealmakers anticipate [that] merger and acquisition (M&A) activity will continue at an active pace in 2020."[2] More globally, M&A activity in the Middle East and North Africa ("MENA") region has demonstrated permanence in Q1 of 2020, rising in value (by over $5 million) and by volume (by an additional six deals in comparison to Q4 of 2019.[3] Moving forward, however, the resilience of M&A activity is in a state of uncertainty. While M&A activity continues to drive capital markets in terms of prospective economic growth and synergies sought by businesses worldwide, cross-border M&A have already tumbled in Q2 of 2020 and nearly reached a standstill[4] due to the incremental disruption caused by the novel pandemic known as the Coronavirus ("COVID-19").

COVID-19 has spread across the world at ravaging speed, sparking early 20th century-style lockdowns and quarantines in well over 100 countries[5] that have disrupted global supply chains and contributed to plummeting capital markets. In addition to the loss of life, COVID-19 has disrupted the basic logistics of the M&A sale process. While countries continue to close their borders and companies continue to ban employees from international travel, target company valuations calculated by prospective buyers are becoming increasingly difficult to reach insomuch as dealmakers are unable to make accurate predictions on future earnings of the target. Companies that don't have the capital to weather the storm may seek internal restructuring and temporarily halt pursuing M&A deals in an effort to thwart taking on unnecessary risk.

Against this premise, acquirers will likely need to come to terms with taking additional steps to share deal completion risk. Some of the announced U.S. deals have contained clauses determining that COVID-19 does not serve as not a rationale for deal termination.[6] For already announced transactions, buyers and sellers may have to live with pre-COVID-19 terms. With all of the logistics in place, not only is it difficult to execute on the M&A deals due to COVID-19's disruption of available capital to fund the transactions, but it is also becoming increasingly difficult to allocate the risk with respect to COVID-19.



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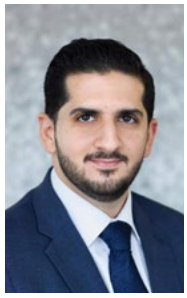

Alan K. Mardini

While the full impact of COVID-19 on cross-border M&A will not be quantifiable for quite some time, both acquirers and sellers need to take certain steps to protect themselves against the looming risks resulting from this pandemic. This article seeks to identify the principal M&A related considerations introduced by COVID-19, primarily focusing on whether COVID-19 fits within the meaning of material adverse effect or material adverse change ("MAE"), a clause that is commonly incorporated in acquisition agreements.

COVID-19's Impact on Global M&A

The global pandemic has unquestionably triggered unprecedented risk management challenges for M&A transactions executed in cross-border corporate deals. While the proliferation of electronic data rooms has ushered in an era of virtual due diligence, buyers and sellers should nevertheless place an increased emphasis on the due diligence process. Purchasers must ensure that their diligence on the prospective target covers insurance policies, supply chain risks,[7] regulatory and data privacy implications, the ability to service debt, and the target's ability to perform on obligations under material contracts,

among many more.[8] Sellers, on the other hand, should ensure that they provide buyers with all of the relevant material information and should brace themselves for a wavering shift in diligence management and expectations.[9]

In addition to an emphasis on diligence, buyers and sellers foresee forthcoming challenges with respect to valuations due to COVID-19's harsh impact on revenue and earnings forecasts. Because M&A deals are customarily priced on the basis of the target's expected revenue or earnings, purchasers may capitalize on the global effects of this pandemic to acquire more favorable pricing. Ultimately, because this pandemic will likely continue to have an adverse effect on both the earnings and solvency of businesses spanning nearly all industries and jurisdictions, a purchaser's liquidity (and cash reserves) and potential to obtain acquisition financing will be severally affected.

Perhaps the most notable impact that this pandemic has, and will continue to have, on cross-border M&A is the increased need to include and enforce MAE/MAC clauses in M&A purchase agreements that capture COVID-19 and other potential epidemic risks.

What is a Material Adverse Effect Clause?

Most cross-border M&A deals employ a delay between the signing of the deal and the closing of the deal as a buffer whilst the parties seek to satisfy various closing conditions such as obtaining financing, regulatory and shareholder approvals, written third-party consents, etc. This delay furnishes the acquirer with the time and opportunity to uncover information and performance data about the target the buyer didn't have when the purchase price was agreed to and that may make the buyer believe the target is not worth as much.[10]

In U.S. transactions, the buyer takes the risk, with one narrow exception: almost all U.S. purchase agreements contain an MAE clause.[11] While MAE clauses serve a myriad of functions in M&A agreements, their primary purpose is to enable a party to avoid its obligation (i.e., closing an acquisition or merger) as necessitated by a binding agreement. If adequately invoked, this clause can supply the buyer with the power to terminate the deal, provided the buyer can prove that an MAE has occurred.[12] It is important to note that, while similar in nature, force majeure clauses differ from MAE clauses insomuch as they allude to a contractual impossibility due to an unforeseeable event. Contrastingly, an MAE clause allows a party to avoid its obligation while a contract is still possible.[13]

The paucity of litigation in this area insinuates that an MAE is a remarkably high threshold to meet.[14] The definition of an MAE is embedded in the purchase agreement, which carves out the particular events that will give rise to triggering the clause, as well as the exceptions (i.e., where an acquirer is not deemed to have a legitimate reason to terminate a transaction based on alleged MAE) that accompany it.[15] The scope of the clause is influenced by the industry, the type of transaction, and the negotiating authority of each party. U.S. courts have generally construed MAE clauses narrowly based on a literal reading of the provision in the acquisition agreement.[16] Therefore, parties should pay close attention to the precise wording of the clause.

