PREFACE: TOWARDS A TWENTY-FIRST CENTURY INVESTMENT AGREEMENT

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Investment agreements have rightly come under attack in recent years. Many years ago, there was an attempt to arrive at a multilateral investment agreement, along the lines of the World Trade Organization (WTO) multilateral trade agreement. That effort failed. Because these agreements have taken on a central role in recent trade agreements, and because they have increasingly become a stumbling block, it is important to understand better both the politics and economics of these agreements.[1]

There are two underlying questions: what motivated the drive for these agreements? What was supposed to be protected? If investors were worried about nationalization (expropriation), in most cases, they could have bought insurance from the Multilateral Investment Guarantee Agency (MIGA), part of the World Bank Group, or from national authorities that offered similar protection. Besides, expropriations have been a rarity in recent decades. This suggests that something else drove the Investment Agenda. I will return to this question at the end.

First, though, I want to describe what I believe a 'good' agreement might look like—something markedly different from what has appeared in recent trade and bilateral investment treaties.

Basic Premises

Any investment agreement should begin with two basic predicates:

(1) The provision of justice is a basic public function that should not be privatized; the current system of dispute resolution privatizes this function, and for

* Parts of this preface were previously distributed as a series of Roosevelt Institute Policy Briefs, *Tricks of the Trade Deal: Six Big Problems with the Trans-Pacific Partnership,* 2016. I am indebted to Felicia Wong, Nell Abernathy, Adam Hersh, Lori Wallach, and Lise Sachs for helpful discussions, and Matthieu Teachout and Debarati Ghosh for research and editorial assistance.

[1] A decade ago, I wrote a long law review article of investment agreements (See Stiglitz, 2008). Since then, such agreements have proliferated, and their adverse consequences have become even clearer than they were then.

no good reason—other than perhaps more favorable outcomes to corporations. The private system is very costly, putting poor countries at a disadvantage.[2] The WTO appellate system proves that one can create well-functioning international commercial courts.

In opposing the investment agreement embedded in trade and investment pacts, I was among the more than 200 law and economics professors who signed a letter to the President in October 2017 describing the devastating deficiencies in the standard investor–state dispute settlement (ISDS) process, focusing on problems with it from the perspective of US law and policy.[3] We noted that:

> Over the past two centuries, the United States has established a framework of rules that govern lawsuits against the government and continually refines them through democratic processes. These include rules on court procedures and evidence, which are designed to ensure the fairness, legitimacy and reliability of proceedings; on who may bring lawsuits and under what circumstances, which are designed to balance the right to sue with the need to ensure that government action is not made impossible due to unlimited litigation; on the power of courts, which are designed to ensure that judges do not overly intrude on legitimate policy decisions made by elected legislatures or executive officials; on appropriate remedies, which are crafted to achieve policy aims such as deterrence, punishment, and compensation; and on the independence and accountability of judges.

But the investment agreements overturn all of this.

> However, through ISDS, the federal government gives foreign investors— and foreign investors alone—the ability to bypass that robust, nuanced, and democratically responsive US legal framework.

Specific objections include: '… ISDS proceedings lack many of the basic protections and procedures normally available in a court of law', and 'there is no oversight or accountability of the private lawyers who serve as arbitrators, many of whom rotate between being arbitrators and bringing cases for corporations against governments'.

I had separately written to Congress in May 2015 expressing some of my own concerns:[4]

> The high cost of access to such legal mechanisms violate a basic tenet of US justice: that legal institutions to resolve civil disputes are a public good to which all

[2] The costs of private arbitration are high—Australia reportedly spent more than $50 million defending against a suit from Philip Morris on 'plain packaging' regulation, similar to Uruguay's regulation. There are incentives to drive up costs: arbitrators are paid by the hour (unlike professional judges).

[3] The letter, issued 25 October 2017, is available at: http://bit.ly/2i7oiqS. The press release by Public Citizen is available at: http://bit.ly/2hTr5EP.

[4] 'Where Progressives and Conservatives Agree on Trade: Current Investor–Trade Dispute Settlement Model is Bad for the United States', Letter to Congress, Roosevelt Institute, 18 May 2015, available at: http://bit.ly/2ig0vWJ.

> should have access. Private tribunals that effectively require millions of dollars in legal costs to use will privilege big businesses with an advantage over small businesses and other stakeholders.

