Introduction

International arbitration to resolve investor-State disputes has increased dramatically over the past two decades. Flows of foreign direct investment have skyrocketed, outgrowing trade flows in the mid-1990s. These flows have been accompanied by an exponential increase of the network of Bilateral Investment Treaties (BITs) and Free-Trade Agreements during this same period. But the growth in international investment agreements (IIAs) has brought a major expansion in the filing of claims. Designed to depoliticize investment disputes and to provide a neutral and specialized forum to hear disputes arising between foreign investors and the host State of their investment, treaty-based investor-State dispute settlement (ISDS) has given rise to over 550 cases as of the end of 2013, and involved over 90 States as respondents. With the first investment treaty case in 1994, the system established by IIAs is now reaching its adult years and lends itself to an assessment and considerations about the way forward.

The increase in the number of cases as well as the amounts at stake in several cases, and the use of ISDS mechanisms to challenge public policy measures taken by States in areas such as environment or public health, has generated a strong debate and identified concerns among a broad range of different stakeholders, usually framed by complaints about a perceived lack of legitimacy, consistency and predictability. Almost every State has its "horror case" that has crystallized discontent among authorities and elements of civil society who support broad discretion to regulate in the public interest. At the same time, investors are increasingly criticizing the system for lacking the qualities of predictability, efficiency and economy generally considered as among the key advantages of international arbitration.

In an Issues Note published in May 2013, the United Nations Conference on Trade and Development (UNCTAD), a UN think-tank leading the debate on investment policy issues, identified several concerns that have been repeatedly discussed in various fora, including the complexity of IIAs, the persistence of decisions perceived as infringing upon States' regulatory powers
or awarding investors unrealistic or unfair damages, contradictions between arbitral awards leading to inconsistent interpretation of investment protection standards and unpredictability of outcomes, difficulties in correcting "erroneous" arbitral decisions, and questions about the independence and impartiality of arbitrators and the costs and time of arbitral proceedings. This list of concerns, qualified by James Crawford in his "Foreword" to Zachary Douglas' *The International Law of Investment Claims* (Cambridge University Press 2009) as "an erratic pattern of decisions, with reasoning often impressionistic and displaying a certain disregard for state regulatory prerogatives," has led to several proposals for reform of the ISDS system. The UNCTAD Issues Note identified five broad paths toward reform of the system, as follows:

- Promoting alternative dispute resolution;
- Tailoring the existing system through individual IIAs;
- Limiting investor access to ISDS;
- Introducing an appeals facility; and
- Creating a standing international investment court.

Earlier papers and discussions also identified possible reforms, including supporting access to ISDS for small and medium enterprises, establishing an advisory center for small economies patterned on the WTO Advisory Centre, and better control of third party funding. [2] Numerous conferences and meetings of the arbitration community have discussed the backlash against investment arbitration and the benefits and drawbacks of various proposed corrective measures and reforms. [3]

Some of the proposals offered thus far are systemic in nature, i.e., would respond to issues relating to the ISDS system per se, as it is currently established and operating. Others are more technical and procedural and address issues such as repeat appointments of arbitrators, party versus institutional appointment, how to deal with issues conflict and to address the need for reasoned decision, the utility of dissenting opinions and the skyrocketing of costs.

One common thread arising from the experience gathered during the last two decades is the perception that when designing the mechanisms to settle disputes involving private investors and sovereign States, the founding fathers of the current ISDS system did not pay sufficient attention to the public international law dimension of these disputes, and the inherent tensions that would arise when a State's sovereign right to regulate for public purposes would be challenged by private investors. Many of the concerns expressed to date - be they over duration, costs, issue conflict, predictability of outcomes, legitimacy or consistency - actually stem from the inherent public nature of one of the parties to the dispute and the fact that international arbitration, patterned on commercial arbitration in its current form, does not adequately address these distinct features of ISDS.

Notwithstanding these criticisms, it is widely accepted that recourse to international arbitration under investment treaties is here to stay, at least for the foreseeable future. At the same time, the system is not without flexibility to adapt. There are ways and means to address shortcomings, to develop alternative approaches, to develop rules and guidelines to ensure that the system works better. This Special Issue aims particularly at paving the way forward.

When we launched the TDM Special Issue at the invitation of its publishers, we were determined to hear as many voices as possible. To this end, we invited participation from a broad range of stakeholders. We sought the views of experienced practitioners and end-users of the ISDS system, arbitrators, academics, public officials and policymakers, emphasizing to all our request that they make concrete proposals for reform and improvement of ISDS, including but not limited to the paths which UNCTAD and others have identified. Our goal was to widen the dialogue beyond the usual advocacy pieces seeking broadly either a "call for action" or to "defend the castle." We sought to privilege practical ideas over hand-wringing, to encourage submissions that proposed a constructive way forward rather than simply debated existing shortcomings, growing pains or failures of investment arbitration. It is easy to criticize a past tribunal for "getting it wrong," or a line of doctrine as perhaps not ideally thought out, but that was not the purpose of this Special Issue, and we declined some proposals that seemed focused entirely on the past, without offering concrete suggestions for the future. With regard to such suggestions, we also encouraged contributors to take a pragmatic rather than purely theoretical approach towards the reality of investment treaty arbitration, which to date has been based on an atomized network of investment treaties, in the absence of any universally accepted multilateral investment agreement.

We have been hugely gratified by the response to our Call for Papers. The more than 65 papers featured (after we received an even greater number of initial proposals and abstracts) make this the largest TDM Special Issue to date. The interest in this topic, and the breadth of proposals offered by our contributors, demonstrates both the importance of holding this dialogue and the creativity of astute users and observers of the present system.

Necessarily, the outpouring of contributions for this Special Issue created challenges of both timing and organization. In the interests of a timely launch, we did not seek to harmonize the style or the format of the papers. We also provided some leeway to contributors who required additional time to finalize their contributions, and have offered others the possibility of contributing to a second batch of papers to be uploaded hereafter. We also struggled with how to group the papers into "chapters" or "sections," since so many of them offer cross-cutting analyses that could fall into many different baskets. In particular, it became apparent that it would be both difficult and unfair to some of the papers to simply force them into boxes defined by UNCTAD's five "paths" forward. Each of the paths is unique in its approach. Some discuss proposals that have been talked or debated already with a novel perspective, while others make thoughtful proposals for other paths of reform, which easily could be characterized...
as a sixth or a seventh path, employing the UNCTAD nomenclature. The issues at stake warrant all creative approaches, whether systemic or technical, procedural or substantive. This collection of papers is precisely designed to deepen the debate, to come up with innovative solutions, to generate discussions, reactions, responses and possibly concrete outcomes in treaty making, in institutional reform or from within the arbitration tribunals.

***

While any organizing system will be somewhat arbitrary, we have chosen to group contributions in eight basic "chapters." The first is an introduction (Chapter I - Setting the Stage for Reform) that allows several authors to set the stage of the call for reform. We start with the article by Chris Campbell, Sophie Nappert and Luke Nottage, "Assessing Treaty-based Investor-State Dispute Settlement: Abandon, Retain or Reform?", which was contributed to the OECD's Freedom of Investment Roundtable Public consultation held from 16 May to 23 July 2012, and which compiled the results of a broad online consultation of the members of the OGEMID network of practitioners. The authors identify the areas of reform that received strongest support at that time (and others that appeared less popular). This background piece provides a useful backdrop for today's debate.

We continue our background chapter with a working paper by the OECD Secretariat in support of the FOI Roundtable, prepared by David Gaukrodger and Kathryn Gordon. Entitled "Inter-Governmental Evaluation of Investor-State Dispute Settlement: Recent Work at the OECD-hosted Freedom of Investment Roundtable," it provides a brief overview of Roundtable scope-level work on ISDS in a few selected areas: enforcement of arbitral awards; remedies and the impact of investment law on a level playing field for investors; the characteristics, selection and regulation of arbitrators; and issues of consistency. The paper then briefly outlines current issues of further work by the Secretariat relating to consistency, including shareholder claims in ISDS, and the issue of government "exit and voice" with regard to investment treaties. It should be noted that David Gaukrodger has authored an in-depth research paper on shareholder claims and issues of consistency in international investment agreements.[4]

Our third introductory contribution is a paper by Christoph Schreuer, asking "Do We Need Investment Arbitration?" Schreuer argues that despite its critics, the current ISDS system serves the interest of host States as well as investors by providing impartial and effective dispute settlement, and in so doing, enhancing security as an incentive to increased investment, which, in turn, would stimulate economic development. He concludes that despite certain weaknesses, at present there is no substitute for investment arbitration for the orderly settlement of investment disputes, and accordingly that calls for its significant restriction should be resisted.

In his paper entitled "Perspectives for Investment Arbitration: Consistency as a Policy Goal?", Rudolf Dolzer draws lessons from the evolution of investment arbitration over the last two decades and highlights how it has become the modern field of arbitration par excellence, observed by specialists of neighboring disciplines of international law with silent envy. He compares the perception from the outside with the critical negative climate on the inside. Business as usual on the ground of investment arbitration is accompanied by loud voices of criticism that he analyzes in his paper. He particularly focuses on the call for consistency and wonders whether it is actually called for and if so, how it can be achieved.

J.J. Saulino and Josh Kallmer's paper, entitled "The Emperor Has No Clothes: A Critique of the Debate of Reform of the ISDS 'System'", follows. The authors suggest that there is no ISDS "system" as such, only the illusion of one, given that there is no unified body of applicable law, but rather a fragmented collection of bilateral and regional treaties negotiated based on individualized circumstances over the span of several decades. They conclude that while investment law "experts" have been focused on the need for consistency, States have not shown a particular appetite for a more unified global system or regime for investor protection, preferring to focus more flexibly on their sovereign economic policy choices.

In his piece, entitled "Making impossible investor-State reform possible", Luis Alberto Gonzalez Garcia discusses all five of the paths for reform proposed by UNCTAD and suggests that most of these involve fundamental changes to investment treaties that he considers impracticable or even impossible at this stage. He focuses instead on possible ways to reform the system without making changes to the current treaties, such as developing new ways of selecting arbitrators; adopting clearer ethical standards for arbitrators, counsel and experts in investment arbitration; and creating an International Investment Law Commission to seek to harmonize legal doctrine and guide tribunals in their work.

Our introductory chapter concludes with a paper by Silvia Constain, entitled "ISDS growing pains and responsible adulthood." The author argues that international investment arbitration is growing in a disorganized and inconsistent manner that is not convenient for the system, investors, governments or other stakeholders, and that governments should provide leadership in several ways. The best path forward, she believes, would be concerted action to agree on a single model treaty text to individually replace existing bilateral and regional IIAs that feature inconsistent, overlapping and diverging provisions, together with an ISDS system featuring a standing pool of highly qualified arbitrators and a standing appellate body to ensure consistent and coherent interpretation and application of the rules.

***

The second chapter of this Special Issue (Chapter II - Methodological Approaches) focuses on methodological approaches to reform of the ISDS system. Antonio Parra, former Deputy Secretary General of ICSID, reminds us of the experience of a first set of amendments proposed by the Administrative Council of ICSID in 2006, after a nourished debate among other things over the desirability of reform of transparency rules, enhanced public access and/or an appellate system. In his
paper, entitled "Advancing Reform at ICSID", he reviews this first stage of reforms to ICSID, and suggests further steps forward, including the possibility of offering mediation services and the idea of establishing a permanent consultative body. Of course, Parra’s paper is also relevant to the discussion of specific reform of ICSID that is discussed in Chapter V, but we include it in Chapter II as an interesting illustration of one method of discussing and conducting reform.

As a counterpoint to this focus on the methodology of reforming the ICSID system, the next contribution examines the negotiation of rules on transparency for international investment arbitration at UNCITRAL. Julia Salaskey and Corinne Montineri take us inside "UN Commission on International Trade Law and multilateral rule-making - Consensus, sovereignty and the role of international organizations in the preparation of the UNCITRAL Rules on Transparency." Their paper is illustrative of a different methodology and approach to reform. In addition to a detailed account of the process that led to the adoption of the Transparency Rules and the expected way forward, the paper analyses the role of international organizations, including inter-governmental and non-governmental organizations in the process and the consensus building required to achieve a universally accepted standard.

The next paper by Andrea Kupfer Schneider, entitled "Error correction and dispute system design in investor-State arbitration", is particularly relevant in the analysis of an issue specific to ICSID arbitration. It reviews annulment committee processes and decisions and then offers proposals for changing ICSID - both the law and the process - using dispute system design theory. In its conclusions, it argues strongly that any changes must be stakeholder-driven. Like Antonio Parra’s contribution, this paper is relevant also for Chapter V on Further Advancing the Reform of ICSID. However, by including this paper in Chapter II, we wished to draw on the proposed methodology and the use of dispute system design when approaching reform of the ISDS system.