A traditional MAE clause in an acquisition agreement generally includes three main parts: (1) definition of an MAE;[17] (2) a provision detailing any applicable carve-outs (i.e. events that are not included in the definition of MAE), such as acts of God, terrorism, etc.;[18] and (3) a provision that states that some of the identified exclusions will not be excluded to the extent they have disproportionally adverse effects on the company. The scarcity of legislative guidance and judicial interpretation implies a particular advantage to acquirers who can leverage a threat of termination of the deal against the risk adversity of a seller to negotiate more favorable terms. While U.K. case law relating to MAE clauses is somewhat limited, there are two leading decisions that highlight the main factors, *Grupo Hotelero Urvasco SA v Carey Value Added SL*[19] and *Decura IM Investments LLP and Others v UBS AG, London Branch*.[20] Main points from the article are highlighted below:

- The party invoking the MAE clause bears a high burden in convincing the court that an MAE has occurred;
- The court's interpretation of an MAE clause is fact-intensive and language-specific;
- A "materiality test" has two elements that must be met: (1) the adverse effect shall be of adequate magnitude (U.K. courts have underscored the significance of the words "significant" or "substantial"); and (2) the adverse effect shall be "durationally significant," which means an adverse effect cannot be temporary or short-term, it must be long-term.
- There must be a "causal link" amongst the change and the adversity.[21]

Is COVID-19 a Material Adverse Effect?

Although U.S. courts are left to determine whether an MAE has ensued, there is no bright-line test that the courts deploy. Rather, judicial decisions involving MAE clauses are notably fact-intensive and not construed in isolation. Most U.S. case law construing MAE clauses in an M&A context is from Delaware and New York. When a party invokes an MAE clause, U.S. courts tend to examine the length of time the target has experienced the purported material adverse effect, reasoning that the effect must have "substantially threaten the overall earnings potential of the [party] in a durationally-significant manner."[22] Thus, a temporary decline in the target's economic value is unlikely to support a buyer's invocation of an MAE clause. In reaching this conclusion, the seminal case in the Delaware Court of Chancery, *Akorn, Inc. v. Fresenius Kabi AG et al*. reasoned that a pre-closing decline in the target's business was not deemed a "cyclical trend," but rather was likely to have a post-closing, durationally-significant effect that was "material when viewed from the longer-term perspective of a reasonable acquiror."[23]

While the sparsity of cases indicate that a U.S. court is unlikely to rule in favor of terminating a deal on the basis of an MAE, it is important to note that the COVID-19 pandemic has proven to be a peculiar event with the potential to have a tremendous impact on the cross-border M&A market. Against the backdrop of this pandemic, timing is paramount. Courts will focus on what facts the buyer knew at the time the agreement was made. Therefore, agreements entered into in late 2019 or early 2020 (i.e., pre-pandemic) will be viewed through a different lens than agreements entered into in March or April of 2020.

As the U.S. courts have illustrated, understanding the duration and significance of the material adverse economic impact is tantamount to enforcing an MAE clause. This article argues that these factors are even more important when a U.S. court is dealing with cases related to the COVID-19 pandemic. At this juncture, it is difficult to quantify the effects of the pandemic. Whether this economic turmoil will continue long-term is unknown. Purchasers may argue that current shutdowns have already triggered a material, long-term, adverse effect on businesses' financial positions worldwide. However, until a longer, more durationally significant period of time passes, invoking an MAE clause may be viewed as a gamble. Furthermore, if COVID-19 is covered within the definition of an MAE clause, the question remains whether the parties will be able to trace the long-term economic effect to COVID-19 and show that the target's financial turmoil is not due to another factor.

Carlyle Group vs. American Express

One newly filed case could shed some light on the COVID-19-related MAE issue very soon. The Delaware Court of Chancery case of *Juweel Investors Limited v. Carlyle Roundtrip, L.P., et al.* [24] involves Carlyle Group which is looking to back out of a $900 million investment for a 20% stake in corporate travel agency American Express GBT due to the economic fallout from COVID-19.[25] This case is significant because it could lead to the first-ever judicial ruling over whether COVID-19 can trigger an MAE clause in a merger or acquisition agreement.