Still another objection relates to federalism. Investment agreements are signed by national governments, but they cover the behavior of sub-national governments as well. In the US, for instance, the federal government would have to provide compensation were a state or local government to be in breach of the investment agreement. (This is not just a hypothetical possibility: Mexico's national government had to pay for an action of a municipality—restricting the use of land in the center of a city being used as a toxic waste dump.) The risk this poses to federalism is obvious, as I mentioned in my 2015 letter:

> [T]he investment protections written into US agreements extend to *all* actions taken by states and local governments. While these provisions do not necessarily proscribe the imposition of regulations, they impose a cost on US taxpayers for any loss in *expected profits* as a result. While the clear intent of the Constitution was to cede full authority for such regulation (other than, for instance, that affecting interstate commerce) to the States, the clear intent of these trade agreements is to use the Treaty Authority to limit the power of states and localities to regulate.

The problematic nature of resulting de facto federal authority over state actions (even actions which were never explicitly reserved for the Federal Government, and thus were reserved to the states) is heightened by the magnitude of the awards, discussed below, which could be well beyond the ability of a municipality to pay, were the burden shifted from the national government to the subnational unity. Since the agreement does not force a change in action, but simply compensation for the action, it is hard to see the national government agreeing to fund a persistent action giving rise to an investment claim; thus, either the Federal government would impose the costs on the subnational authority—and since they are even more constrained than the federal government, they would be financially 'forced' to change their behavior—and would prohibit the action. The trade agreement is thus, in effect, binding the states and municipalities to the broad standards of conduct and potential liabilities in the treaty. This is irrespective of the issue or measure and whether such issue or measure is (possibly solely) within the domain of the subnational unity, at least as far as the investments of foreign firms, constituting a major expansion of the reach of the Federal government in a way that arguably goes well beyond the Constitution.

We concluded in the joint 2017 letter:

> Freed from the rules of US domestic procedural and substantive law that would have otherwise governed their lawsuits against the government, foreign corporations can succeed in lawsuits before ISDS tribunals even when domestic law would have clearly led to the rejection of those companies' claims. Corporations are even able to re-litigate cases they have already lost in domestic courts. It is ISDS arbitrators, not domestic courts, who are ultimately able to determine the bounds of proper US administrative, legislative, and judicial conduct.

(2) A basic function of the state is to protect the environment and citizens' health and safety and to ensure the economy functions well; regulations are an important tool for accomplishing these basic functions. The imposition of regulations will adversely affect those who are being regulated. A corporation selling a product which contains carcinogens will see its profits decrease if it is told it can't sell the product. A firm that exploits its workers with unhealthy working conditions may see its profits decrease if it is told it can't do that. A financial firm that is told that it can't engage in predatory lending too will see its profits decrease. There is no end of 'bad practices' that corporations engage in, all for the purpose of making money; and stopping them from doing so naturally reduces their profits.[5] But all countries have decided that it is unconscionable to have to pay those corporations engaging in such nefarious actions for not engaging in them.

The magnitude of the change *intended* to be brought about by investment agreements is brought out by a quote attributed to a Toronto lawyer, Barry Appleton, who has been creative in expanding corporate claims under the North American Free Trade Agreement (NAFTA) and was involved in suing Canada in both the *Ethyl* and *SD Myers* cases: 'It wouldn't matter if a substance was liquid plutonium destined for a child's breakfast cereal. If the government bans a product and a US based company loses profits, the company can claim damages under NAFTA.'

One can view all of this within the perspective of rights in general, and property rights in particular. Individuals have *rights,* for example, the right to free speech. Corporations are creations of the state, and as such have no inalienable rights. Whatever rights they may have are derived rights, derived from the rights of those that are stakeholders in the firm (e.g. the rights of the 'owners') or rights that are *given* to them by the laws that create them. Thus, modern corporations are created with limited liability, but this limited liability should not be absolute, but constructed in ways which serves societal interests. Thus, I argue below that when a corporation engages in actions which put lives of individuals or the environment in danger, the officers of the corporation should be held liable. In this view, then, corporations have no fundamental right to kill people, for example, through the sale of cigarettes, or opium, or other dangerous products. If they had that fundamental right, then (it could be argued) that they need to be compensated for taking away that right through regulation.

The standard Coasian debate on property rights pitted smokers versus non-smokers, suggesting that either assignment of property rights could lead to an efficient solution. One could give the property right of 'air' to smokers, in which case non-smokers would have to pay smokers not to smoke; or one could assign the property right to the non-smokers, in which case the smokers would have to

[5] Nobel Prize winners George Akerlof and Robert Shiller have written a beautiful book detailing in sector after sector how corporations 'phish for phools' (See Akerlof and Shiller, 2015).

bribe the non-smokers if they wanted to smoke. In the cases under discussion here, though, societies have by and large come to a clear view: corporations (or for that matter individuals) have no inherent right to pollute, or to engage in other activities which inflict harm on others; and, therefore, there is no necessity to compensate them when regulations are passed stopping them from doing so. Indeed, in many cases, those committing those harms can be sued for the damage imposed, though it is often hard to prove in any given case a link, even though for the population as a whole, the link is indisputable. Thus, most countries have adopted the polluter pay principle: that the polluter not only is not compensated for stopping polluting, but that he has to pay for the damage that his pollution has caused.