An interesting approach is presented by Catherine Rogers in her study of "The Politics of International Investment Arbitrators." She discusses empirical research that has been used to evaluate selected reform proposals in investment arbitration, including Albert van den Berg’s study of dissenting opinions by party-appointed arbitrators (and related proposals to dramatically reduce if not eliminate dissenting opinions), and Gus Van Harten’s study of jurisdictional rulings (and related proposal for a permanent International Investment Court). She highlights the risks of linking empirical research to specific reform proposals; recommends future empirical research; and calls for evaluating quantitative empirical findings through comparative analysis with other international tribunals, and for greater dialogue between empirical research and other forms of qualitative scholarship.

Finally, Locknie Hsu, in her paper entitled "Investor-State Dispute Settlement Reform - Examining the Formative Aspect of Investment Treaty Commitments: Lessons from Commercial Law and Trade Law", draws several parallels between reform of the international investment regime and the evolution of the international trading system and commercial arbitration. She suggests, for example, that several of the underlying concerns are perpetuated in the system because negotiators of new agreements habitually refer to provisions of prior agreements for ‘templates’, akin to commercial parties using ‘standard form’ contracts rather than negotiating tailored provisions. Similarly, investors, host States and their counsel could learn from the growing use of ADR clauses in the commercial world and of preliminary consultations in WTO disputes. Finally, treaty negotiators should consider the possible inclusion of risk-allocation provisions with respect to regulatory areas with broad public policy ramifications, akin to liquidated damages clauses in commercial agreements. Her paper reminds us that the search for paths forward for the ISDS system does not occur in a vacuum, and lessons may be learned from other dispute resolution systems, notwithstanding their considerable differences.

Some of the contributions we received were focused primarily on regional experiences - in Latin America, Asia and Africa, as well as the continuing challenge in Europe of allocating competence for IIAs and ISDS between the EU and its Member States - and our third chapter is devoted to these (Chapter III - Regional Experiences with ISDS). We begin by taking a close look at the experience of Latin America, where much of the debate over possible reform avenues by States has been born. Latin America was the last region to embrace widespread use of BITs but also the first to be hit by investor-State disputes in substantial numbers, and several authors focus their submissions on “lessons learned” in the region, including through attempts at reforming investment treaties and proposed regional alternatives to existing ISDS avenues.

First, in her paper entitled "Proposal of changes to the system of investment dispute resolution: a contribution from South America", Hildegard Rondón de Sansó analyses the concrete paths taken by a number of Latin American countries, members of UNASUR, to reform the ISDS system and particularly to create a regional investment court, region-specific dispute settlement rules and an advisory centre for countries of the region. Her paper offers some insight into the challenges faced by Latin American countries when designing a system to cater for their concerns and specificities.

Next, Rodrigo Polanco Lazo in his paper entitled "Is There a Life for Latin American Countries After Denouncing the ICSID Convention?", studies the reasons why some Latin American countries have terminated IIAs and denounced the ICSID Convention. He focuses on the alternatives to treaty-based investor-State arbitration that these countries are pursuing. The author concludes, however, that this path of reform will not necessarily achieve the purpose that inspired the denunciation and termination of investment treaties, unless the concerned States appropriately manage their “newly” available options that go beyond a mere return to domestic courts to settle investment disputes.
Alvaro Galindo also offers a paper, soon to be uploaded to the Special Issue, about the experience of Ecuador with investment treaties and disputes and the various actions taken to correct the course. He also addresses the UNASUR initiative that Ecuador helped promote.

Latin America with its record number of ISDS cases is also a region where new players are becoming involved in investment disputes and where their role, as part of the system, needs to be assessed. This is what William Shipley seeks to do in his paper entitled "What's Yours is Mine: Conflict of Law and Conflict of Interest Regarding Indigenous Property Rights in Latin American Investment Dispute Arbitration", which analyses the interests of indigenous peoples whose rights may be adversely affected as a result of an investment dispute but whose perspectives may not be adequately represented by their States, whose interests may diverge from those of particular constituencies. He argues that investment arbitration should allow procedural measures to incorporate the perspectives of (and possible claims by) third party indigenous peoples, failing which the issue should be addressed directly through treaty amendment.

As a counterpoint to these articles focusing on the Latin American experience, several authors address regional experiences and approaches among ASEAN countries and the specificities of investment disputes in Africa. First, in a paper entitled "A Resilient Boat Sailing in Stormy Seas: ASEAN Investment Agreements and the Current Investor-State Dispute Settlement Regime", Teerawat Wongkaew reviews the changes in the investment framework brought by the ASEAN Comprehensive Investment Agreement, that consolidates the experience of other regions in ISDS and the specificities of ASEAN member countries. The author contrasts the "investment-protective" dimension of ASEAN instruments with their "sovereignty-preserving" dimension, and suggests that these dimensions are being more effectively balanced in recent treaties than in the past, although certain challenges remain for the current ASEAN architecture.

Next, an interesting proposal is made by Thanh Tu Nguyen and Thi Chau Quynh Vu in their paper entitled "Investor-State Dispute Settlement from the Perspective of Vietnam: Looking for a 'Post-Honeymoon' Reform", where the authors examine the Vietnamese network of investment treaties and domestic regulations as well as cooperation and coordination mechanisms for investor-state dispute settlement and prevention, and three treaty-based cases in which Vietnam has been respondent. The authors identify the drawbacks and concerns raised by this experience, and propose a gradual but systematic re-negotiation of investment treaties, to achieve a harmonization of investment rules and policies and improvement of cooperation and coordination mechanisms for investor-state dispute settlement and prevention. In terms of regional efforts in the context of the establishment of the ASEAN Economic Community in 2015, their paper suggests the establishment of an ASEAN advisory center for ISDS, a facility for countries in the regional to respond to claims brought by investors. All of these present initial steps in finding a clearer path toward an effective and fair system for investor-state dispute settlement and prevention from the perspective of a developing country like Vietnam.

The next two papers look into the specificities of ISDS in Africa. The paper by Won Kidane asks the question of "ICSID’s Relevance for the Resolution of China-Africa Disputes." The author notes that while African countries were among the earliest and most enthusiastic supporters of the ICSID system, that system has not served such countries well. Today Africa's largest infrastructure financier is no longer the World Bank; it is China, and China does not have as much experience with ICSID as Africa. In order to stay relevant for Africa and its new economic partners, the author argues, ICSID must make a conscious effort to address the diversity deficit, encourage hearings to take place outside of the traditional venues, and consider revised approaches to cost allocation and other factors. At a deeper level, ICSID must move beyond a past history of "benevolent imposition and effective exclusion from meaningful decision making," and attempt to remedy perceived inequities of the last half century of arbitral justice.

The paper by Uche Ewelukwa Ofodile, entitled "Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject?" examines both the stated position of, and the realities of action by, countries in Sub-Saharan Africa (SSA) regarding ISDS reform proposals. The author argues that through sub-regional level instruments like the Investment Agreement for the COMESA Common Investment Area, the SADC Bilateral Investment Treaty Template, and the SADC Protocol on Investment, countries in SSA appear to express a desire for a radically transformed ISDS system. However, their actions have not kept pace, and in their BITs and related treaties, SSA countries still cling to the traditional approach to ISDS and BITs. The paper suggests that the inconsistent position of SSA countries on the ISDS question deserves closer study, as do the myriad factors that limit the capacity of African countries to negotiate tailored and development-oriented IIAs and undermine their effective participation in the international investment law regime more generally.

Finally, our chapter on regional experiences travels back to Europe, and includes a contribution from Jan Asmus Bischoff, entitled "Initial hiccups or more? About the efforts of the EU to find its future role in international investment law." Focusing on the interplay between public international law and EU law, and on improvements to the ISDS system envisaged by European institutions, the author identifies the practical difficulties that the internal allocation of competences between the EU and its Member States poses for future IIAs, and outlines what ISDS mechanisms in future EU IIAs might look like, in a post-Lisbon Treaty world. The contribution is particularly timely in light of the European Union public consultation on investor-state dispute settlement and the Transatlantic Trade and Investment Partnership just begun by EU Trade Commissioner Karel De Gucht.[5]
Not surprisingly, the focus of a majority of proposals for reform is on the role of States, since investment treaties are economic policy instruments devised and negotiated by States. International investment law is created by States and States are the masters of their agreements and their use. Our largest Chapter (Chapter IV - Strengthening the Role of States) therefore features proposals to strengthen the involvement of States, both in interpreting existing treaty language (Section I) and through revising specific treaty text or negotiating new treaties (Section II). We also include papers examining the possibility of establishing regional or international courts and a renewed interest in State-State procedures (Section III).

We begin by compiling contributions on interpretation of treaties by the State parties to the treaties or by joint commissions or technical committees established under these treaties (Section I - Treaty Interpretation). In her paper entitled "Delegating Interpretative Authority in Investment Treaties: The Case of Joint Commissions," Anne van Aaken suggests that in the debate over alternative approaches for reforming the ISDS system, an important point has been neglected, namely the role of joint commissions of the State parties in resolving certain problems in investment treaties. She identifies various alternative authorities to which interpretative authority could be transferred, as well as criteria such as credibility of commitment and relevant expertise against which to benchmark the outsourcing of interpretation, and proceeds with a comparative analysis between outsourcing to a joint commission and outsourcing to an arbitral tribunal.

Another approach is taken by Joshua Karton in his paper on "Reform of Investor-State Dispute Settlement: Lessons from International Uniform Law." It describes the answers yielded by the experience of the international uniform law movement and identifies which non-binding aids to interpretation are most effective in promoting quality and consistency, without necessarily the establishment of centralized administrative or appellate bodies.

Michael Ewing-Chow and Junianto James Losari, in their paper "Which is to be the Master?: Extra-Arbitral Interpretative Procedures for IIAs", take the reader beyond the textual interpretative process and interpretation based on a State-State arbitration, such as in the case between Ecuador and the United States on interpretation of a provision of the Ecuador-US BIT. The authors suggest that there are alternative methods of interpretation, for example through joint interpretation procedures such as under NAFTA, or implicitly through the incorporation of customary rules of interpretation that could go beyond a binary adjudicative process and help develop an "epistemic community" that would be able to think about the issue in a more multifaceted way.

Interpretation by the State parties to the treaty is also the proposal advocated by Tomoko Ishikawa in her paper entitled "Keeping interpretation of investment treaty arbitration on track: the role of State parties." Starting with a review of recent cases involving sovereign debt instruments and a perception that tribunals have adopted an overbroad approach to jurisdiction that goes beyond the treaty framework acceptable to both of the State parties, the paper then analyses the difficulty in determining the objective intentions of the contracting State parties, and argues that there are situations where this difficulty (arising from a lack of explicit language) leads to unforeseen and unacceptable tribunal interpretations. Bearing in mind the need to respect investors’ legitimate expectations, the article proposes the inclusion of a formal mechanism for using joint interpretative statements as a way to achieve balance between the interpretative power of the States and investors’ rights to due process.

A novel voice in investment treaty interpretation comes from Ugur Erman Özgür and his paper "In search of consistency and fairness in investor-State arbitration: an institutional approach to interpreting the doctrine of legitimate expectation." The paper employs the New Institutional Economics framework to assess the role of the State’s municipal and institutional reality. It reviews several cases brought against Argentina and highlights the divergent understanding by various tribunals of the institutional and administrative developments in Argentina. It focuses on the analysis of the concepts of regulatory fairness and regulatory certainty in the Total award, and draws lessons for a codification of institutional principles into IIAs or at the disposal of an arbitral tribunal. The paper’s analysis is also relevant to the discussion of reform of the ISDS system through revisions of treaties addressed in the next subsection of this Chapter.

Our next authors, Baiju S. Vasani and Anastasiya Ugale, address the role of the "Travaux Préparatoires and the legitimacy of Investor-State Arbitration." Starting with the assessment that the investor-State arbitration system is not indefectible but also that it is not flawed to the extent that calls for its wholesale abolition need be given disproportionate prominence, the authors suggest that the ISDS system should be molded carefully with a scalpel rather than attacked with a sledgehammer. To do so and as one way forward in strengthening the interpretation of consent, they advocate a more thorough and systematic recourse to the treaty’s travaux préparatoires to elucidate the terms of the State parties’ consent and their intentions regarding substantive treaty standards.

As a conclusion to this section on interpretation and on the role of State parties in interpretation, we include the paper by Anthea Roberts entitled "Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States", where the author discusses how analysis of subsequent agreements and practice can help treaty parties and tribunals engage in a constructive dialogue about interpretation. The paper examines why and how this evidence is applied in public international law, including human rights law, so as to develop a theory about its use and its limits in the investment context. It takes up the practical challenge of providing an illustrative list of the types of subsequent agreements and practices most readily available in the investment context, and provides a road-map for States wishing to generate and plead, and tribunals wishing to identify and assess, such evidence.
The next section of this Chapter on Strengthening the Role of States features contributions focusing on revisions to treaty language (Section II -- Revising Treaty Language). This responds directly to two of UNCTAD’s suggested paths for reform, consisting of limiting access to ISDS through treaties and revising treaties more broadly to clarify their scope of application and limit the extent of their coverage.