The issue is whether an MAE clause in the acquisition agreement which failed to explicitly carve out "pandemics" allows Carlyle Group to abandon the investment.[26] American Express argues that the acquisition agreement carved out changes due to "national or international political or social conditions" from the definition of MAE and that "pandemics" fall within such carveout, thus preventing Carlyle from exiting the deal.[27] Interpreting previous judicial decisions mentioned above, Carlyle Group will most likely argue that scores of merger agreements unequivocally carve out "pandemics" from being a justifiable reason for acquirers to exit a deal or merger. On the other hand, American Express will probably fortify its argument that the main issue does not lie within the specific definition of "pandemic," but rather that a "national or international political or social condition" has emerged from this particular pandemic. While every M&A deal is unique, this court decision could formulate some rudimentary legal guardrails.

Conclusion

As the COVID-19 pandemic continues to progressively infiltrate both our society and our businesses, and as the capital markets fight to maintain stability, companies engaged in cross-border M&A transactions must overcome increased risk and uncertainties. Because the long-term impact of COVID-19 remains unquantifiable, buyers and sellers engaging in cross-border M&A transactions must examine their pending deals and account for

COVID-19 when negotiating and drafting future deals. From due diligence, to valuation issues, to tailored representations and warranties and indemnities, buyers and sellers now face increased risk. More specifically, they must re-evaluate their MAE clauses in order to cover themselves.

By virtue of the highly contextual and fact-specific nature of determining whether an MAE occurred, purchasers and sellers must vigilantly evaluate the factual basis for any invocation of an MAE in light of the express language of the MAE provision. Due to this fact-intensive examination, the COVID-19 pandemic impact on the economic turmoil experienced by businesses worldwide may or may not be classified as an MAE. A close examination of an MAE clause's specific language is warranted in order to ensure a reduction of risk to buyers and sellers.

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Endnotes

1 *The State of the Deal: M&A Trends 2020*, Deloitte, https://www2.deloitte.com/us/en/pages/mergers-and-acquisitions/articles/m-a-trends-report.html (last visited May 24, 2020).

2 *Id.* at 1.

3 Omar Momany, George Sayen, et. al, *Middle East M&A holds steady during the first quarter of 2020 amid Covid-19 outbreak*, Baker McKenzie Rep. (May 12, 2020), https://me-insights.bakermckenzie.com/2020/05/12/middle-east-ma-holds-steady-during-the-first-quarter-of-2020-amid-covid-19-outbreak-baker-mckenzie-report/ ("Cross-border deal activity in the region increased slightly in Q1 2020, with 63 deals valued at USD 4.8 billion, up from 58 deals amounting to USD 3.6 billion in the previous quarter.").

4 Richard D. Harroch, David A. Lipkin, and Richard V. Smith, *The Impact Of The Coronavirus Crisis On Mergers And Acquisitions*, Forbes (Apr. 17, 2020), https://www.forbes.com/sites/allbusiness/2020/04/17/impact-of-coronavirus-crisis-on-mergers-and-acquisitions/#1baefd5d200a ("M&A levels in the United States fell by more than 50% in the first quarter to $253 billion compared to 2019, but most of those transactions were entered into or closed earlier in the quarter before the crisis spread worldwide.").

5 *Coronavirus: The world in lockdown in maps and charts*, BBC NEWS (Apr. 7, 2020) (citing Oxford COVID-19 Government Response Tracker, BBC Research), https://www.bbc.com/news/world-52103747.

6 *See* Weinstein, *infra* note 17.

7 COVID-19 has severally impacted the supply chain, especially in the automotive industry. The increased global spread of the virus has led to the shutdown of plants and assembly not in China but also in the United States and around the world, leading to substantial economic turmoil. *See, e.g.,* Kalea Hall, *Detroit carmakers will close plants due to coronavirus concerns*, The Det. News (Mar. 18, 2020); Tian Yang and Chunying Zhang, *Chfinese plants start up as the rest of the world shuts down*, Automotive News (Mar. 25, 2020).

8 *See* generally, Ryan Scofield and Parthiv Rishi, Sidley Austin LLP, *Diagnosing and Treating Coronavirus Risks in M&A Transactions*, Harv. L. Sch. F. on Corp. Gov't (Mar. 19, 2020), https://corpgov.law.harvard.edu/2020/03/19/diagnosing-and-treating-coronavirus-risks-in-ma-transactions/.

9 *Id.* Sellers could go an extra step further and utilize third-party advisor resources in an effort to facilitate the diligence process and relieve some pressure off of both parties.

10 Many events can occur between the signing and the closing that may frustrate the buyer's desire to continue with the deal. By way of example, suppose that the target produces battery powered electric cars and, after signing the deal, the world's only battery supplier announces that it has exhausted the world's supply of raw materials needed to make batteries.

11 *See* discussion *infra*.

12 *See Akorn, infra* note 14 at 738 ("[a] buyer faces a heavy burden when it attempts to invoke a material adverse change clause in order to avoid its obligation to close.").

13 *Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1248 n. 5 (5th Cir. 1990) (citing 6A Arthur L. Corbin, Corbin on Contracts § 1324 (1962)).

14 To date, there has only been one case that Delaware Chancery Court that has found that an MAE occurred that permitted termination of a merger agreement. *See Akorn, Inc., v. Fresenius Kabi AG, et al.*, C.A. No. 2018-0300-JTL, 130 (Del. Ch. Oct. 1, 2018) [hereinafter "*Akorn*"].