Investment agreements (as they have been written in the past) turn all of this on its head. Those agreements say that governments have to pay polluters not to pollute, they have to pay cigarette and asbestos companies not to produce products that kill, and they have to pay banks not to engage in practices that exploit others. Of course, the agreements are filled with words that only lawyers can understand—and different lawyers understand them in different ways. A simple trade agreement like the Trans-Pacific Partnership (TPP) Agreement ran to some 6,000 pages, ensuring that virtually no Congressman could have read it before he voted on it. And amongst those 6,000 pages, there would have been no passage with inflammatory words such as, 'this agreement enshrines a corporation's right to kill. A corporation shall be fully compensated for any law or regulation depriving corporations of this fundamental property right'. But this, in effect, is what the investment agreements do. They circumvent the standard way that property rights get assigned and re-assigned, through open democratic debate, and substitute a subterfuge, a de facto reassignment through seemingly obscure provisions of a trade and investment agreement.

The power that these investment agreements give to corporations and the extent to which the normal democratic processes for regulation and legislation are undermined cannot be overestimated. As I noted in the ISDS briefing paper written for the Roosevelt Institute,[6] 'Two arbitrators can, in effect, undermine decisions of Congress and the president, ordering billions of dollars in payments for their lost investment value and guesstimated lost profits. They can sue over pretty much any law, regulation, or government decision.'

Six Fundamental Questions

Any investment agreement has to answer six questions.

[6] See Part I of the series of Roosevelt Institute Policy Briefs, *Tricks of the Trade Deal: Six Big Problems with the Trans-Pacific Partnership,* 2016.

a) What is protected?

The objective of investment agreements should be to protect against *discrimination against foreign firms.* Existing agreements have done something quite different: They have sought to curb the ability of the state to regulate, to legislate, and to redefine property rights. Rather than adhering to the well-established *polluter pays* principle, these agreements set a new precedent that governments would have to compensate corporations for *not* polluting or imposing other harms on others. TPP carved out an exemption that would allow for tobacco regulations to be passed without requiring the nation to compensate the tobacco company for losses. Every other area of regulation was seemingly left in—meaning, for example, nations could be sued for regulating carbon emissions or cutting subsidies to the fossil fuel industry to address climate change. Not only should it be clear that no investment agreement should curtail the ability of government to regulate, so too, no investment agreement should curtail the ability of government to end any corporate subsidy. Of course, this is especially true in the case of subsidies to fossil fuels.

Current agreements actually create discrimination against domestic firms: Foreign firms have rights not given to domestic firms, which encourages inversions, with all the adverse consequences for growth, development, and public finances that result. In the United States, Courts have ruled that the government does not have to compensate firms who experience a loss in profits or the value of their assets as a result of regulations, and for good reason: such compensation would hobble the ability of government to undertake actions to protect the health and safety of their citizens, protect the environment, or ensure a sound economy. Presumably banks would have had to be compensated when new regulations were passed to curb their excessive risk taking, their abusive credit card practices, their predatory lending, or other acts of malfeasance not covered by existing legislation. If such regulations had been in place when it was discovered that asbestos was dangerous, rather than the asbestos producers compensating those that their product injured (killed), the government would have had to compensate these firms for not producing their dangerous products.

Such suits are not just a fantasy: they have occurred repeatedly, most notably in areas of health and the environment. Philip Morris' suit against Uruguay's plain wrapping regulations for cigarettes is perhaps the most notorious example: the regulation worked.[7] Smoking was discouraged, Philip Morris lost expected profits,

[7] *Philip Morris v Uruguay*, ICSID Case No. ARB/10/7. (The details of the case can be found here: http://bit.ly/2AIUTM8.) In this and the many other cases adjudicated under the investment agreements, no claim was made concerning discrimination, demonstrating that discrimination is not the central concern of these agreements. Although this case was ultimately decided in favor of Uruguay, it was on a 2–1 basis, so even this egregious case is not one that arbitrators deemed to be frivolous or a clear win for the government. Additionally, in this case, the World Health

and so it felt justified in suing. Advocates of these provisions point out that they do not interfere with the ability to regulate: the government is not compelled to change its law, just to provide for compensation for those who are injured. But for cash-starved governments, the threat of massive payments has a chilling effect on regulation; and indeed, I believe that is one of the main intents—not just to compensate those who have lost through regulations, but the 'preventive' effect of discouraging such regulations. Thus, the adverse effects of the investment agreements are not to be measured just by the suits that governments have lost, or even by the changes in policies that these suits have induced, but by the harder to measure but far broader negative impacts on desirable regulation or action.[8]