To begin this section, we acknowledge the leadership of the government of the United States for spearheading debate about reform of investment treaties, by substantially revising its model treaty to take into account its experience with investment disputes under NAFTA and seeking to rebalance the State’s rights and obligations under investment treaties. A paper by Karin Kizer and Jeremy Sharpe, entitled “Reform of Investor-State Dispute Settlement: the US Experience”, draws on the U.S. experience with ISDS and focuses on how reforms can be achieved through the negotiation of agreements. It discusses the periodic review by the United States of its BIT program, and the way its Model BIT has been revised and clarified in important respects, including by emphasizing the preservation of appropriate regulatory discretion for host States to promote legitimate public welfare objectives, aiming at greater precision in obligations, reform of ISDS mechanisms through transparency and the negotiation of an appeal mechanism, and the narrowing of claims and claimants.

Somewhat as a counterpoint, we next feature Simon Lester’s contribution, “Liberalization or Litigation? Time to Rethink the International Investment Regime.” The author argues that the rules contained in U.S. international trade and investment agreements are not always about liberalization of foreign investment as it is usually understood (i.e., encouraging and welcoming foreign investment, and treating it like domestic investment), but in many instances about giving special legal protections to American companies that invest abroad. He suggests that liberalization of foreign investment would be better served by eliminating vague legal principles that provide numerous opportunities for litigation, and in so doing undermine the more basic principle of treating foreign and domestic investment equally. He contends that if international rules are to be used at all in this area, a focus on nondiscrimination, and a more flexible legal framework, would be preferable to the existing system.

Several papers explore the notion of limiting treaty protection through revision of treaty text. First, in her paper entitled “Rethinking Rights and Responsibilities In Investor-State Dispute Settlement: Some Model International Investment Agreement Provisions”, Elizabeth Boomer revisits earlier proposals of model treaties, such as by the IISD, the Commonwealth Secretariat or UNCTAD’s IPFSD. She focuses on rebalancing rights and obligations of States under investment treaties and places emphasis on novel approaches to safeguard the State’s right to regulate for public policy objectives.

Next, the paper by Daniel Kalderimis, “Back to the Future: Contemplating a Return to the Exhaustion Rules”, reminds us of the historical context of recourse to international arbitration in investment treaties, and emphasizes in particular its nature as an exception to the requirement under public international law of prior recourse to domestic courts and exhaustion of local remedies. He asks whether developed countries should consider reintroducing the exhaustion rule to ISDS claims by investors of other developed countries. His response is that they should, but only if exhaustion rules are applied in a more modern form, which required investors to prosecute, and also empowered domestic courts to rule upon, international investment claims by applying BIT standards as well as domestic law rules.

Mara Valenti’s paper on “Restricting the Scope of International Investment Agreements as a Means to Set Limits to the Extent of Arbitral Jurisdiction” focuses on the definitions of investor and investment, and the way in which investment treaties could be used to limit access to international arbitration for frivolous or unmeritorious claims.

In their paper entitled: “Limiting Investor Access to Investment Arbitration - A Solution without a Problem?” Liang-Ying Tan and Amal Bouchenaki discuss the efficacy and other consequences of the mechanisms used to limit access by investors to ISDS vis-à-vis their intended outcomes and assess whether they adequately respond to criticisms that ISDS has become too easily accessible by investors with unmeritorious claims, resulting in onerous burdens of time and expense on respondent States, and even worse, unjustifiable awards. They analyse both the treaty practice and the outcomes of awards where access has been denied and where limits have been found not to apply. They then ask the question whether, if access can be effectively policed through more robust implementation of the existing limits, new limitations are called for and explore how the existing limits (if they are truly insufficient) can be made more effective while still preserving the values of the system- and the system itself.

Our next contribution, “Exclusion from Within the Ambit of a Protected Investor, a Fair Price to Pay for the Act of Abusive Treaty Shopping” by Vidushi Gupta, discusses changes to investment treaty language to limit investor access to ISDS absent significant connections to the purported State of nationality. He examines various drafting techniques such as the inclusion of a restrictive definition of an ‘investor’ and/or a ‘denial of benefits’ clause, and identifies circumstances under which tribunals have not permitted purported investors to pursue claims, despite the absence of such restrictions in treaty language.

“A Few Pragmatic Observations on How BITs should be Modified to Incorporate Human Rights Obligations”, by Patrick Dumberry and Gabrielle Dumas-Aubin, observes that while international law as it now stands does not impose any direct legal obligations on corporations (except for jus cogens norms), nothing prevents countries from signing BITs imposing human rights obligations upon corporations. They examine concretely how such BITs could be drafted (and existing ones be amended), including where non-investment
obligations should be located in BITs; what type of language should be used; which international instruments should be referred to in BITs and why; and which enforcement mechanisms should be adopted.

Finally, in his article "On Genealogy of Proposals to Reform Investor-State Arbitration", Ahmad Ali Ghouri starts from the proposition that while demands have grown for greater incorporation of non-investment public law values in the international investment regime, the overall structure of the regime is unlikely to change. In light of this reality, he explores three different “models” of how public interest issues might be integrated more significantly into investor-State arbitration: a “contract” model, an “institutional capacity building” model, and an "arbitral activist" model. He posits that the first two models eventually fall back on the third, necessitating that the investor-State arbitral system develop indigenous principles of systemic self-governance. He offers a preliminary sketch of the possible roadmap for formulation of such indigenous principles.

As the many papers collected in these Sections on interpretation and revision demonstrate, the existing ISDS system is not static and is capable of reform. The driving forces for reform are and remain the States themselves, and the authors offer concrete examples of interpretation, clarification and revision to ensure that treaty language responds to the primary objective of the treaties, of protecting investors while ensuring a balance with the State’s right to regulate for public purposes. At the same time, some observers have proposed more fundamental structural reforms to strengthen the role of States, including expanding recourse to State-State procedures in the resolution of investor State disputes and/or fostering the creation of an investment court. The final Section of this Chapter focuses on those issues (Section III- State-State Procedures and a Standing Investment Court).

We begin with a paper by Theodore R. Posner and Marguerite C. Walter entitled "The abiding role of State-State engagement in the resolution of investor-State disputes", which analyses the role State-State interaction can play when the host State in an investment dispute resists enforcing an arbitral award against it or resists going to arbitration in the first place. Taking the example of dispute settlement proceedings in the WTO, the authors discuss the role that clarification of a particular obligation through a State-State process can have in informing the expectations or the objectives of investors. They also assess possible uses of State-State dispute settlement as an alternative to investor-State dispute settlement.

A second paper by Anthea Roberts, entitled "State-to-State Investment Treaty Arbitration: a Hybrid Theory of Interdependent Rights and Shared Interpretative Authority", bridges the gap with Section I as it discusses both the re-emergence of State-State arbitration and the allocation of interpretative authority among the treaty parties, investor-State tribunals and state-to-state tribunals. The paper suggests a progressive mechanism by which treaty parties can re-engage with the system in order to correct existing imbalances and help share its development from within.

Tim Feighery, in his paper "In search of a Roadmap: Lessons for the ISDS Regime in the U.S. Experience of Lump-Sum Claims Settlement Processes", suggests that there may be a newly-emergent role for diplomatic protection as a supplement to, or indeed for some States, a replacement of the ISDS regime. Drawing upon the U.S. experience with several commissions to address international mass claims, he argues that unless States have a greater sense of control and predictability in the system, they inevitably will withdraw or reduce participation in the regime.

Two papers look more closely at the possibility of establishing a regional or a multilateral investment court. While the example of the Arab Investment Court has not been picked up by contributors for this Special Issue, no doubt it will contribute to further thinking about the feasibility of a regional approach. In his paper entitled "Permanent Investment Tribunals: the Momentum is Building Up", Omar García-Bolivar describes the options taken by countries in Latin America to set up a permanent investment court under the auspices of UNASUR, and identifies the features of such a permanent tribunal. Lessons can be learned from this experience when thinking about establishing standing tribunals to hear investment disputes.

In his paper on "The Challenges of Creating a Standing International Investment Court", Eduardo Zuleta discusses the challenges of elaborating a multilateral treaty to establish a Court, issues of impartiality and independence of adjudicators as well as concerns of predictability, party autonomy and transparency.

Several other papers are relevant to this Section, such as Roberto Echandi’s paper on "Investor-State Conflict Management: A Preliminary Sketch", which highlights the preventive role of State authorities and proposes elements of dispute prevention policies. However for a better flow of various papers, it has been included in Chapter VII on Investor-State Mediation.

* * *

Chapter V focuses specifically on reform of ICSID as the cornerstone of the current ISDS system (Chapter V- Further Advancing the Reform of ICSID). Our contributors offer several concrete proposals for reforming, streamlining, and simplifying ICSID rules, both for original arbitration proceedings and for annulment and other post-award procedures.

First, in a piece entitled "Achieving a Faster ICSID", Adam Raviv takes a practical approach based on empirical data. He examines the length of ICSID arbitrations as they are currently practiced and analyses why they take so long. He reviews each stage of an ICSID proceeding and offers a variety of suggestions to speed them up, focusing on amendments to the ICSID Rules and institutional practices.

On a similar note, "Streamlining ICSID," by Joongi Kim, also starts with an in-depth analysis of various stages of the arbitral proceedings at ICSID and provides comprehensive statistical information on key stages. The paper then examines the dispute
settlement processes of other international institutions to gain insight from a comparative perspective into ways to reform ICSID arbitration to streamline the process and assure parties a more expeditious settlement of the disputes at hand.

Roberto Castro de Figueiredo addresses a different challenge at ICSID, namely "Fragmentation and Harmonization in the ICSID Decision-Making Process." He contends that the functionality of the ICSID system is threatened by the inherent fragmentation of the ICSID decision-making process, which leads to inconsistent analyses of core jurisdictional issues that potentially affect not just the parties to a particular dispute, but all Contracting States. He suggests that harmonization could be fostered by the adoption of interpretative resolutions by the Administrative Council, as a source of the intention of the Contracting States.

Four contributors tackle the issue of ICSID annulment and other post-award remedies. First, Nikolas Tsolakidis’ paper, entitled "ICSID Annulment Standards: Who has finally won the Reisman vs Broches debate two decades ago?", reengages with the spirited debate between Michael Reisman and Aaron Broches and tries to assess, by reference to subsequent decided annulment cases, which analysis has been more successful or whether both have been ignored. The paper concludes with an assessment of the perceived shortcomings of ICSID’s annulment process and ways it can be remedied or reformed.

Mallory Silberman asks: on "ICSID Annulment Reform, are we looking at the right problem?" She argues that while some have complained that there is an overabundance of annulment, the problem instead might be an overabundance of annulment claims, which present significant costs that the parties and the system must bear without any real relief. The paper details the apparent and hidden costs associated with annulment petitions and examines potential avenues for reducing the number of unmeritorious claims, thereby reducing the costs borne by the parties and the system.

Vanessa Giraud Martinelli’s paper on "The trembling legitimacy of the ICSID annulment system in the light of decisions by Ad Hoc Committees" starts by observing the increase in annulment proceedings after 2001, and posits that some ad hoc committees have, through their extensive interpretation of underlying legal issues in the dispute, stretched the purposes of the ICSID annulment system to the limit. In order to safeguard the essence of annulment procedures under ICSID, she proposes the amendment of the ICSID Arbitration Rules by introducing a scrutiny of the award by a permanent body (akin to the scrutiny function performed by the ICC Court of Arbitration), and the creation of Guidelines for the Conduct of Ad Hoc Committees to help steer them towards best practices.

Finally, Diego Gosis in his paper focuses on "Addressing and Redressing Errors in ICSID Arbitration." He starts with the assessment that the ICSID Convention and Rules allow remedies for awards that contain petty errors, but the system seems to limit itself to the correction of small rather than significant errors, through an inadequate reading of the applicable texts. Gosis discusses the proper interpretation and use of the remedial devices available in ICSID arbitration to cure defective awards, and proposes certain improvements aimed at bringing the investment arbitration system up to par with the current developments in this rapidly expanding area of law.

Our next chapter is devoted to the ongoing debate about an appeals mechanism, whether treaty-based or through a multilateral facility such as an appeal facility proposed by ICSID (Chapter VI - An Appellate Mechanism). As suggested by Antonio Parra in his paper in Chapter II, the debate is not new and indeed has been ongoing for a number of years, particularly after the United States included in its free trade agreements with several countries (most recently the Korea-US Free Trade Agreement (KORUS)) a commitment to negotiate an appellate mechanism. The early initiatives lost momentum after encountering strong resistance from other OECD countries 10 years ago, but the pendulum is swinging back now, with the negotiation of mega-IIAs such as the Trans-Pacific Partnership Agreement (TPP) and the EU-US FTA. The EU is also including into its negotiating mandate the design of an appellate system.