15 There is no independent, specific definition of an MAE or a dollar amount of value loss. The definition is merely what the parties set forth in the acquisition agreement. Contingent upon the negotiated terms of the acquisition agreement, the MAE clause could include a business' financial condition, operations, the ability to repay debt, capitalization, or liabilities, etc.

16 *See generally*, *Akorn*, *supra* note 14. *See also In re IBP Shareholders Litig.*, 789 A.2d. 14 (Del. Ch. 2001) [hereinafter "*IBP*"] and *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008).

17 MAEs are usually defined as "any event, development or condition occurring that has had, or would be reasonably expected to have, a material adverse effect on the business, financial condition or results of operations of the company and its subsidiaries (taken as a whole)." *See* Gail Weinstein, Warren de Wied, Steward Kagan, *COVID-19 as a Material Adverse Effect (MAC) Under M&A and Financing Agreements*, Harv. L. Sch. F. on Corp Gov't (April 4, 2020), [hereinafter, "*COVID-19 as MAC*"] https://corpgov.law.harvard.edu/2020/04/04/covid-19-as-a-material-adverse-effect-mac-under-ma-and-financing-agreements/.

18 There are some MAE provisions that explicitly exclude events such as "pandemics," "epidemics." *See COVID-19 as MAC*, *See Weinstein*, *supra* note 17, (referring to a Morgan Stanley-E*TRADE merger agreement as specifically excluding "the COVID-19 pandemic" in its MAE clause.).

19 *Grupo Hotelero Urvasco SA v. Carey Value Added SL* (*2013*) EWHC 1039 (Comm).

20 *Decura IM Investments LLP and Others v. UBS AG, London Branch* [2015] EWHC 171 (Comm).

21 *See generally*, *Ipsos S.A. v Dentsu Aegis Network Ltd* [2015] EWHC 1726 (Comm).

22 *Akorn*, at 130 (quoting *IBP*, 789 A.2d at 68).

23 *Id.* at 204.

24 *Juweel Investors Limited v. Carlyle Roundtrip, L.P., et al.,* No. 2020-0338-JRS (Del. Ch. 2008).

25 *Id.*

26 Carlyle Complaint, ¶¶ 153-95 *Juweel Investors Limited.,* No. 2020-0338-JRS (Del. Ch. 2008).

27 American Express GBT Complaint, ¶¶ 6, 35, *Juweel Investors Limited.,* No. 2020-0338-JRS (Del. Ch. 2008).

Investor-State Dispute Settlement in USMCA and CETA: The End of Investor-State Arbitration?

By Vera S. Hansen

Introduction

Investor-State Arbitration (ISA) has been the dominant dispute settlement mechanism for investment treaty disputes since the 1970s.[1] ISA is a form of mixed, ad-hoc arbitration that allows foreign investors to bring claims against host governments for certain violations of international investment agreements, including Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs). These agreements provide the investment protections that serve as a basis for investors' claims, such as a prohibition against expropriation (i.e. uncompensated takings), as well as denials of fair and equitable treatment, national treatment and most favored nation treatment.

Most ISA cases are arbitrated either under the rules of the World Bank's International Centre for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL). Before ISA became the primary mechanism of Investor-State Dispute Settlement (ISDS), foreign investors either had to pursue claims in the domestic courts of the host state or persuade their governments to espouse their claims against a host state. Both options have shortcomings; for one, the local courts in the host state might be inefficient or biased, or a state may assert sovereign immunity. Second, an investor's government might choose not to pursue the investor's claim based on political considerations, lack of resources, or lack of interest.

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The ISA system promised a more independent and efficient form of dispute settlement for investors. Host states agreed to ISA and the investment protections contained in most BITs and FTAs in the hopes of attracting foreign investment. With the rapid expansion of international trade and commerce, ISA became the main dispute settlement mechanism for direct foreign investments. Today, about 3,340 international investment agreements have been negotiated, most of which

include ISA provisions, and at least 1,023 treaty-based ISA cases have been arbitrated.[2]

Nevertheless, the ISA system has increasingly been subject to extensive criticism and has gained the reputation of being a one-sided, nontransparent, and inconsistent process. Developing countries have long criticized the shortfalls and biases of a system that was established by, and in the interest of, capital-exporting developed countries. Thus, Venezuela, Bolivia, and Ecuador withdrew from the ICSID Convention in 2007, 2010, and 2012 respectively; other countries, including South Africa, Indonesia, and India have started to disengage from the traditional ISA system.[3]

Some of the most vocal criticisms, however, have come from developed countries, resulting in the rejection of the traditional ISA approach in the trade agreement between the EU and Canada (CETA) in 2018, and the trade agreement replacing NAFTA between the U.S., Mexico, and Canada (USMCA) in 2020.[4]

Remarkably, the approach taken in lieu of traditional ISA differs substantially in CETA and USMCA, with CETA modifying the existing system and USMCA largely withdrawing from it. Thus, significant uncertainty exists about the future of investor-state arbitration. This indeed is a noteworthy development, as the countries trading under CETA and USMCA account for over half of the global GDP.[5]

This article will first discuss some of the key problems with the current ISA system and then analyze and compare how the EU and the U.S. seek to reform investor-state dispute settlement through the CETA and USMCA trade agreements.