Anyone who participates in policy arenas touched by the investment agreement knows this situation well. The Investment Agreement sits there, in the foreground, shaping the set of policies that a country should consider. One can hear the debate: If we do X, we will almost surely be sued by Y. The Retort: But won't we win? The Answer: With the biased system of adjudication (the ISDS dispute settlement process described below), who knows? There is a risk we can lose, with no appeal. And besides, do we want this distraction? Do we want other foreign investors to read the dispute as if we are unfriendly to foreign investors? Normally, the conversation will end with something like this: It just doesn't seem to be worth the risk. Isn't there something else we can do that almost accomplishes what we want, but reduces the risk of running afoul of the investment agreement, at least in the minds of foreign investors?

I was in Chile in 2011 visiting the President and the Finance Minister. But my quiet conversations behind the scenes with those who formulate the law were equally telling. In the Chile–US Trade Agreement, which came into force in 2004, there was a provision relating to the free flow of capital. Chile had had more stability in its exchange rate, and economy, partly because it had long had a system of capital controls on the influx of capital. Those, like me and the former head of the UN Economic Commission for Latin America (ECLA), José Antonio Ocampo, argued that this system was important in managing the 'capital account', in ensuring that excessive in and out flows didn't create booms and busts that wreak havoc to the economy. Our views, which we articulated in a series of books and conferences, have now become mainstream.[9]

Organization weighed in with an amicus brief. What would happen if the host state's measures were more cutting edge and hadn't yet received the stamp of approval of an international body? The government would likely have had a much more difficult time defending itself.

[8] Kyla Tienharra, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 606, 615; Julia G Brown, 'International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?' (2013) 3(1) *Western Journal of Legal Studies*. See also the chapter by Gus Van Harten and Dayna Nadine Scott in this volume.

[9] See, for instance, Stiglitz *et al* (2006) and Ocampo and Stiglitz (2008).

Even the International Monetary Fund (IMF) supports capital account management along the lines we had been advocating. (Though, of course, earlier they had taken quite the opposite position, attempting to change their charter in Hong Kong in 1997 to allow them to put pressure on countries that had not fully liberalized. Fortunately, that earlier venture failed.) The nature of global capital flows is that there are surges into or out of developing countries. It is these surges that are so destructive. Sometimes the surge is created by 'animal spirits', a sudden change in views about whether, for example, East Asia is a safe place to put one's money. Sometimes the surge is brought about by a change in a particular government policy. That was the case in 2011, when the US government had begun its most expansionary policy *ever,* driving not just short term interest rates to zero, but also longer term rates. Capital sought higher returns elsewhere. Not surprisingly, there was a surge to those that seemed strong and well managed, including Chile, Brazil, and Israel. This money brings with it more costs: at the time, the countries were booming, and didn't need more stimulation. The inflow of money would have raised the exchange rate, hurting export industries, including the new ones being established as part of the development process. There was a consensus, I would say, both among economists and among the 'afflicted' countries that something should be done to dampen these flows—to avoid the historically loaded term 'capital controls,' such interventions were called 'capital account management techniques'.

Brazil, South Korea, Israel, and Indonesia went ahead. But Chile worried: if Chile did, would it be contravening the trade and investment agreement? Could it be sued? With what consequences? Even though the case for Chile taking action was overwhelming, it did not, and I believe that the trade and investment agreement was critical in that decision.

In the case of the TPP, the United States Trade Representative (USTR) claimed that in the agreement there is language to avoid the abuses of previous investment agreements. Others, however, had a different reading of TPP. What is unambiguous is that there are massive ambiguities, providing a field day for lawyers. All of this is unnecessary. Arguably, a simpler statement could say: *The purpose of investment agreement provisions is not to curtail regulation, but to ensure that regulations cannot be written to discriminate against foreign firms and cannot be enforced in a discriminatory manner.*

But even this does not suffice: the 2008 crisis as well as the East Asian Financial crisis made it clear that cross-border capital flows can be very destabilizing, and need to be regulated differently, and more tightly, than domestic financial transactions. Even the IMF now recognizes this.[10]

[10] See IMF Policy Paper (2016).

b) If there is a violation, what are the damages that can be collected?

A second key question is, if a government is found to violate the rights of an investor, what is the compensation that should be paid? A natural answer is that investors should be able to recover the amount they have spent. While that is the *natural* answer, it is not the answer in the typical investment agreements. Rather, these agreements allow investors to recover their expected profits.