Chapter VI opens with a paper by Bart Legum, revisiting his earlier skepticism about an appellate mechanism reflected in several prior papers. In "Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-US FTA?", he re-examines appellate mechanisms in light of the TPP and the EU-US FTA, and suggests that a second look might be warranted.

Next, Eun Young Park addresses "Appellate Review in Investor State Arbitration", and identifies the pros and cons of an appellate mechanism. The author argues that while such an appellate review process may be necessary in order to promote consistency and predictability in legal interpretation, such process would need to be devised so as not to undermine the basic underlying pillar of investor-State arbitrations, namely party autonomy.

Gabriel Bottini, in his paper entitled "Reform of the Investor-State arbitration regime: the appeal proposal", argues that notwithstanding the failure of prior proposals, the creation of an appeal mechanism is still generally suggested as one of the ways to improve the functioning of investment arbitration and strengthen its legitimacy. The author argues that objections to an appeal mechanism are based on questionable assumptions, and that an appellate mechanism could play an important role in alleviating concerns expressed about the current ISDS system.

Jaemin Lee places the debate about an appellate mechanism in the broader context of experience with the WTO dispute settlement mechanism. In his paper entitled "Introduction of an Appellate Review Mechanism for International Investment Disputes - Expected Benefits and Remaining Tasks", he examines the pluses and minuses of an appeals system. In particular he examines the issue from the perspective of States,
particularly those with limited resources and capacity, in terms of their participation in international investment arbitration.

Finally, Kristina Andelic’s thought-provoking paper examines “Why ICSID Doesn’t Need an Appellate procedure, and What to do Instead.” The author argues that there should be no appellate procedure under ICSID because the lack of confidence in the system is based not on imperfections of the prescribed mechanisms for settlement of disputes, but rather on changed circumstances in economic relations. Considering that in times of crisis, there is a greater need for stability of existing institutions, the author argues that changing a functional procedure would be counter-productive. But she suggests instead the adaptation of existing procedures in a way to provide greater legitimacy to the ISDS system.

* * *

Chapter VII addresses momentum in the push for expanded investor-State mediation, with the recently adopted IBA Investor-State Mediation Rules and the actual recourse to these rules in the investor-State context (Chapter VII - Investor-State Mediation). This chapter dovetails nicely with the ICSID Review of January 2014 [6] entirely focused on investment mediation, where several authors contribute to an in-depth analysis of mediation as a viable alternative to investment arbitration and explore the role of institutions such as ICSID in administering mediation processes. Although the availability of mediation as an alternative to arbitration is not new and existing treaties do not prevent parties from seeking assistance to settle their dispute before or during the course of an arbitration,[7] to date any treaty language on the issue remained rather vague. A new generation of treaties - spearheaded by the US Model BIT, the templates for negotiation used by the EU and several regional arrangements - specifically proposes mediation as an option to settle investment disputes either before or in parallel to an arbitration procedure. This chapter focuses on investor-State mediation as a practical means to respond to a call for faster and cheaper dispute resolution mechanisms that in particular facilitate preservation of relationships between foreign investors and host States.

The papers in this chapter should be read together with the contributions in earlier chapters by Antonio Parra, who discusses mediation of investment disputes under ICSID, and Locknie Sue, who discusses mediation as a viable option for investors. In addition:

Fatma Khalifa in her paper entitled “Mediation use in ISDS” identifies the role of mediation in an investment dispute, compares it with other dispute settlement mechanisms, and explains the mediation process before making proposals for a way forward, strengthening the recourse to mediation in investment disputes.

Wolf von Kumberg, Jeremy Lack and Michael Leathes contend that “The time to introduce mediation has come”, in their paper on “Enabling Early Settlement in Investor-State Arbitration.” They review the current status of mediation in ISDS, including the contribution of the IBA’s 2012 Rules for Investor-State Mediation, examine what parties need and how mediation can deliver, and offer ten practical suggestions to aid the implementation of the IBA Rules, to enable the “systematic adoption of mediation in ISDS, alongside, and dovetailed into, the arbitral process.”

Edna Sussman’s paper, “The Advantages of Mediation and the Special Challenges to its Utilization in Investor-State Disputes”, likewise responds to UNCTAD’s call for an increasing resort to alternatives dispute resolution methods and the IBA’s issuance of its 2012 Rules for Investor-State Mediation. It outlines the many benefits that a mediation process offers, reviews the possible use of mediation in the investor-State context and discusses the many unique obstacles that are presented when a State is a party.

Nancy Welsh and Andrea Kupfer Schneider take a systemic approach in their paper entitled “Integrating Mediation Into Investor-State Arbitration.” Taking stock of the U.S. domestic experience to identify elements of the mediation process that can be made compulsory and the effects of this choice, their paper recommends the integration of a default model of mediation into the investor-State context. This model would begin in a facilitative manner, in order to increase trust-building and information exchange regarding underlying interests, but certain elements of mediation could be made compulsory.

An interesting use of ADR is proposed in the paper by Nicolas Angelet on “Post-Award ADR and Restitution,” where the author argues that the purpose of the investment protection regime to create stable relations and promote economic development warrants greater attention to restitution, which is the primary means of reparation under international law and the best means to get an investor-State relationship back on track. The author addresses a number of real or perceived obstacles to restitution in international law and argues in favor of post-award ADR to be used after or on the basis of an arbitral decision on wrongfulness.

Also of interest is Roberto Echandi’s examination of the non-contentious use of dispute prevention policies to avoid disputes altogether, in his paper entitled “Investor-State Conflict Management: a Preliminary Sketch.” The paper introduces the concept of conflict management and analyses some “best practice” cases where governments set up mechanisms to prevent and efficiently manage conflicts arising with foreign investors.

* * *

As many of our contributors recognize, another path for reform may be from within the existing system, rather than through structural reforms that seek fundamental change to it. The articles included in Chapter VIII - Reform from Within suggest that arbitral tribunals can meaningfully contribute to a reform of the system from within by a variety of means, including for example applying standards of review or methods such as capacity-limitation to

Volume 11 - Issue #01 - January 2014 - 10
The Tribunal's Tool to Encourage Procedural Economy

To begin, Stephan Schill in his paper "The Sixth Path: Reforming Investment Law from Within" sketches out a path for investment law reform that is based on an internal-system reconceptualization of investor-State arbitration as a form of public law-based judicial review. He argues that public law ideas and comparative public law methodology can be brought into investment arbitration in its present form, and suggests that arbitrators have an interest in conforming to these standards even in the absence of fundamental institutional reform.

In his paper "The Margin of Appreciation in International Investment Law", Julian Arato discusses the suitability of the margin of appreciation in the adjudication of investment disputes. The paper starts with the assessment that investment treaties say nothing about the appropriate standard of review and do not address whether States should be afforded any deference in their own assessment of their treaty obligations, or alternatively whether State action must be strictly reviewed. The paper further questions the suitability of the margin of appreciation and a unified a priori doctrine of deference. But it concludes instead that the desired certainty can be achieved only gradually, through judicial practice and dialogue over the medium to long term.

Frederic Sourgens suggests, in his paper "By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations", that common criticisms of the ISDS system start from the wrong place, namely a focus on creating better formal international investment law rules. In his view, these critics do not address the legitimacy problem in investor-state arbitration, they (unwittingly, perhaps) are the legitimacy problem, because they lose sight of the purpose of dispute resolution at public international law, which at heart has always involved "a balancing act." He proposes that a balancing test be used to determine the jurisdiction of investor-state tribunals, and that doing so will ultimately moot complaints that investor-state arbitration lacks legitimacy.

Next, in their paper on "Interim Costs Orders: The Tribunal's Tool to Encourage Procedural Economy", Jeff Sullivan and David Ingle review the complaint that investment arbitration has become a slow and expensive process. They analyze the source of the problem, notably the fact that the system allows parties to bring frivolous claims and employ dilatory tactics because there is no effective deterrent for such conduct. Their paper argues that tribunals already have the tools necessary to encourage procedural economy by using interim costs orders to deter nefarious tactics while also balancing the two seemingly irreconcilable goals of due process and procedural economy.

In his paper on "Reforming the Approach to Costs in Investment Treaty Arbitration", Matthew Hodgson discusses the fact that despite the considerable costs of the investment arbitration process, the vast majority of investment tribunals devote just a few paragraphs of their award to the subject of cost allocation and many fail to enunciate a clear starting point for their analysis, or take divergent approaches. Drawing on a recent survey of costs in investment treaty arbitrations, this article argues for a more reasoned and consistent approach to costs. Establishing a default position as to costs would promote consistency and predictability across the field of treaty arbitration. Such an approach could be achieved by wording in bilateral investment treaties or a change to the ICSID rules to bring them into line with the UNCITRAL position; the author argues that the most appropriate default position is "loser pays."

In an insightful paper entitled "Distinguishing Investors from Exporters Under Investment Treaties", Mark Feldman makes two recommendations based on the NAFTA Chapter Eleven cases. He suggests first that when distinguishing investors from exporters, tribunals should look primarily to the capacity limitation, rather than the causation limitation (which lacks effectiveness) or the territorial limitation (which lacks flexibility). Second, he contends that when applying the capacity limitation, tribunals should be guided by the nature of a claimant's global business.

Stephan Wilske, in his paper entitled "Collective Action in Investment Arbitration to Enforce Small Claims Justice to the Deprived or Death Knell for the System of Investor-State Arbitration", discusses whether collective action can be a way to seek justice for small investors, or would rather be the "straw that breaks the camel's back" and damages the system of investment arbitration. After pointing out the challenges faced by small claimants in bringing an claim against a State, the author introduces some suggestions to overcome these challenges, including through collective action. The author concludes that the system is robust enough to deal with collective action and may find its own tools to make it fair and workable.

Finally, in his paper entitled "ICSID Treaty Counterclaims: Case Law and Treaty Evolution", Jose Antonio Rivas argues that future jurisprudential and investment treaty developments may shape expanded use of counterclaims by States in ICSID treaty cases. There may be voices of concern discouraging the practical use of counterclaims, and any development that would increase their use might create a disincentive to investors for launching claims in the first place. Yet, a considerable part of making counterclaims an operative alternative involves realizing that under certain lines of authority and existing investment arbitration instruments - including the ICSID Convention, the Rules of Arbitration and certain investment treaties - the tools for effective submission of counterclaims already exist.
Conclusion

The Call for Papers that began this process, and the Special Issue that resulted from the enormous efforts of all involved, has not been an end in itself. We encourage the submission of more papers and more discussion to nourish the debate and support initiative by States and relevant institutions. In addition to further publications in TDM - whether through later upload to this Special Issue or as stand-alone articles in future issues - we would welcome sustained attention to these topics through online discussions, including a possible OGE MID dialogue that is in the works. We also believe there is no substitute for face-to-face discussion, and encourage the organization of live symposia on these important issues. It is our hope that this publication contributes to an ongoing constructive dialogue about ways to strengthen and refine the ISDS system to meet its many important goals, without losing the many advantages the system already offers over the alternatives that predated it.

Also available as an individual paper here

Footnotes


[3] 2014 ICCA Congress (XXII) entitled "Legitimacy: Myths, Realities, Challenges"


CHAPTER 1 - SETTING THE STAGE FOR REFORM

Assessing Treaty-based Investor-State Dispute Settlement: Abandon, Retain or Reform?

Sophie Nappert
3 Verulam Buildings

Professor Luke Nottage
Sydney Law School

Christian Tyler Campbell
Center for International Legal Studies

Abstract

As a constructive contribution to the OECD’s Freedom of Investment (FOI) Roundtable Public consultation held from 16 May - 23 July 2012, the authors created an online form asking for views on whether ISDS should be left as is, abandoned completely, or adapted in various listed ways. This article summarizes the responses received, noting strong support for investor-State mediation, greater transparency and measures to reduce delay and cost, and less interest in other possible reforms.

Full article here

Inter-Governmental Evaluation of Investor-State Dispute Settlement: Recent Work at the OECD-hosted Freedom of Investment Roundtable

David Gaukroder
Kathryn Gordon
Investment Division, OECD

Introduction

The OECD-hosted "Freedom of Investment" (FOI) Roundtable helps governments to preserve and expand an open international investment system while also implementing effective policies to address other public interests. The Roundtable is a unique venue for governments to explore together the policy and legal issues raised by investment treaties and ISDS. Supported by fact finding studies on dispute
Settlement and treaty practice, the Roundtable has been exploring a wide range of investment law issues.

The Roundtable makes available a variety of documents on its website to inform the public about its discussions and to encourage public debate about the issues under consideration. Secretariat background papers and expert input considered by the Roundtable are frequently made available. Following each Roundtable meeting (which are generally held twice a year), the OECD Secretariat prepares a summary of the discussion.

This paper first gives a brief overview of Roundtable scoping-level work on ISDS in a few areas (enforcement of arbitral awards; remedies and the impact of investment law on a level playing field for investors; the characteristics, selection and regulation of arbitrators; and issues of consistency). It then briefly outlines current issues of interest to the Roundtable relating to consistency including shareholder claims in ISDS and the issue of government “exit and voice” with regard to investment treaties.