Criticism and Problems of the Investor-State Arbitration System

While an in-depth analysis of the problems with the ISA system is not within the scope of this article, some of the most prevalent points of criticism shall briefly be discussed. Both the substance and procedure of ISA have been subject to extensive criticism by developed and developing countries alike.

One of the primary points of criticism is that ISA increases the power of large corporations at the expense of national sovereignty. Over the years, tribunals have arguably rendered a number of controversial decisions in favor of foreign investors claiming a host state's regulatory measure breached their treaty rights.[6] Nevertheless, according to the most recent estimates by the United Nations Conference on Trade and Development (UNCTAD), only approximately 29 % of claims result in an award in favor of the investor.[7] Moreover, a successful claimant is awarded $522 million on average, which merely corresponds to about 40 % of the amount claimed.[8]

One prominent example is when Argentina adopted emergency measures in response to its severe economic and financial crisis of 2001 and as a result faced more than forty claims from foreign investors.[9]

Another example is the pending €4.6 billion claim the Swedish company Vattenfall initiated against Germany after the state decided to phase out nuclear power in response to the Fukushima nuclear disaster in 2012.[10] It is important to note that, while highly contentious and intensely debated, this case is unusual in many ways, e.g., the extraordinary amount of damages claimed, the unusual long time period, and the fact the respondent is a major developed state. Nevertheless, *Vattenfall* demonstrates the manner in which foreign investors can interfere with the political decisions a state takes based on public interests – an issue that increasingly arises in the context of environmental regulations.

Critics argue that corporations should not be able to unduly intrude on national sovereignty and self-determination, and that investors' capacity to attain multimillion-dollar awards based on a host state's regulatory measures may dissuade governments from adopting measures in the public interest, resulting in a "regulatory chill."[11]

While this problem affects all states, developing countries are particularly vulnerable to awards with the potential to deplete a large percentage of their GDP. Developing nations might also be more intimidated by the perspective of foreign investors pulling out their investments in response to a regulatory change.[12]

Another major concern with ISA is the lack of transparency. Even though ISA rulings may have a significant effect on sovereign power, there is generally no public access to the hearings, no obligation to publish materials or even awards, and limited opportunity for third-party participation.[13] Today, awards are published as a matter of course and tribunals under the UNCITRAL and ICSID rules generally recognize the power to accept *amicus submissions*, but they frequently deny such submissions and rarely discuss them in awards. Even though there have been significant improvements in recent years, only five states were willing to ratify and commit to the extensive transparency rules of the Mauritius Convention on Transparency, adopted by the United Nations in 2014.[14]

Critics also argue that ISA has fallen short of its goal to depoliticize investment disputes, with the party-appointed arbitrators at times replicating the divide between the parties. The UNCITRAL Working Group III has identified several concerns regarding arbitrators, such as the lack of a precise definition of relevant ethical requirements and conflicts of interest, the obscurity regarding qualifications required to serve as an arbitrator, and the issue of third-party funding's impact on arbitrators' independence and impartiality.[15]

Critics claim that another serious problem is the lack of coherence in the reasoning and interpretation of concepts in the absence of *stare decisis*. Probably the most egregious examples are the *Lauder* and *CME* cases, where the same dispute was arbitrated twice and resulted in conflicting outcomes.[16] Inconsistent interpretations can render the arbitral process unfair and unpredictable and thus threaten to undermine the rule of law and due process.

One of the investment protections whose inconsistent interpretation has caused major controversy is the Fair and Equitable Treatment (FET) standard, a provision contained in most BITs and FTAs.[17] For instance, NAFTA's article 1105(1) provides: "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, *including fair and equitable treatment* and full protection and security.[18] FET is one of the most commonly invoked standards in ISA but also one of the most precarious. Its vague wording has caused tribunals to adopt an array of different interpretations, at times conveying protections to investors to a degree never envisioned by host states.[19]

The various problems of the ISA system are exacerbated by the absence of an appellate mechanism. Even if a case has been decided clearly erroneously, it is nearly impossible to have it reviewed on the merits. The bases for set aside are strictly limited to procedural issues, for example, the improper constitution of the tribunal, a claim that the tribunal "manifestly exceeded its power,"[20] a claim that the parties were not given notice or not given an opportunity to present their case, and, in some cases, a conflict with the public policy of a state.[21]

Investor-State Dispute Settlement under CETA

The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU contains a new approach to ISA that seeks to address many of the criticisms noted above. Canada and the EU signed CETA on October 30, 2016 and all of the chapters entered into force on September 21, 2017, with the exception of a new, controversial chapter on the Investment Court System (ICS) that will replace the traditional ISA mechanism. It is modelled after the dispute settlement institutions that form part of the World Trade Organization (WTO), but with additional safeguards to prevent a situation like the ongoing deadlock of the WTO appellate body.[22]

The EU already included the ICS approach in its recent trade agreements with Singapore, Mexico, and Vietnam. Notably, Canada, as well as Singapore, Mexico, and Vietnam, held a manifestly weaker bargaining position in the negotiations with the EU. [23] Thus, it is clear that the EU was the driving force behind this development, which is further evidenced by the EU's global advocacy for the establishment of a Multilateral Investment Court.