The distinction is important for two reasons. First, because expected profits can be so much higher than the amount spent, this provision provides a strong incentive for investors to sue. And secondly, while the amount spent can be ascertained with reasonable reliability, expected profits are conjectural.

Consider, for instance, Philip Morris's suit against Uruguay for its tobacco regulation. Is it reasonable to assume that smokers who could so easily be influenced not to smoke by a change in packaging would not have quit smoking eventually, perhaps as a result of an advertising campaign against smoking or social trends related to the growing awareness of the dangers of smoking? The capricious arbitration system leaves it to three lawyers to decide what the company's profits would have been in the absence of the regulation. Any economist knows how fraught such calculations are, and no economist would feel comfortable leaving the decision up to a panel of three lawyers, especially when one of them has been picked by the suing corporation, and the other one appointed only with concurrence.

The analysis requires a highly speculative 'counterfactual'—what the world would be like in the future but for the regulation. Good law tries to eschew such speculation. In this case, there was no need for reliance on such speculative calculations; there is an alternative: reimbursing corporations for their investments.

Why, one might ask, should one have such a speculative and expansive basis for compensation when investors could be fully protected against losses? The answer is simple: current agreements are structured as if the objectives are to enrich the corporations and to have a chilling effect on all regulations. Simply compensating for the lost investment might not have sufficed for these purposes.

That the lawyers have failed in their calculation of 'future profits' seems clear from numerous decisions. For instance, in the widely cited Myers case,[11] Canada was forced to compensate a company for a regulation prohibiting shipping certain toxic wastes to the US, even though the US prohibited the shipment, as did an international treaty. Any reasonable counterfactual would lead to the conclusion that the toxic waste shipment would not have occurred even if Canada had

[11] *SD Myers, Inc v Government of Canada*, UNCITRAL (1976). (The details of the case can be found here: http://bit.ly/2AFWPnW).

introduced the ban, and, therefore, there was no loss in Myers's expected profits. But the arbitration panel ruled otherwise.

Interestingly, awards have been paid even when there was corruption involved in getting the contract. While a war against corruption is being waged elsewhere, the fruits of corruption are being guaranteed in investment agreements.[12]

c) **Who can bring an action?**

Under a fair investment agreement—one not just focused on corporate interests— all stakeholders should have the right to pursue legal action if there has been a harm in violation of the agreement by either the regulatory state or the investor. However, under the standard investment agreements, 'host' country governments and citizens cannot sue foreign investors that violate local environment, public health, consumer protection, and labor laws—and they certainly do not have recourse to arbitration tribunals to redress their grievances. A balanced system would ensure that any rights that allow corporations to litigate violations should also be guaranteed to governments, civil society, and others affected by a violation on the part of corporations of legal rights of citizens and/or a failure of firms to live up to their responsibilities. The legal process for redress of a violation of a corporation's rights seeks to bypass the normal legal process within the country. As I comment below, I am skeptical about the desirability of this kind of bypass. But if such a bypass should be granted to corporations, it should also be granted to other stakeholders in our economic system; and it needs to be recognized that if corporations have rights, they also have responsibilities, and those responsibilities include complying with all the laws of the land. And if one is skeptical of the ability of government to enforce the rights of corporations, one should be equally (or more) skeptical of the ability or willingness of governments to enforce the rights of citizens and others in a case where a large multinational corporation has violated those rights. Moreover, corporations have excelled in their ability to use cross-border legal machinations to avoid both taxes and legal liability: When corporations enter a country, they need to post bond or provide other surety that they will provide for any compensation for any harm they do to others. Most importantly, it must be possible to pierce the corporate veil and pass responsibility up through the increasingly complex web of global value chains; and since CEOs and other top managers often manage to avoid responsibility for their acts—with compensation coming out of the pockets of shareholders—there needs to be a system of holding managers accountable, including through prison

[12] In another famous case, Indonesia had to pay more than USD 300 million in compensation for canceling a contract that the IMF itself had strongly recommended being cancelled because of the conditions under which it had been obtained. *Cemex Asia Holdings Ltd v Republic of Indonesia*, ICSID Case No. ARB/04/3. (The details of the case can be found here: http://bit.ly/2zHohSR).

terms, with extradition treaties embedded in investment agreements for malfeasance on the part of corporate officers.[13]