Do We Need Investment Arbitration?

Professor Christoph H. Schreuer
Wolf Theiss

Introduction

Investment protection in general and investment arbitration in particular are often portrayed as one-sided and as serving the interest of investors who mostly represent big business. In actual fact, the characteristics, selection and regulation of arbitrators; and procedural rights granted to foreign investors in our current system of investment law represent a balanced system that serves the interest of host states as well as investors.

For the investor, the risks of investing in a foreign country are considerable and quite different from those of a trader. Investment disputes, unlike trade disputes, are usually highly individualised. An investor typically must commit considerable resources before it can hope to reap the expected profits. In doing so, it makes itself dependent on the benevolence of the host state. This situation of dependence calls for strong legal protection.

After having made the investment, the investor is exposed to a number of non-commercial risks at the hands of the host state. These include regime change, a change of general or sectorial economic policy, economic or political emergencies in the host state including public violence, to name just a few. Whereas large multinational corporations may sometimes be in a position to pursue their claims through a variety of strategies, medium sized and smaller investors are particularly vulnerable. For many, investment arbitration will constitute the only means of protection.

From the host state’s perspective, the most obvious advantage of investment protection is the improvement of its investment climate. That climate consists of a variety of elements, economic and political. The legal framework for foreign investors is one important factor in determining the investment climate. A key element of this legal framework is the settlement of disputes between host states and foreign investors. Impartial and effective dispute settlement is an essential aspect of the protection of investments.

The idea of investment arbitration as an incentive or at least a safety net for foreign investment was the inspiration for the ICSID Convention. It was hoped that the added security thus obtained would translate into increased investment which, in turn, would stimulate economic development.

Perspectives for Investment Arbitration: Consistency as a Policy Goal?

Professor Rudolf Dolzer
University of Bonn

Introduction

Judging by the evolution of its caseload, ICSID is today widely accepted and firmly established; ratification of the ICSID Convention by Canada on November 1, 2013, confirms this impression. Indeed, no other domain of contemporary international law is characterized by the same degree of acceptance of arbitration as the mode of settlement and of the actual use of arbitration in practice. Within two decades, investment arbitration has become the modern field of arbitration par excellence; specialists of neighboring disciplines of international law have mostly observed this development with silent envy.

This is the perspective from the vantage point "outside" of the realm of investment arbitration. Looking from the "inside" (the investment community, in particular), in the views of some states and some academic commentators, the balance sheet is much more nuanced, perhaps even negative. We hear about a backlash, about discontent and about open issues.

In other words, we seem to observe a gulf between the reality of investment arbitration as a fascinating success story, and a critical, negative climate surrounding this success which has come to dominate the perception of investment arbitration from the viewpoint of prominent commentators. Business as usual on the ground of investment arbitration is accompanied by loudly voiced clusters of criticism.

Introduction

Current calls for a debate over reform of the Investor-State Dispute Settlement (ISDS) system are based upon a flawed premise. Specifically, they assume as a starting point that there already exists an ISDS “system” or “regime” that is capable of being reformed (let alone treated as a single entity). The reality is that there is no system or regime of investor protection or ISDS at present. There is no unified body of applicable law, only a fragmented collection of bilateral and regional treaties negotiated based on individualized circumstances over the span of several decades.

Put differently, there is no “system,” only the illusion of one.

There is a simple reason why there is no global system or regime for investor protection: states have not up to this point wanted one. International Investment Agreements (IIAs) do not exist outside of the political context and the political entities that decide that they will exist and what they will contain. Any debate over reform of an ISDS system is counterproductive to the extent that it does not internalize the fact that IIAs, by definition, emanate from the policy choices of sovereign states. Going forward, those sovereign economic policy choices will continue to drive the debate over whether to create a multilateral ISDS system and what features it should have.

Efforts to modify IIAs, or to move toward a coherent multilateral system, must therefore acknowledge and work within the unique, complex, and often ugly political and policy environments characterizing the economies that negotiate the agreements. There may indeed be several good ideas for how to improve the bilateral and regional agreements that do exist, as well as how to improve the limited areas of multilateral agreement in this field—for example, the ICSID Convention. But these suggestions will be useful and practical only to the extent that they respond effectively to the valid policy preferences of governments and their populations, and not because they contribute to an independent notion of reform developed by substantive investment law experts but untethered from the political and commercial dynamics of states.

Making impossible investor-state reform possible

Abstract

The purpose of this paper is to set forth the considerations which I believe must be taken into account in framing any workable reform to the investor-state dispute settlement system and offer my comments to UNCTAD’s five main reform paths. In this paper it is suggested that most of UNCTAD’s reform paths involve treaty changes which are neither practicable nor will improve the present situation. However, an attempt will be made to show that it is nevertheless possible to reform the investor-state arbitration system without making changes to current treaties.

ISDS growing pains and responsible adulthood

Voices promoting reform of the current investor-State dispute settlement (ISDS) system seem to be growing louder, and calls for change more frequent and from a broader set of actors. Many refer to a “crisis”, and point out “challenges” and “concerns”, when explaining why ISDS reform is necessary or convenient, and should be imminent.

The current system is made up by well over 3,000 international investment agreements (IIAs) and an unknown number of contracts between investors and States with international investment dispute settlement provisions, underpinning an ever-increasing number of disputes. Despite what could be described as the growing popularity of ISDS as a mechanism for addressing investor-State controversies, it is hard to find someone (other than lawyers) completely content with the current system.

The IIA universe is a patchwork of agreements, some of which were concluded over half a century ago, and none of which is identical to another. It is no wonder, then, that the shortcomings identified by UNCTAD and others exist. These include a “perceived deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators, and concerns relating to the costs and time of arbitral procedures”. All these concerns are legitimate and arise from the practical experience of the system, especially since the mid 1990s when most of the ISDS cases have taken place.

The author argues that the best path forward would be concerted action to agree on a single model treaty text to individually replace existing bilateral and regional IIAs that feature inconsistent, overlapping and diverging provisions, together with an ISDS system featuring a standing pool of highly qualified arbitrators and a standing appellate body to ensure consistent and coherent interpretation and application of the rules.
CHAPTER II - METHODOLOGICAL APPROACHES

Advancing Reform at ICSID

Antonio R. Parra
International Council for Commercial Arbitration (ICCA)

Introduction

This paper considers amendments of the ICSID Regulations and Rules and other improvements at ICSID as a distinct further “reform path.” The most recent amendments were those approved by the Administrative Council in 2006. They contributed significantly to enhancing the efficiency and transparency of ISDS at ICSID. Section II of this paper describes the process leading up to those amendments as well as the amendments themselves. As part of the process, ICSID raised the possibility of offering a mediation service and explored in detail the idea of establishing an investor-State arbitration appeals facility. Those aspects of the process are also described in section II.

Since the adoption of the 2006 amendments, ICSID has continued to innovate and introduce improvements benefiting its ISDS facilities. Section III of the paper looks at those developments and suggests some possible future amendments of the Regulations and Rules.

Footnotes omitted from this introduction.

Full article here

UN Commission on International Trade Law and Multilateral Rule-making - Consensus, Sovereignty and the Role of International Organizations in the Preparation of the UNCITRAL Rules on Transparency

Julia Salasky
Corinne Montineri
UNCITRAL

Introduction

International arbitration is unique as a dispute resolution process insofar as it relies on the consent of parties to submit disputes not to a national framework, but to an adjudicative process the parameters of which are themselves the subject of negotiation. That such a process works cross-border, cross-culturally and in relation to complex and simple disputes alike is in part a function of the global framework established by the instruments developed by the United Nations and the UN Commission on International Trade Law (“UNCITRAL” or the “Commission”), including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), the UNCITRAL Model Law on International Commercial Arbitration, and the UNCITRAL Arbitration Rules.

There are parallels to be drawn between international arbitration as a process, and the development of UNCITRAL texts in the field of international arbitration: in relation to the latter, there is putative consent that multilateral rule-making in the UNCITRAL forum confers legitimacy upon a text (cf., in the former, consent to arbitration as a system), and there is specific negotiation of the text itself (cf., in the former, the negotiation of the arbitral procedure in each arbitration). However whereas in an arbitration, the final boundaries are set by the arbitral tribunal based on parties’ agreement, in the negotiation of a multilateral text, it is the stakeholders themselves that must arrive at a consensus.

That consensus is achieved at the end of a multilateral process whereby UNCITRAL Member and observer States, as well as international organizations (“IOs”, which include intergovernmental and non-governmental organizations), together debate, negotiate and consult, to achieve a universally accepted standard. This feat of political and legal diplomacy comprises not only an outcome, but indeed a process that contributes to the legitimacy of the resulting texts.

The recently concluded UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the “Rules on Transparency” or the “Rules”) mark a watershed moment in such multilateral rule-making, because harmonization of practice in this respect was seen not only to benefit the main actors of the arbitral process, but also the public interest at large. Thus the role of IO observers to UNCITRAL, and the willingness of States to accommodate the public interest, were both critical components to the successful completion of the Rules.

This note sets out to provide (a) a background on the rule-making process at UNCITRAL; (b) the role of both governmental and non-governmental IOs, and States, in the genesis and development of the Rules on Transparency; and (c) the content of the Rules on Transparency in light of compromises achieved during the consensus-making process.

Full article here

Error Correction and Dispute System Design in Investor-State Arbitration

Professor Andrea Kupfer Schneider
Marquette Law School

Introduction

The current crisis in investor-state arbitration under the International Centre for Settlement of Investment Disputes (ICSID) system is the subject of commentary by both practitioners and scholars in the field. This Article first reviews the current status of ICSID arbitration by specifically using the Argentinean cases as examples of the ongoing legitimacy concerns that many countries have about ICSID. This Article seeks to explain the current crisis using theories of judicial review to understand how the annulment committee process and decisions are contributing to this crisis. The judicial theory of error
correction, when utilized to review the recent annulment committee decisions, illuminates the debate in the appropriate use of the appellate function for ICSID. Then the Article will use dispute system design theories of legitimacy and sustainability to suggest potential avenues of moving forward. Through the lens of stakeholder participation, the Article examines concerns with the law applied by the arbitral tribunals and the standards of review used by the annulment committees. Finally, the Article uses dispute system design theory to examine proposals for changing ICSID- both the law and the process-and argues that any changes must be stakeholder-driven.


Full article here

The Politics of International Investment Arbitrators

Professor Catherine A. Rogers
Università Commerciale Luigi Bocconi

Introduction

Part I of this paper begins with a brief sketch of some of the most significant methodological challenges raised by this genre of empirical research, including how some of those challenges affect empirical research regarding investment arbitrators. The assessment of empirical methodology provides a backdrop to the analysis of issues in the remainder of the paper.

Part II offers an evaluation of selected reforms that have been proposed for investment arbitration based, in part, on some findings in empirical research. In Section A, I examine Albert van den Berg’s study of dissenting opinions by party-appointed arbitrators, and related proposals to dramatically reduce if not eliminate dissenting opinions. Section B examines Gus Van Harten’s study of jurisdictional rulings, and related proposal for a permanent International Investment Court. I use both studies to examine more specifically some of the methodological challenges identified in Part I, and the risks of linking empirical research to specific reform proposals. Part II also analyzes, in comparison with other adjudicatory models, some questions about system design features of investment arbitration critiqued by the two studies.

Based on the findings in Part II, Part III examines the risks of allowing substantive policy preferences to affect empirical analysis. It also argues for integration of research about investment arbitration into a comprehensive theory of international adjudication as a neutral and law-bound process, and in relation to other forms of public international adjudication that imposes limitations on State power.

To this end, Part III also provides some preliminary recommendations for future empirical research regarding investment arbitrators. Acknowledging the need for continued assessment of the basic tenets of the field’s features and functions, it nevertheless calls for caution in giving excessive weight to or predating proposed reforms on a limited set of findings. Finally, it calls for evaluating quantitative empirical findings through comparative analysis with other international tribunals, and for greater dialogue between empirical research and other forms of qualitative scholarship.

Footnotes omitted from this introduction.


Full article here

Investor-State Dispute Settlement Reform - Examining the Formative Aspect of Investment Treaty Commitments: Lessons from Commercial Law and Trade Law

Associate Professor Locknie Hsu
School of Law, Singapore Management University

Abstract

Criticisms of the current investor-State dispute settlement system stemming from a large number of bilateral investment treaties are well known. These include a lack of consistency in arbitral reasoning among tribunals, the lack of an appellate mechanism, selection and choice of arbitrators, costs and arbitral decisions affecting matters of public interest. Criticisms are directed at the process, the outcomes as well as the players. In order to address these, solutions or changes need to be directed at the formative process leading to the treaty commitments. This article focuses on this formative aspect. Commercial and trade law can offer useful ideas toward this end, in terms of provisions that can be negotiated.