Originally, the draft on CETA as published in September 2014 contained the traditional ISA provisions, and at that time there was little indication that ISDS would become a controversial aspect of the CETA negotiations. However, at around the same time that CETA was negotiated, the European Parliament and numerous civil society groups pushed the European Commission for a new approach to ISDS in the concurrent negotiations of the Transatlantic Trade and Investment Partnership (TTIP) with the United States. This movement carried over to the CETA negotiations, prolonged the drafting process by another two years and resulted in the adoption of the ICS dispute settlement mechanism.[24]

The Investment Court envisioned by the EU will establish a permanent body that is subject to greater transparency and has a permanent body of qualified judges. The new court will have fifteen tribunal members: five shall be nationals of a member state of the EU, five Canadian nationals, and five nationals of third countries. Members must be recognized jurists under their respective national laws and will be appointed for a once-renewable five-year term.[25]

The tribunal members will hear disputes in three-member tribunals, with random assignments. Alternatively, parties can agree to have their dispute heard by a randomly appointed sole Member of the Tribunal.[26] Even though the assignment mechanism seeks to de-politicize the process, it can be argued that the possibility of term renewal creates a high potential for politicization.

The new system also establishes extensive transparency rules: hearings, exhibits, and submissions must be

made available to the public, and civil society stakeholders may make *amicus curiae* submissions.[27] Unlike the TTIP proposal, however, CETA does not offer the possibility of third-party interventions.[28]

The most substantial change is the establishment of an extensive appellate mechanism under Art. 8.28 that is governed by *stare decisis* and seeks to establish more consistency in ICS decisions. The appellate tribunal may uphold, modify or reverse awards based on: (i) a *de novo* review of the legal reasoning, e.g. errors in the application or interpretation of applicable law; (ii) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; and (iii) the grounds for annulment under Art. 52 (1) (a) through (e) of the ICSID Convention.[29]

The new system also seeks to address the problem of inconsistency through the issuance of interpretative notes, where "serious concerns arise as regards to matters of interpretation."[30] The general rules of interpretation applying to CETA are the Vienna Convention on the Law of Treaties and other rules and principles of international law applicable between the parties. In case of a serious disagreement, however, the CETA Joint Committee may adopt binding interpretations on the substantive provisions of the treaty.[31]

Yet another remarkable change is that CETA clarifies the FET standard by adopting a more precise definition and limiting its application to six grounds: (i) denial of justice in judicial proceedings, (ii) breach of due process, (iii) manifest arbitrariness, (iv) targeted discrimination, (v) abusive treatment, and (vi) any other breach of FET as adopted by the parties. The last clause emphasizes that the parties retain the ability to review the FET standard anytime through the adoption of an interpretative note.[32]

Overall, CETA's new dispute settlement mechanism has a strong focus on efficiency of the proceedings; proceedings are subject to strict time limits, and the Appellate Tribunal may reject manifestly unfounded appeals on an expedited basis.[33]

Investor-State Dispute Settlement under USMCA

The United States-Mexico-Canada Agreement (USMCA) will has been in effect since July 1, 2020. Some of USMCA's most significant changes to NAFTA's investment chapter are the modifications to the investor-state dispute settlement (ISDS) provisions. Under NAFTA, ISA was frequently utilized, with sixty-six claims adjudicated in its twenty-five-year history, as of December 2019.[34]

Under USMCA, Canada will completely withdraw from investor-state arbitration with the United States. With respect to Mexico and the U.S., access to ISA is narrowed significantly and can only be used in the following two circumstances: (i) for government contracts in certain covered sectors (gas and oil, power generation, telecommunications, infrastructure), and (ii) for claims of direct expropriation, alleged violations of national treatment and most-favored-nation treatment, in the

post-establishment phase, *provided* that investors exhaust domestic remedies first.[35]

The new system thus excludes arbitration claims based on violations of fair and equitable treatment (FET), as well as indirect expropriation (i.e. regulatory taking) - arguably two of the most frequently asserted claims in ISA. Moreover, claims for the denial of national treatment and most-favored-nation treatment are no longer permitted in the pre-establishment phase.

For the three years from the date of NAFTA's termination, however, investors from all Member States may still arbitrate their "legacy claims," meaning claims from existing investments under NAFTA Chapter 11.[36] After the deadline, investors with claims not covered by the new rules must bring their cases in the domestic courts of the host state. Alternatively, investors can try to convince their government to commence a state-to-state claim against the host state's government under Chapter 31 of the USMCA.[37] Presumably, state-to-state claims will become more important under USMCA, as Member States can no longer obstruct such claims by blocking the panel selection process, the reason why only three state-to-state cases were adjudicated under NAFTA.