Over time, arbitration panels and new investment agreements have taken an increasingly expansive view of who can sue, including what it means to make an investment in a country. Simply having an office may be treated as an 'investment'. The opportunities for suits for lost profits are unbounded: a small investment can bring large returns from litigations. Buyers of bonds may be considered as investors, and sue over any attempt at restructuring—possibly making restructuring in practice impossible. Since the nineteenth century, there has been a principle that debtors have the rights to a fresh start; under extreme exigencies there needs to be debt write-down. But forcing the issuing country to compensate a bondholder for the loss of value would de facto preventing that fresh start. I believe that investment agreements should (at most) have a narrow remit: to protect those making substantial real investments in the country from a loss of their investments *in a discriminatory manner* as a result of a government action. As I noted earlier, this simple statement has to be qualified in two ways. There may be some situations (which should be explicitly specified) where differential treatment should be acceptable, for example, concerning cross-border financial flows. And there may be some actions, such as full expropriation without compensation, which might be covered whether discriminatory or not (since firms can obtain insurance against the latter, for simplicity, I would not include that within the investment treaty).[14]

d) How can a private actor bring an action?

Among the most criticized aspects of investment agreements is that investors can sue governments directly, creating an asymmetry between states and investors that did not previously exist. Traditionally, only governments can sue investors (with limited exceptions, where governments agree to be sued for certain liabilities), not the other way around. I believe that the approach should be similar to the WTO, where only governments can bring actions against government.

Many governments (such as Brazil) have made it clear that this system of ISDS is unacceptable. I agree. A firm (or another stakeholder) that believes that some provision of the agreement has been violated resulting in harm to the stakeholder

[13] Famously, in the Bhopal chemical disaster in India, it proved impossible to hold the officials of Union Carbide accountable. See Chapter 7 in Stiglitz (2006) for a brief discussion.

[14] It should be obvious that even what appears to be a straightforward agreement in practice may entail many complexities, in particular, in deciding whether a particular action is discriminatory. If the only seller of large cars is a foreign company, then a regulation pertaining to large cars but not to small cars could be viewed as discriminatory. Yet many countries make such differentiation as a matter of public policy. The investment agreement should make clear that there should be a high bar in proving discrimination, i.e. deference should be given to the government in a finding of the desirability of that particular act as advancing a public purpose.

should have recourse to petition its government to bring a case. If this provision was put in place, the worst abuses of ISDS would not occur. It is unlikely that the US government would have brought a case against Uruguay for its tobacco regulation or against Canada for prohibiting the shipment of toxic waste to the US. Requiring the government to bring the case puts the case at least through a filter, a judgment of whether the suit makes sense from the perspective of overall policy. A government where the given act would not have been deemed grounds of suit would be wary of bringing a suit against another government. The US government recognizes the right to interfere with the packaging of cigarettes. It knows that health advocates would like plain packaging, because such packaging discourages purchases. Health authorities know that it is internal political reasons that are holding back such a requirement here—the power of the cigarette companies and tobacco farmers. Most government officials would secretly congratulate Uruguay for doing what it is doing. Accordingly, it is hard to see how they could bring a suit against Uruguay, or if they did, whether they would put into the case the resources necessary to win.

e) What is the mechanism for adjudicating disputes? And under what 'law'?

Disputes should be adjudicated according to broadly accepted rules of law. One of the most vilified, and rightly so, aspects of the investment agreements embodied in TPP and other trade agreements, is that the judicial standards fall far below twenty-first century standards. The problems have, by now, been well documented, and could easily be remedied:

1) A case should only be brought after *exhaustion* of domestic remedies. Thus, a case would be heard by an international tribunal only after the plaintiff had gone through the country's court system. The plaintiff could bring such a case if they had been *discriminated* against, either in terms of the regulation itself or in terms of the way that domestic courts had treated them. (Recall, I have argued that the only protection should be for discrimination. There can, of course, be complaints about other laws, but these are complaints that should be evaluated solely in terms of the countries' constitution and other laws. A foreigner should have no special standing. If the investor doesn't like the legal framework, he doesn't have to invest in the country. But he should have no right to change the laws according to his interests or beliefs, or to be compensated when he knowingly enters a country where there is a different legal tradition.)
2) Adjudication should be done by a permanent court, with a permanent appellate court, with permanent judges chosen on the basis of the highest judicial standards. This could either be a newly established Investment Court or one of the courts of the constituent countries (e.g. a panel of judges from the Supreme Courts of the two countries). This would eliminate the problems of conflicts of interest, conflicting findings, and the absence of appeal, that

have made the ISDS process a mockery of justice. (Today, a judge in one case can be an advocate in an almost parallel case. He would obviously have an incentive in the first case to make a ruling that he could cite to help win the second. Judges have an incentive not to rule against the larger countries, since the larger countries are embroiled in more suits, and being seen as contrary to the interests of the US or another large country may cost one dearly—one won't be chosen to be either judge or counsel, and losing the legitimacy in the eyes of these countries may cause the whole system to unravel. This could play a role in the oft-cited finding that the larger countries are less likely to lose cases. President Obama boasted that the US had never lost a case, though Canada had lost more than a dozen NAFTA cases, and settled others in ways that were unfavorable to Canada's broader interests. It may be that the US just happened to have better cases, or that it could afford better lawyers; but there is a darker, more sinister interpretation, just suggested.) Of course, the court/appellate body would be limited to adjudicating state-to-state claims for the narrow breaches that should be the subject of investment agreements.