First, the system currently perpetuates several of the underlying concerns partly because negotiators of new agreements habitually refer to provisions of prior agreements for ‘templates’. While this can facilitate and speed up the treaty negotiation process, it also imports existing ambiguities and problems. By analogy, commercial parties may use ‘standard form’ contracts, or template contracts; these too may import recurrent issues, and parties often would be better served by negotiating tailored provisions. The need for clearer, customized, negotiated investment provisions/agreements, particularly in highly contentious areas, is urgent, if we are not to continue perpetuating existing problems and outcomes. This article first examines this aspect of current negotiation processes.

Second, the use of ADR clauses has been growing in the commercial world and methods such as mediation are now often agreed to be a requisite first step, before litigation may be initiated. In state-to-state trade disputes of the World Trade Organization, too, members are required to engage in “consultations” (i.e. negotiations) before the more litigious panel procedure is triggered. In investor-State disputes, the use of ADR can provide a means of settlement that accommodates the interests of
both parties, probably much more than in a contentious, highly publicized international arbitration. For mechanisms such as mediation to take root in this field, a mindset shift is required on the part of investors, host States and their legal counsel, just as it has been necessary in commercial arrangements. Such means must also be tailored to meet the needs of both investors and host States. To this end, the rules of the WTO and other organizations which encourage settlement may also offer useful ideas for treaty negotiators.

Third, given that numerous treaties providing for arbitration between investors and States exist, such arbitrations are unlikely to disappear any time soon. Commercial parties negotiate and enter into agreements that carry acceptable risks to them, with one common contractual risk-allocation device being the use of liquidated damages clauses. Such clauses aim to better define the damages payable should particular breaches of their agreement occur. Similarly, treaty negotiators may, when pressed to accept investor-State arbitration, consider whether they may negotiate risk-allocation provisions with respect to regulatory areas with broad public policy ramifications, such as health regulation. The final part of this article examines the feasibility of incorporating such clauses in new investment agreements or chapters.

**CHAPTER III - REGIONAL EXPERIENCES WITH ISDS**

Proposal of changes to the system of investment dispute resolution: a contribution from South America

Dr. Hildegard Rondón de Sansó

**Introduction**

There is a strong and wide perception that the system of international investment arbitration has serious flaws. In Latin America we know of them through direct experience. Although it is not the region of the world that attracts the majority of foreign direct investment, it is the one that holds that holds a sad record of investment arbitration against countries of the region and this in spite of the fact that we are ruled by democratically elected governments where institutions are well established and rules well developed, which shows that it is a region where the rule of law is respected and promoted.

However, most countries in the region have been under attack -and others are about to experience- through an inefficient and highly criticized system of investment dispute resolution brought against States' sovereign decisions devoted to regulate public interest matters. Those attacks have been perpetrated through investment arbitration and more specifically through the arbitrators. Ostensibly those attacks have extremely negative consequences to the countries with respect to social and economic sustainable development, country image and governance, inter alia due to multi billion dollars compensation awards which could exceed their gross domestic products.

Perhaps because of that, respectable organizations such as the United Nations Conference of Trade and Development (UNCTAD) and the Transnational Institute have joined the critics that some countries have made in the past which have motivated specific moves against the system of investment arbitration. Along with those organizations we could say that the doubts about the legitimacy and transparency of the system arise fundamentally from the arbitrators whose independence and impartiality are just an illusion, mainly due to their constant change of roles (as they are arbitrators in some cases, counsel or experts in others).

A summary of the main problems found on the current system of international protection of foreign investment can be summarized as follows:

- Frequent conflict of interest of arbitrators,
- Numerous decisions against the interest of the States;
- Inconsistency of the arbitral awards;
- Questionable methods used to calculate the interests;
- Timing used for calculation of the compensation;
- Confusion -- according to the temporary convenience of the claimants-- of the sovereign States with the operative government controlled companies; and
- Third party financing of arbitration claims specially through "vulture funds" which has caused an exponential growth of the number of investment arbitration claims in the recent years.

**Is There a Life for Latin American Countries After Denouncing the ICSID Convention?**

Professor Rodrigo Polanco Lazo

World Trade Institute

**Abstract**

This paper studies the reasons why some Latin American States have recently decided to denounce and terminate international investment agreements and the ICSID Convention. It analyses the consequences of that choice, focused especially on the alternatives to treaty-based Investor-State arbitration that those countries are pursuing. After examining these new avenues for dispute settlement between the host State and foreign investors, the author concludes that this pathway will not necessarily achieve the purpose that inspired the denunciation and termination of investment treaties, unless the concerned countries appropriately manage their "newly" available choices that go beyond a merely return to sole domestic jurisdiction for investment disputes.
Ecuador's Contribution to the Reshaping of the Protection of Foreign Investment...

Alvaro Galindo
Dechert LLP

Introduction

This paper will added to the special Special Issue very soon. It is about the experience of Ecuador with investment treaties and disputes and the various actions taken to correct the course. The author also addresses the UNASUR initiative that Ecuador helped promote.

Full article here

What's Yours is Mine: Conflict of Law and Conflict of Interest Regarding Indigenous Property Rights in Latin American Investment Dispute Arbitration

William Shipley
Centre for International Sustainable Development Law (CISDL)

Abstract

An assumption implicit to the international investment dispute arbitration regime is that state party respondents will adequately represent the interests of citizens whose rights may be adversely affected as a result of an investment dispute. However, for a variety of reasons, states cannot be reasonably expected to adequately represent the property rights of indigenous peoples whose disputed land claims are adverse to the economic development plans of states and investors both. In the Western Hemisphere in particular, this conflict of interest threatens the adequate preservation of indigenous property and human rights claims of third party indigenous peoples. Absent such consideration in investment dispute arbitration, investment treaties may need to be amended in order to provide for the property claims of third party indigenous peoples whose fundamental human rights may otherwise be adversely affected.

Full article here

A Resilient Boat Sailing in Stormy Seas: ASEAN Investment Agreements and the Current Investor-State Dispute Settlement Regime

Teerawat Wongkaew
Graduate Institute of International and Development Studies

Introduction

After the introduction section, the article is organized as follows. Section 2 examines the 'planning and designing' process with a view to understanding the objectives of those agreements in the broader context of regional economic integration and ASEAN Community building process. Section 3 focuses on the 'tailoring and customizing' process of creating agreements to serve the desired objectives. Section 4 analyzes one aspect of the versatile ASEAN architecture (its investment-protective dimension), and Section 5 examines the other aspect (its sovereignty-preserving dimension). Section 6 provides a brief analysis of ISDS trends in ASEAN region, in particular lessons learnt for the future. Section 7 offers some reflections on the key challenges for the current ASEAN architecture.

Full article here

Investor-State Dispute Settlement from the Perspective of Vietnam: Looking for a "Post-Honeymoon" Reform

Thanh Tu Nguyen
International Law Department, Ministry of Justice of Vietnam

Abstract

The increasing number of investor-state disputes has, particularly in the recent period of economic crisis, created significant burden on host countries, both developed and developing ones. For developing countries, such burden is often multiplied due to their limited resource and experience. Many developing
countries, after a long "honeymoon" with foreign investors, have been re-considering the pros and cons of the investor-state dispute settlement mechanism and more cautious on their negotiations of bilateral investment treaties or investment chapters in free trade agreements. Through the experience of Vietnam, this paper discusses challenges and difficulties faced by developing countries in dealing with investor-state disputes. By examining Vietnamese network of investment treaties, domestic regulations as well as cooperation and coordination mechanism for investor-state dispute settlement and prevention, and three treaty-based cases in which Vietnam has been respondent, the paper identifies relevant drawbacks and concerns. It then proposes a gradual but systematic re-negotiation of investment treaties, harmonization of investment rules and policies, improvement of cooperation and coordination mechanism for investor-state dispute settlement and prevention. In terms of regional effort in the context of the establishment of the ASEAN Economic Community in 2015, it suggests to set up an ASEAN advisory center for investor-state dispute settlement. All of these present initial steps in finding a clearer path toward an effective and fair system for investor-state dispute settlement and prevention from the perspective of a developing country like Vietnam.

Full article here

ICSID’s Relevance for the Resolution of China-Africa Disputes

Professor Won Kidane
Seattle University School of Law

Introduction

The International Center for the Settlement of Investment Disputes (ICSID) was created at a time when most African countries had just gained independence and foreign investment required a more legitimate protection in the former colonies. The ICSID Convention, which set up the Center, came into force on October 14, 1966 when the twentieth instrument of ratification was deposited with the Secretariat of the United Nations. Significantly, fifteen of the original deposits of the ratification instruments came from African states. Naturally, the very first respondent state in ICSID proceedings was also an African state.

Examination of the history of the ICSID convention suggests that the African States’ instantaneous and overwhelming acceptance of ICSID was solely propelled by the perception that doing so would increase the flow of badly needed foreign direct investment (FDI) from the North into the newly independent continent, although the Convention itself makes no such express promise. Structurally, however, ICSID’s close affiliations with the World Bank never sat very comfortably with the Africans from the very beginning. The history is full of examples of expressions of misgivings about the establishment of a dispute settlement mechanism under the auspices of Africa’s principal financier.

Full article here

Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject?

Professor Uché Ewelukwa Ofodile
University of Arkansas School of Law

Abstract

This paper examines the position of countries in Sub-Saharan Africa (SSA) regarding proposals to reform the investor-State dispute settlement (ISDS) system. Despite their silence on ongoing discussions about the future of the ISDS system and possible pathways for reform, SSA countries are making their position on the issue known. The paper argues that the position of SSA countries can be gleaned from instruments that these countries have pushed for at the sub-regional level. In particular, in the Investment Agreement for the COMESA Common Investment Area (CCIA), in the SADC Bilateral Investment Treaty Template (SADC Model BIT), and even the SADC Protocol on Investment, countries in SSA appear to express a desire for a radically transformed ISDS system.

However, closer inspection suggests that SSA countries are inconsistent in their actions when it comes to reforming the ISDS mechanism. Although these countries espouse a vision of an ISDS mechanism that is different from the existing mechanism, their actions tell a different story. For example, the CCIA is not operational, the SADC Model BIT is not binding and very few countries, if any, have taken steps to model their bilateral investment treaties (BITs) after it, and in their BITs and related treaties, SSA countries still cling to the traditional approach to ISDS and BITs more generally. Furthermore, while SSA countries would prefer to limit investor access to ISDS, the demise of the SADC Tribunal in the wake of Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe undermines efforts to project domestic and regional institutions in Africa as credible alternatives to international arbitration. The paper suggests that the inconsistent position of SSA countries on the ISDS question deserves closer study. Also deserving closer study is an assessment of the experience of SSA countries with the ISDS system since the system emerged some forty years ago.

Finally, attention must be paid to the myriad factors that presently limit the capacity of countries in Africa to negotiate tailored and development-oriented international investment agreements (IIAs) as well as factors that undermine their effective participation in the international investment law regime more generally.

Full article here
Initial Hiccups or More? About the Efforts of the EU to Find its Future Role in International Investment Law

Dr. Jan Asmus Bischoff
M.M. Warburg & Co

Summary

In the following article the author outlines how ISDS mechanisms in future EU IIAs could look like. This on the one hand includes questions that will arise as a consequence of the interplay between public international law and EU law. On the other hand, this also concerns the improvements envisaged by the European institutions based on the documents just mentioned. In order to do so, first a short introduction on the status quo ante Lisbon, i.e. the role mostly the EU Member States played in this field of law before the Treaty of Lisbon entered into force (infra II.). Then, the status quo will be addressed by discussing the effects Treaty of Lisbon on the competences and the attempts of the EU and its Member States to avoid these consequences (infra III.). Considering the new legal framework, the author seeks to show the practical difficulties the internal allocation of competences between the EU and its Member States - which the author argues is shared between the EU and its Member States - has for future EU IIAs (infra IV.). Based on these elaborations, the author discusses how future EU IIAs and in particular ISDS mechanisms might look like (infra V.) and then conclude with some final remarks (infra VI.).

FULL ARTICLE HERE

CHAPTER IV
STRENGTHENING THE ROLE OF STATES

Section I - Treaty Interpretation

Delegating Interpretative Authority in Investment Treaties: The Case of Joint Commissions

Prof. Dr. Anne Aaken
University of St. Gallen

Abstract

ISDS is at a crossroads and many alternative solutions have been proposed for reforming the system. One has been neglected in the discussion: the role of joint commissions of the state parties resolving certain problems in investment treaties. This alternative ‘withdraws’ interpretative authority from tribunals and directs it to state agencies; tribunals gain interpretative authority only as a default rule. In order to answer the question of whether this alternative is viable and extendable, this contribution draws on rationalist approaches for answering the question of why and to whom interpretation of investment treaties should be delegated. The current system of ISDS is used as a benchmark against which other possibilities of outsourcing interpretation are judged on certain criteria (credibility of commitment and relevant expertise). A comparative analysis between this solution and the current delegation of interpretation to arbitral tribunals is offered.