Similarly to CETA, Chapter 31 provides for third-party participation through open hearings and "written and oral submissions to the panel" and determines that the agreement shall be interpreted in accordance with the Vienna Convention on the Law of Treaties. Like CETA and NAFTA, USMCA continues to have a committee appointed by the Member States that may issue binding interpretations on the substantive content of the treaty.[38]

Even though USMCA's dispute settlement mechanism differs substantially from NAFTA's, the standards of protection for foreign investments, such as National Treatment, Fair and Equitable Treatment (FET), and protections against direct and indirect expropriation, remain the same. Like in NAFTA, the FET standard is expressly limited to the Minimum Standard of Treatment under customary international law, as opposed to an unlimited standard.[39] Even though this was not part of the original NAFTA, in 2001 the Member States adopted a binding note of interpretation to confine the broad scope of FET in response to a large number of FET claims. [40]

During the USMCA negotiation process, it became evident that Canada, Mexico, and the United States lacked a common position on the ISA mechanism. Canada proposed to follow the approach of CETA on dispute settlement,[41] whereas the Mexican government sought to maintain the ISA system in order to attract foreign investment.[42] The United States government's position was divided, with the U.S. Trade Representative Ambassador Robert Lighthizer strongly disfavoring ISA, while some influential Republican legislators, e.g. Kevin Patrick Brady, supported maintaining the ISA mechanism.[43]

Considering the record on NAFTA ISA disputes, it is unsurprising that Canada was interested in a modification of the system. Not only was Canada the country facing the most claims (twenty-two), it also lost five cases and settled four cases, whereas the United States faced seventeen cases and did not lose a single case.[44]

The United States' retreat from ISA is more explainable in light of the general withdrawal from multilateral institutions and commitments under the Trump administration and Lighthizer's strong disdain of multilateral trade policies, including his vocal criticism of the WTO.[45]

Conclusion

As set out above, the United States and the European Union have taken two very different approaches in reforming the investor-state dispute settlement system. The EU seeks to create a more transparent, consistent, and efficient system through the establishment of a permanent investment court with an appellate mechanism. The U.S., on the other hand, aims to curtail the extensive use of the ISA mechanism by largely retreating from the system and taking claims back to domestic courts.

Perhaps one approach will serve as a new paradigm for future investor-state dispute settlement. It is more likely, however, that these reforms exemplify a general new trend towards greater flexibility and divergence in ISDS, as evidenced by other countries' retreat from, and reform of, the traditional ISDS mechanisms. In light of the recent disparities between the EU and U.S. and the general decline of Western power, it is to be expected that other countries strive to adopt their own reforms. Thus, future proposal will likely encompass elements from both systems and soften the current arbitration-court division discussed in this article.[46]

About the Author

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Endnotes

1 *See, e.g.*, Michael Faure & Wanli Ma, *Investor-State Arbitration: Economic and Empirical Perspectives*, 41 MICH. J. INT'L L. 1 (2020), https://repository.law.umich.edu/mjil/vol41/iss1/2.

2 *Investment Dispute Settlement Navigator*, UNCTAD (updated Dec. 31, 2019), https://investmentpolicy.unctad.org/investment-dispute-settlement. This is in addition to non-treaty based ISA.

3 Trishna Menon & Gladwin Issac, *Developing Country Opposition to an Investment Court: Could State-State Dispute Settlement be an Alternative?*, Kluwer Arb. Blog (Feb. 17, 2018), http://arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/?doing_wp_cron=1589854178.6488919258117675781250.

4 Additionally, the U.S.-Australia Free Trade Agreement from 2005 does not contain investor-state arbitration.

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6 Menon & Issac, *supra* note 3.

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9 Burke-White, William W., *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System* (Jan. 24, 2008). Univ. of Penn., Inst for Law & Econ Research Paper No. 08-01. http://dx.doi.org/10.2139/ssrn.1088837.

10 Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Notice of Arbitration, May 31, 2012.

11 Congressional Research Service, *NAFTA and the United States-Mexico-Canada Agreement (USMCA)*, CRS (updated March 2, 2020) at 22. https://crsreports.congress.gov/product/pdf/R/R44981.

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15 Working Group III, *Possible reform of investor-State dispute settlement (ISDS) Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS*, The UN (Aug. 30, 2018), https://undocs.org/en/A/CN.9/WG.III/WP.151.

16 Ronald Lauder v. Czech Republic, Final Award of Sept. 3, 2001 (UNCITRAL); CME Czech Republic B.V. v. Czech Republic, Final Award of March 14, 2003 (UNCITRAL). Another problem highlighted by the *CME/Lauder* awards is the potential of parallel proceedings due to the absence of *res judicata* and *lis pendens*.