3) The international tribunal adjudicating such disputes should conform to the basic principles practiced by commercial courts in the EU and US, including those pertaining to evidence, precedence, appeal, and transparency. Of course, there are differences among countries in the details of these judicial processes, and a committee of jurists from the relevant countries should resolve such differences, with their decisions then approved by the parliaments. (Trade ministers may not be in the best position to judge among alternative judicial processes and procedures.) Because issues in one case may have relevance in other cases, or be important as matters of principle, non-litigants should be allowed to file briefs.

In the private arbitration, others with an interest in the outcome of the case—those whose lives might be at risk if a regulation were circumscribed or repealed, as might likely happen if the corporation seeking damages prevails—cannot typically present their concerns. Because precedents may play little or no role, two almost identical cases can emerge with different outcomes, providing no guidance forward; and with no system of appeal, these problems are exacerbated.

f) What is the mechanism for revision?

The arbitration panels have sometimes come to peculiar or at least unexpected or unanticipated interpretations of certain words in an investment agreement. An agreement might, for instance, specify 'appropriate compensation', not spelling out what that means. An expansive arbitration panel might decide that that meant compensation for a loss of expected profits, and with a small number of international law firms engaged as judges and advocates in such cases, this may become the 'norm', contrary, perhaps, even to the expectations of all parties to the agreement. As I wrote in my Roosevelt Institute briefing paper, 'Investment agreements guarantee a "minimum standard of treatment," a vague standard that corporate-friendly arbitrators have interpreted liberally in past decisions, inventing obligations for governments that do not exist in the actual text of agreements or host countries' laws.'

Words are always subject to different interpretations, and when tens or even hundreds of millions of dollars are at stake, good lawyers can make good arguments for an interpretation that is favorable to their client, regardless of the costs to society. When this happens domestically, the legislature makes a correction, spelling out what it is that was meant. With trade and investment treaties, there is no way in which such corrections can be made systematically.

So too, economies and technologies change, and a provision that made sense at one time may not make sense a quarter or half century later. Built into agreements are specifics, like the time period of data exclusivity for biologics. There is disagreement about what the appropriate number should have been in, say, 2014 (with the President of the United States suggesting 7 years, his own USTR arguing for 12 years, many in the scientific community arguing for 0.) But there should be no disagreement that whatever that number in 2014, there is no a priori reason it should be the same twenty-five years later. Again, there is no systematic way for revisions. Opening up an agreement for renegotiation opens up a 'can of worms'. But there should be an understanding that specific provisions (like the misinterpretation of certain words by dispute panels) should periodically be analyzed and reviewed, and that this should be done not just by trade ministers, who often are captured by special interests, but in an open process involving civil society, legislators, and others.

Concluding Comments

We have seen that investment agreements are not about discrimination, as their advocates dishonestly purport. Indeed, there have been very few cases in which the investor succeeded on a claim of discrimination, of receiving less favorable treatment than the domestic investor.[15] They are about expanding the power of

[15] Based on the data on claims available from UNCTAD (http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches), Lisa Sachs and Lise Johnson found 'that there have only been 8 cases in which the investor succeeded on a claim that it received less favorable treatment than the domestic investor. Importantly, however, in none of the cases did the tribunal find that there was intentional nationality-based discrimination against the investor. Rather, liability was usually based on protection of an upstream segment (e.g. domestic producers of sugar or other agricultural commodities) or downstream segment (domestic producers of hazardous wastes) of the value chain that negatively affected the downstream or upstream foreign investor; in other cases, liability was a result of disparate treatment in the law (or its enforcement or application) that the tribunal didn't agree with but that had nothing to do with nationality (3 cases).' See Sachs and Johnson (2017).

corporations, at the expense of the rest of society. If investment agreements were really about discrimination, they would have been narrower; and in narrowing their focus, they would have avoided much of the controversy surrounding them. But narrowing their focus would have undermined their true objective.