FULL ARTICLE HERE

Reform of Investor-State Dispute Settlement: Lessons From International Uniform Law

Assistant Professor Joshua Karton
Queen’s University, Faculty of Law

Introduction

This article is organized around three “questions asked” with respect to Investor-State Dispute Settlement (ISDS). For each, it describes the “answers” yielded by the experience of the international uniform law movement, and proposes how the insights gained might be put into practice in ISDS. The first two questions are doctrinal in character. Part II poses the question: what degree of consistency between ISDS tribunals should be the goal? Part III asks: what should be the role of precedent in a decentralized, non-hierarchical interpretive community? On both of these issues, the international uniform law literature provides doctrines that are both normatively attractive and feasible in ISDS.

The third question is more practical. Part IV asks: which non-binding aids to interpretation are most effective in promoting quality and consistency? A wide range of interpretive aids exist for various international uniform law instruments, providing an opportunity to identify best practices. In general, the international uniform law experience shows that substantial improvements in consistency and quality of decision-making can be realized even without the establishment of centralized administrative or appellate bodies.

Footnotes omitted from this introduction.

FULL ARTICLE HERE

Which is to be the Master?: Extra-Arbitral Interpretative Procedures for IIAs

Professor Michael Ewing-Chow
Junianto James Losari
Centre for International Law (CIL)

Abstract

Certainty and clarity in the law is critical. Unfortunately, most International Investment Agreements (IIAs) were drafted with vague language that allows for multiple reasonable interpretations of their provisions.

The textual interpretative process is usually triggered by investors requesting Investor-State Dispute Settlement (ISDS). The case brought before
the Permanent Court of Arbitration between Ecuador and the United States in which Ecuador requested the interpretation of a clause in the Ecuador-US BIT through state-to-state arbitration highlights the possibility of yet another, albeit rare, interpretative procedure. Both these methods produce interpretations that are not binding on future tribunals though ISDS awards are often enough referred to by other tribunals, and this suggests that the interpretation carries weight even if it is not understood to be de facto binding. Even as precedents with limited persuasive authority, these interpretations are often binary and usually only enough to decide the case before them and therefore represent less than optimal methods of systemic interpretation.

As an alternative to these arbitral methods of interpretation, the authors seek to explore the extra-arbitral methods of interpretation provided in IIAs, either explicitly such as the well-known joint interpretation procedure in NAFTA Article 1131(2) or implicitly through the incorporation of the customary rules of interpretation in international law. Then, the authors explore how such interpretations should be received by arbitral tribunals and how they could affect the interpretations of the relevant IIA.

The authors believe that these extra-arbitral alternative interpretative procedures could be useful in two ways. First, states would not feel bound by obligations that they did not envisage when they drafted the IIA. Second, the process of attempting to come up with an interpretation freed from the limitations of a binary adjudicative process could help develop an "epistemic community" that would be able to think about the issue in a more multifaceted way.

Keeping Interpretation in Investment Treaty Arbitration 'on Track': The Role of States Parties

Tomoko Ishikawa
Waseda Institute for Advanced Study

Introduction

Recent investment arbitration cases suggest a tendency towards an ever-broader subject-matter jurisdiction of tribunals over disputes between investors and the host state. Firstly, in a series of cases bearing on government debts/debts of a state owned enterprise, tribunals confirmed that security entitlements deriving from sovereign bonds, and rights under derivative contracts, fall within the scope of an 'investment' covered both by Article 25(1) of the ICSID Convention and the relevant investment treaties: Abaclat v. Argentina, Ambiente v. Argentina and Deutsche Bank v. Sri Lanka.

Although cases on public financial instruments are not new in investment arbitration (e.g. Fedax v. Venezuela and CSOB v. Slovak Republic), the debt instruments at issue in the former category of cases are distinguished from those in the latter category, because for such debt instruments, the host state stood on an equal footing with the creditor in the contractual relationship (as will be examined in Section II). Second, in the recent EDFI v. Argentina case, an ICSID tribunal allowed an investor to 'incorporate' an umbrella clause into the applicable investment treaty via the most-favoured-nation ('MFN') clause in the treaty.

As will be demonstrated in Section IV, the combination of these developments in investment arbitration indicates that now there is a real possibility for allegations of a breach of any obligation of the host state, including that the state undertook as a party to commercial contracts or as a market actor, to satisfy subject-matter jurisdictional requirements. A natural question follows: is this in line with the intention of the contracting states parties to the relevant investment treaty? The existence of the controversies over these cases itself indicates that there may well be situations where such dramatic expansion of the subject matter jurisdiction goes beyond the treaty framework ‘acceptable to both of the State parties’. Against this background, this article addresses the question of what states may - and should - do in order to avoid such consequences.

The structure of this article is as follows. Section II examines the treatment of two issues by recent arbitral tribunals that points to a tendency towards broad jurisdiction in investment arbitration: the scope of the term 'investments' and the scope of the application of an MFN clause. It first provides an overview of the approach of the majority of the Abaclat, Ambiente and Deutsche Bank tribunals on the question of whether the financial instruments at issue qualify as 'investments' under Article 25(1) of the ICSID Convention and the relevant investment treaties, and criticisms of this approach by dissenting arbitrators as well as by scholars (Sections II.1 and II.2). It then examines the approach adopted by the EDFI tribunal to broadening the scope of a treaty through an MFN clause (Section II.3). Section II concludes by arguing that the combination of the interpretation of the term 'investments' and of the/an MFN clause by these tribunals may well result in a dramatic expansion in the scope of subject matter jurisdiction in investment treaty arbitration (Section II.4). Against this background, Section III turns to the examination of the vexing question of whether such consequences are in line with the intentions of the contracting states. It demonstrates the difficulty in finding 'objectified intentions' of the contracting states in investment treaty arbitration, and argues that there are situations where this difficulty/lack of explicit language actually causes 'unforeseen and unacceptable' interpretation by investment arbitration tribunals. Section IV proceeds to examine what states may - and should - do in order to prevent such overly broad interpretations from occurring, focusing on the states' active role in interpreting investment treaties. Bearing in mind the need to respect the investors' legitimate expectations with respect to interpretation and their rights to due process, this article proposes the inclusion of a formal mechanism for issuing 'joint interpretative statements' by the states involved in investment treaties as a way to achieve balance between the interpretive power of the states and the disputing investor's rights to due process.

Full article here
In Search of Consistency and Fairness in Investor-State Arbitration: An "Institutional" Approach to Interpreting the Doctrine of Legitimate Expectations

Uğur Erman Özgür
CEPMLP, University of Dundee

Introduction

This paper attempts to explain issues of fairness and inconsistency in investor-state arbitration with the New Institutional Economics (NIE) framework. It argues that the NIE correlates to international investment regime in two ways: First, municipal institutions are direct determinants in locational decisions of investors. Second, international investment law helps entrenching municipal institutional rights promised to foreign investors. This paper questions whether arbitral tribunals are responsive to institutional settings when they interpret treaty standards. It revisits some of the controversial Argentine cases examining whether arbitral tribunals were sensitive to concrete institutional realities in the interpretation of doctrine of legitimate expectations. The paper shows that, as a result of the tribunals' divergent understanding of institutional and organisational developments in Argentina, there are contradictions between the earlier set of awards including CMS, Enron, Sempra and LG&E, which established host-state obligation by applying the concept of stability, and the Total award, which introduced the concept of "regulatory fairness or regulatory certainty". Consequently, this paper argues that tribunals could be provided with interpretative tools in order to overcome such inconsistencies. It proposes that the NIE could provide a useful framework to strike a fair balance in investor-state arbitration and to promote establishment of consistent arbitral jurisprudence. Consequently, it discusses codification of institutional principles in individual clauses and/or annexes to IIAs as an option for reform.

State-To-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority

Anthea Roberts
London School of Economics, Department of Law

Abstract

Most investment treaties contain two dispute resolution clauses: one permitting investor-state arbitration for investment disputes and the other permitting state-to-state arbitration for disputes concerning the treaty’s interpretation and/or application. Despite this duality, the potential role of state-to-state arbitration, and its proper relationship with investor-state arbitration, have largely been ignored. However, recent cases, including Peru v. Chile, Italy v. Cuba and Ecuador v. United States, demonstrate the need to examine the potential and limits of this form of dispute resolution and to consider its implications for the hybridity of the investment treaty system as a whole.

One reaction to the re-emergence of state-to-state arbitration has been to view it as a dangerous development that threatens to infringe upon investors' rights and to re-politicize investor-state disputes. This has led some to suggest radically curtailing the scope and application of state-to-state arbitration in favor of investor-state arbitration. This Article argues that these attempts are inconsistent with the text, object and purpose, and history of investment treaties. The co-existence of these two forms of arbitration without a clear priority
mechanism reflects the system’s essential hybridity and cannot be wished away. This duality helps to demonstrate that the goals of investor protection and the depoliticization of investor-state disputes are important, but not absolute.

Instead, the re-emergence of state-to-state arbitration represents an important step toward a new third era of the investment treaty system in which the rights and claims of both investors and treaty parties are recognized and valued, rather than one being reflexively privileged over the other. The investment treaty system has evolved from its first era, which focused exclusively on states’ rights and state-to-state arbitration, to its second era, which focused primarily on investors’ rights and investor-state arbitration. Instead of being an illegitimate or regressive development, the re-emergence of state-to-state arbitration represents a permissible and potentially progressive mechanism by which treaty parties can re-engage with the system in order to correct existing imbalances and help shape its development from within.

More generally, the co-existence of investor-state and state-to-state arbitration requires a hybrid theory about the nature of investment treaty rights and the allocation of interpretive authority. This Article argues that: investment treaty rights should be understood as being granted to investors and home states on an interdependent basis, such that either-but usually not both—may bring arbitral claims; and interpretative authority should be understood as being shared between the treaty parties, investor-state tribunals, and state-to-state tribunals. This hybrid theory has the potential to help resolve other controversial issues within the field.


Section II - Revising Treaty Language

Reform of Investor-State Dispute Settlement: the US Experience

Karin L. Kizer
Jeremy K. Sharpe
U.S. Department of State

Introduction

By drawing on the U.S. experience with investor-State dispute settlement, the authors’ comments focus on how reforms can be achieved through the negotiation of agreements. The authors will not deal separately with alternative dispute resolution methods, which offer a viable avenue for resolving disputes in addition to arbitration (particularly for investors seeking to continue their investments in the host State), and are encouraged in all U.S. international investment agreements.

Similarly, the authors will not delve into broader institutional reforms, such as the introduction of an appellate mechanism or the establishment of a standing international investment court. In this paper, the authors will touch briefly on several significant developments concerning how the United States structures its IIAs. These reform efforts might prove useful to other States that are considering reforming their own investor-State dispute settlement mechanisms.

Footnotes omitted from this introduction.

Full article here

Liberalization or Litigation? Time to Rethink the International Investment Regime

Simon Lester
WorldTradeLaw.net

Summary

Private investment is the great driver of economic growth. Despite this positive economic impact, however, there are sometimes objections to investment when it comes from foreign sources. These objections are misguided. Aside from occasional national security concerns, foreign investment offers all the same benefits as investment from domestic sources. A liberal and open policy toward foreign investment is clearly the optimal one. Governments should allow foreign companies to invest in the domestic market and should also allow domestic companies to invest abroad.

The United States has used international trade and investment agreements to promote foreign investment. However, if we examine the actual obligations in these agreements, we find the rules are not always about liberalization as it is usually understood. Rather than simply encouraging and welcoming foreign investment, and treating it like domestic investment, many of the rules are designed to give special legal protections to American companies that invest abroad. The United States is in the process of negotiating investment rules in several of its trade initiatives and is also considering new investment treaties. This recent activity in the area of investment rules provides an opportunity for reevaluation.

The current rules are not well calibrated to liberalizing foreign investment. Instead of offering a simple and direct policy of liberalization, they incorporate vague legal principles that provide numerous opportunities for litigation, and in doing so they undermine the more basic principle of treating foreign and domestic investment equally. If international rules are to be used at all in this area, a focus on nondiscrimination, and a more flexible legal framework, would be preferable to the existing system.

CATO Institute Policy Analysis No. 730 July 8, 2013 - Republished with permission.

Full article here

Elizabeth Boomer
MIDS

Introduction

This paper attempts to identify model treaty language for international investment agreements, with the particular goal of rethinking the Investor-State Dispute Settlement (ISDS) regime. Since IIID's 2004 model investment agreement, and informed by UNCTAD's Investment Policy Framework for Sustainable Development and the COMESA Common Investment Area Agreement, a movement toward incorporating sustainable development into investment treaty language is emerging. In addition, many arbitral tribunals have rendered awards that give states further insight into what provisions they could safely include in a treaty to preserve policy space and allow for a careful balancing of investor rights, public policy, and State obligations in a manner that is legitimate, transparent and accountable.

The framework, analysis and accompanying model text and commentary focus on recent scholarly writings and arbitral awards to rethink the rights and obligations of States and investors in the ISDS regime. The analysis is also timely as more than one third of the world's existing BITs will be up for termination or renegotiation by the end of 2013, as Trans-Pacific Partnership negotiations continue to add new members, and as the European Union opens negotiations on its investment treaties with the United States, Canada, and China.