17 Even though the fair and equitable treatment standard predates modern trade agreements and was already included in earlier agreements, such as the 1959 Draft Convention on Investments Abroad, and the 1967 Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD

on the Draft Convention, it only became controversial through the use of modern investor-state arbitration. *See* Abs and Shawcross, *The Proposed Convention to Protect Foreign Investment: A Round Table:*

Comment on the Draft Convention by its Authors, 9 J. of Public L. (1960), 119-24; *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD*

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18 North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) art. 1105 [hereinafter NAFTA].

19 Enrique Boone Barrera, *The Case for Removing the Fair and Equitable Treatment Standard from NAFTA*, Ctr. for Int'l Governance Innovation (April 27, 2017) at 2. https://www.cigionline.org/publications/case-removing-fair-and-equitable-treatment-standard-nafta.

20 International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 52(1)(b), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID].

21 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T 2517, 330 U.N.T.S. 38, art. V(2)(b) [hereinafter New York Convention].

22 Ultimate decision-making power regarding implementation and application largely rests with a Joint Committee, *see* Art. 26.1. It is therefore less likely that individual EU member states will sway the votes of the representatives of the committee. *See also* Elizabeth Whitsitt & Todd Weiler, *WTO Dispute Settlement, Investor-State Arbitration and Investment Courts: Exploring Themes of State Power, Adjudication and Legitimacy* (May 21, 2019) at 175. http://dx.doi.org/10.2139/ssrn.3391894.

23 *Id.* at 5.

24 European Commission, *Joint statement: Canada-EU Comprehensive Economic and Trade Agreement (CETA)* (Feb. 29, 2016), http://europa.eu/rapid/press-release_STATEMENT-16-446_en.htm (last visited May 22, 2020).

25 CETA, *supra* note 24, art. 8.23.

26 *Id.*

27 CETA, *supra* note 24, art. 8.36, Annex 29-A.

28 European Commission, *Commission Draft Text on the Transatlantic Trade and Investment Partnership*, Chapter II, art. 23, The EU Comm'n, https://trade.ec.europa.eu/doclib/html/153807.htm (Last visited May 22, 2020).

29 CETA, supra note 24, art. 8.28.

30 *Id.*, art. 8.31

31 *Id.*

32 *Id.*, art. 8.10. The provision also de-emphasizes the concept of an investor's legitimate expectations, by stating that the tribunal *may* take such expectations into account.

33 *See, e.g.*, EU-Canada Comprehensive Economic and Trade Agreement [CETA], Art. 8.19 ("Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations pursuant to paragraph 4."); *See also* Comprehensive Economic and Trade Agreement Between Canada of the One Part, and the European Union and its Member States, of the Other Part, Can.-E.U., Oct. 30, 2016, art. 29.10 ("The arbitration panel shall issue to the Parties and to the CETA Joint Committee a final within 30 days of the interim report.") [hereinafter CETA].

34 Congressional Research Service, *supra* note 10, at 23.

35 Agreement between the United States of America, the United Mexican States, and Canada, adopted Jan. 29, 2020, art. 14.4, Annex 14-D [hereinafter USMCA].

36 *Id.* at Annex 14-C.

37 *Id.* at art. 31.

38 USMCA, *supra* note 34, art. 30.2.

39 USMCA, *supra* note 34, art. 14.

40 NAFTA Free Trade Commission, *Notes of Interpretation* ("The concepts of fair and equitable

treatment and full protection and security do not require treatment in addition to and beyond that which is

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41 Adam Behsudi & Doug Palmer, *Investor dispute provision in NAFTA still at impasse ahead of Washington meeting*, Politico (Feb. 21, 2018), https://www.politico.com/story/2018/02/21/canada-stands-firm-on-pursuing-bilateral-investor-dispute-process-with-mexico-in-nafta-356665.

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43 *See* International Economic Law and Policy Blog, *Brady-Lightizer ISDS Exchange* (March 21, 2018), https://worldtradelaw.typepad.com/ielpblog/2018/03/bradylighthizer-isds-exchange.html.

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International Law Section Treasurer's Report

For the three months ending May 31, 2020

	Current Activity May 2020	Year To Date May 2020	Year To Date May 2019
Revenue:			
International Law Section Dues		12,530.00	12,390.00
International Stud/Affil Dues		35.00	70.00
Total Revenue		**12,565.00**	**12,460.00**
Expenses:			
ListServ	25.00	175.00	175.00
Meetings		533.82	4,345.52
Newsletter		150.00	563.29
Miscellaneous		149.10	165.90
Total Expenses	**25.00**	**1,007.92**	**5,249.71**
Net Income	(25.00)	11,557.08	7,210.29
Beginning Fund Balance:		25,755.46	21,711.08
Total Beginning Fund Balance:		25,755.46	21,711.08
Ending Fund Balance:		**37,312.54**	**28,921.37**

Mission

The International Law Section strives to promote the highest quality of practice and professionalism in international law in Michigan. Toward that end, the Section seeks (i) to provide its members with interesting and educational programs on practice-relevant international law issues; (ii) to build a diverse and engaging membership with regular opportunities for social networking and mentoring; and (iii) to promote the practice and awareness of international law issues among the broader Michigan legal, business and legislative communities.

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2019-2020 International Law Section Council

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