One of the sources of comparative advantage of the US and other advanced countries is their rule of law. Indeed, with capital and skilled labor increasingly mobile, this is one of the true sources of comparative advantage. One might wonder, then, why would advanced countries give up this comparative advantage, helping to ensure that developing countries provide even stronger property rights than do developed countries? Surely, doing so is not in their national interests. But we need to remember: trade and investment agreements are crafted in secret, with corporations at the table, and broader interests absent. Such agreements are not in the national interest, but in narrow corporate interests. They facilitate the movement of jobs out of a country, by ensuring property rights protection when factories move abroad, and ensuring the output of those factories easy entry into the US (or other advanced country that is party to the agreement), regardless of the environmental and labor standards of the country or how those standards are enforced. They provide no recourse to those in the advanced country that see unfair competition in developing countries not enforcing whatever weak standards have been agreed to or are encoded in the laws of the country; but provide full recourse when corporations' profits are at risk. The threat of factories moving out of a country—to a locale with better property rights protection but fewer labor and environmental protections—weakens workers' bargaining rights. The decrease in wages, especially of unskilled workers, may not be a matter of collateral damage in the process of globalization, an unfortunate side-effect; but it may in fact have been the 'main show'.[16] This decrease in wages, of course, increases profits. The change in property rights—reflected in the regulatory takings provision—makes it all the more difficult for countries domestically to pass regulations protecting citizens' welfare, through environmental, health, safety, and economic regulations. This too enhances corporate profits, again at the expense of the rest of society.

Investment agreements between developed countries and those between a developed country and developing country pose distinct problems. In both cases, investment agreements in their current form should be viewed as an unacceptable change in property rights, giving more power to corporations and diminishing that of ordinary citizens.

Developing countries may gain jobs, but they pay a high price, as country after country has learned. South Africa discovered that it could be sued as it tried to

[16] This thesis is developed further in Stiglitz (2017).

rectify through its black empowerment laws a half century of racial discrimination through apartheid. Egypt discovered that it could be sued as it tried to ensure a minimal standard of living for its workers through a minimum wage law.

If there is to be investment agreements between developed and developing countries, they need to be narrowly circumscribed, to issues of discrimination, and there is a need to create an international investment court to adjudicate disputes. I suspect that corporations will be little interested in such an investment agreement, which would fulfill the purported objective of investment agreements.

But for developed countries, investment agreements are even more problematic. These agreements are sold as providing property rights protections not otherwise afforded to investors. The objections raised by the proposed agreement between the US and EU make clear the lack of logic in these agreements: (1) Both the US and the EU have good systems of property rights; (2) Both the US and the EU have good judicial systems for enforcing those property rights; (3) If there is a deficiency in either the judicial system or the property rights regime, it should be remedied for all investors, indeed all citizens, not just foreign investors.

The only justification for an investment agreement is the belief that courts in the US will discriminate against corporations from the EU and vice versa. No evidence that this is a real problem has been presented. The investment agreements seem to be solving a problem that does not exist. But in doing so, they create massive new problems, including an undemocratic redefinition of property rights. If it were that there were a problem of discrimination, the remedy would be a simple agreement, again focusing on discrimination, as a last recourse, after exhaustion of domestic courts, with adjudication through an international investment tribunal, not the faux justice of private arbitration.

It is time to see these investment agreements for what they are: a behind the scenes power grab on the part of corporations. At least in their current form, they have no place in a democratic society.

References

Akerlof, GA and Shiller, RJ, 2015, *Phishing for Phools: The Economics of Manipulation and Deception* (Princeton University Press 2015)

International Monetary Fund, 2016, 'Capital Flows— Review of Experience with the Institutional View' *Policy Paper*, available at: https://www.imf.org/external/np/pp/eng/2016/110416a.pdf

Ocampo, JA and Stiglitz, JE (eds), *Capital Market Liberalization and Development* (Oxford University Press 2008)

Sachs, L and Johnson, L, 'Discrimination Against Foreign Investors: Myth or reality?' CCSI Briefing Note (forthcoming 2017).

Stiglitz, JE, *Globalization and Its Discontents* (WW Norton Company 2002)

Stiglitz, JE, *Globalization and Its Discontents Revisited: Anti-globalization in the Era of Trump* (WW Norton Company 2017)

Stiglitz, JE, *Making Globalization Work* (WW Norton Company 2006)

Stiglitz, JE, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities' (2008) 23(3) *American University International Law Review* 451–558. Grotius Lecture presented at the 101st Annual Meeting of the American Society for International Law, Washington, DC, 28 March 2007

Stiglitz, JE, *Tricks of the Trade Deal: Six Big Problems with the Trans-Pacific Partnership*, 2016, Roosevelt Institute Policy Briefs, available at: http://rooseveltinstitute.org/tricks-trade-deal-six-big-problems-trans-pacific-partnership/

Stiglitz, J E, Ocampo, JA, Spiegel, S, Ffrench-Davis, R, and Nayyar, D, *Stability with Growth: Macroeconomics, Liberalization, and Development* (Oxford University Press 2006)