The proposed model treaty language offers clauses designed to promote sustainable development while encouraging investment by addressing the potential importance of the preamble, definitions, the level of protection offered against expropriation, the applicable national treatment standard, the importance of the substantive minimum standard of treatment, the scope of the most-favored nation clause, home state obligations, investor-state dispute settlement provisions, the potential importance of exceptions, the use of counterclaims, and the potential creation of a cooperation commission.

This is perhaps unsurprising. The International Centre for the Settlement of Investment Disputes (ICSID) was, in 1966, expected to derive its jurisdiction from specific contractual agreements to investor-state arbitration. Indeed, the Preamble to the ICSID Convention expressly recognises that "while [international investment disputes] would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases".

In other words, international investment disputes were to be the exception, and domestic settlement of such disputes the norm. That anticipated context has been exploded. Instead we have witnessed a vast proliferation of bilateral investment treaties (BITs) and investment chapters of free trade agreements (FTAs) which - in place of international arbitration by specific agreement - have supplied arbitration without privity. Arbitration without privity has in turn become a standard mechanism - sometimes in addition to and sometimes in replacement of specific arbitration agreements - for the resolution of foreign investment disputes.

The author asks whether developed countries should consider reintroducing the exhaustion rule to ISDS claims by investors of other developed countries. His response is that they should, but only if exhaustion rules are applied in a more modern form, which required investors to prosecute, and also empowered domestic courts to rule upon, international investment claims by applying BIT standards as well as domestic law rules.

Restricting the Scope of International Investment Agreements as a Means to Set Limits to the Extent of Arbitral Jurisdiction

Dr. Mara Valenti
Università degli Studi di Milano

Introduction

Investor-State Dispute Settlement (ISDS) has been one of the major achievements of international law, especially if one looks at it from the perspective of the status of the individual according to international law. The power to initiate an arbitral proceeding directly against the host State has become a strong tool in the hands of foreign investors around the world.

In the field of the protection of human rights, we may find a similar right of access to an international jurisdiction. Yet such a right remains subject to certain conditions, which highlight the traditional attitude of States towards adjudication.

Back to the Future: Contemplating a Return to the Exhaustion Rule

Daniel Kalderimis
Chapman Tripp

Introduction

The so-called "backlash" against investor-state dispute settlement (ISDS) has been well-documented. The extent and validity of dissatisfaction with ISDS, and the investment treaty arbitration (ITA) system of which it is the operative mechanism, remains a hotly contested subject. This paper does not delve into these debates, but takes for granted that the ITA system, having developed apace over the past two decades, is undergoing a period of reappraisal - which is involving intense scrutiny from various quarters as to its conceptual foundations, normative basis, substantive nature, and internal processes. In other words, the honeymoon is well and truly over.
exhaustion of the domestic remedies rule, which is typical of many treaties on the protection of human rights, well illustrates the opinion that the primary responsibility for the ascertainment of an alleged violation of human rights lies on States and their organs.

ISDS, on the contrary, has been originally conceived as a direct remedy of redress for the aggrieved investor. It is symptomatic, under this respect, that the ICSID Convention requires the contracting parties to waive their right to exercise diplomatic protection on behalf of their nationals who have initiated a proceeding under the Convention.

In other fields of international law there has been quite recently a proliferation of courts and tribunals established to ascertain the alleged violations of the treaty concerned. Let’s take international trade law and the dispute settlement procedure administered by the WTO, for example.

**Full article here**

**Limiting Investor Access to Investment Arbitration - A Solution without a Problem?**

*Amal Bouchenaki*
*Herbert Smith Freehills LLP*

*Liang-Ying Tan*
*Gibson Dunn*

**Abstract**

The investor-state dispute settlement (ISDS) regime, premised upon the right of investors to bring arbitration proceedings directly against a host state pursuant to an investment treaty between the host state and the investor’s home state, has been credited with making a significant contribution to the peaceful - and potentially more economical - settlement of investment disputes, by doing away with the need for diplomatic protection and thus depoliticizing such disputes. However, as such treaties and claims proliferate, and in particular as awards have been rendered that are perceived to infringe upon states’ sovereign power to legislate on issues of public policy, or to award unrealistic and unfair damages to claimants with insufficient regard to national security and other extraordinary extenuating circumstances (as in the Argentine crisis), the pendulum of public opinion in some sectors has swung back in favor of limiting investor access to these arbitration proceedings.

This paper examines the extent to which there has been a discernible trend of limiting investor access to ISDS through various means over the past few decades, including (i) evolving investment treaty language to specifically exclude certain substantive claims from arbitration, (ii) statements and acts of States in refusing to abide by awards or in withdrawing from ISDS altogether, and (iii) the findings and reasoning of arbitral tribunals in ISDS awards as regard both jurisdictional bars to arbitration and the interpretation of substantive protections.

In analyzing the current mechanisms in place to limit investor access, we will evaluate the efficacy and other consequences of these mechanisms vis-à-vis their intended outcomes, and assess whether they adequately respond to criticisms that ISDS has become too easily accessible by investors with unmeritorious claims, resulting in onerous burdens of time and expense on respondent States, and even worse, unjustifiable awards.

In this regard, we will analyze existing limits including: (i) treaties excluding claims relating to certain subject matters, such as claims concerning financial institutions (Canada-Jordan BIT), claims relating to intellectual property rights and to prudential measures regarding financial services (China-Japan-Republic of Korea investment agreement), claims arising out of measures to protect national security interests (India-Malaysia Comprehensive Economic Cooperation Agreement), claims limited to disputes over compensation amount (Albania-China (1993), Bulgaria-China (1989), Belgium-Poland BIT (1987)); (ii) the definition of an "investor", including denial of benefits clauses, which exclude investors who do not have substantial business activities in their alleged home State, and issues of dual nationality; (iii) the requirement to exhaust local remedies and other preconditions to arbitration; and (iv) any other jurisdictional/admissibility limits.

We will also evaluate, by surveying awards that have reviewed the issue of investor access (both where access has been denied and where limits have been found not to apply), whether discontent with the existing limits to investor access has reached the level of endangering the existence of the system as a whole, or whether the more extreme reactions can be attributed to vocal outliers that paradoxically show the healthy development of ISDS specifically as investment-exporting states start receiving significant foreign investment themselves. The playing field has significantly changed from the time when ISDS was dominated by investors from the North-Western hemisphere bringing claims against host states in the developing world.

Today, as more disputes are brought against the US and EU member states, will one see a more robust implementation of the limits to investor access? The question then is, if access can be effectively policed through more robust implementation of the existing limits, are new and distinct limitations called for? Finally, if the problems with the system are not in the first place fundamentally attributable to excessive ease of investor access, then the solutions may not be to limit investor access; we explore how, in light of the legal theories in place, the existing limits (if they are truly insufficient) can be made more effective while still preserving the values of the system - and the system itself.

Footnotes omitted from this introduction.

**Full article here**
Exclusion From Within the Ambit of a Protected Investor, a Fair Price to Pay for the Act of Abusive Treaty Shopping?

Vidushi Gupta
Dr. Ram Manohar Lohia National Law University, Lucknow

Abstract

The investor-state dispute settlement mechanism, which is a unique feature of Bilateral Investment Treaties (BITs) is often described as a double edged sword. It gives investors the right to bring a claim against a state for breach of treaty provisions, thereby giving them direct means to seek redress. On the other hand, such a mechanism may also open the floodgates for frivolous claims which may result in a waste of public funds, and threaten the state’s power as a sovereign to regulate and to implement reforms within its territory.

In some cases, investors seek treaty protection by restructuring their investment through third countries for the various reasons. Such restructures are at least partly influenced by the aim of gaining the right to initiate an investor state dispute under the garb of legitimate corporate nationality planning. Such an act is in essence a paradox to the purpose of BITs which is to secure a stable legal environment for international investment. Thus, it is imperative to exclude such investors from obtaining protection under the scheme of the treaty.

This paper deals with the need to limit investor access to the investor-state dispute settlement mechanism in light of situations where protection is sought through the practice of treaty shopping. Various drafting techniques such as the inclusion of a restrictive definition of an ‘investor’ and/or a ‘denial of benefits’ clause to exclude purported investors from within the ambit of BITs will be examined in this paper. Further, through an analysis of cases, the paper identifies circumstances under which purported investors have not been permitted to bring a claim against the host state, despite the absence of express mention of such exclusion in the words of the treaty. The author seeks to offer a holistic view of the situations in which there can be a restriction on the range of covered investors to protect the object and purpose of the treaty from being violated.

A Few Pragmatic Observations on How BITs should be Modified to Incorporate Human Rights Obligations

Professor Patrick Dumberry
Gabrielle Dumas-Aubin

Faculty of Law, University of Ottawa

Abstract

The authors observe that while international law, as it now stands, does not impose any direct legal obligations on corporations (except for jus cogens norms), nothing prevents countries from signing BITs imposing human rights obligations upon corporations. They examine concretely how such BITs could be drafted (and existing ones be amended), including where non-investment obligations should be located in BITs; what type of language should be used; which international instruments should be referred to in BITs and why; and which enforcement mechanisms should be adopted.

This article reflects facts current as of February 2012. The article is a modified version of an article originally published by the authors: P. Dumberry & G. Dumas-Aubin, "How to Impose Human Rights Obligations on Corporations under Investment Treaties?", 4 Yearbook on International Investment Law and Policy, 569-600 (2011-2012).

On Genealogy of Proposals to Reform Investor-State Arbitration

Dr. Ahmad Ghouri
University of Turku, Faculty of Law

Abstract

Investor-State arbitration cases involving public interest regulation have been understood as struggles between advocates of the free movement of investment capital, such as multinational corporations, and environmental or human rights interest groups. The critical questions have been framed as follows: should the competing values and interests in public interest regulatory disputes be reconciled through investor-State arbitration? Should arbitrators be permitted to incorporate non-investment international norms into investment law and interpret investment treaties by applying international law generally? Is the development of international law better served by States, as representatives of their peoples, determining the balance of protection and costs by concluding consensual agreements through political processes?

These are questions of institutional competence and democratic legitimacy, the allocation of decision making authority among States and the various available investor-State arbitration rules and institutions. The manner in which these questions have been addressed in the existing literature suggests a genealogy based on the following three “models” of how public interest issues might be integrated into investor-State arbitration: 1) the contract model; 2) the institutional capacity building model; and 3) the arbitral activist model. The primary argument of this paper is that the first two models, namely the contract model and the institutional capacity building model, eventually fall-back on the third model, namely the arbitral activist model, implicating arbitral activism and necessitating that the investor-State arbitral system develops indigenous principles of systemic self-governance.
Section III - State-State Procedures and a Standing Investment Court

The Abiding Role of State-State Engagement In the Resolution of Investor-State Disputes

Theodore R. Posner
Marguerite C. Walter
Weil, Gotshal & Manges LLP

Introduction

In Part I of this paper the authors discuss the role State-to-State interaction can play when the host State in an investment dispute resists enforcing an arbitral award against it or resists going to arbitration in the first place.

In Part II, the possible interplay between State-State dispute settlement mechanisms and investor-State dispute mechanisms and, in particular, how the former might be used to advance an investor's objectives in the latter is discussed. The paradigm we have in mind here is a State-State dispute proceeding in the WTO, for example, that serves to clarify a particular obligation (say, under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights), which clarification then becomes relevant in other contexts (e.g., because of the incorporation of "international law" into BITs and other treaties) and is used by an investor in an investor-State dispute settlement proceeding under a BIT.

In Part III addresses possible uses of State-State dispute settlement as an alternative to investor-State dispute settlement. Although it may seem counter-intuitive, it is possible to envision scenarios in which an investor would prefer to have a dispute resolved through State-State dispute settlement even though investor-State arbitration is an option, and even though the investor inevitably will have less control over the State-State process. This might be the case where there is a persistent pattern of harmful treatment of foreign investments, but where the size of the harm to each individual investor is relatively small, making it difficult for aggrieved investors to seek resolution through investor-State arbitration. It may also be the case if the investor is impeded from entering a market to which it should have access pursuant to a BIT (in which case, quantifying damages might be impractical), or the investor wants to stay in a market and would prefer removal of a problematic measure to payment of monetary damages, or fears retaliation if it were to bring a claim on its own. We project such scenarios to become more common with the advent of BITs between major commercial actors with significantly different views on the role of government, such as an eventual U.S.-China BIT.

Full article here

Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States

Anthea Roberts
London School of Economics, Department of Law

Introduction

Part I sets out the theoretical framework, examining the nature of investment treaties, the interpretive balance of power between treaty parties and tribunals, and the likelihood of strategic interactions between these actors. Part II turns to legal doctrine to consider how analysis of subsequent agreements and practice can help treaty parties and tribunals to engage in a constructive dialogue about interpretation. It examines why and how this evidence is applied in public international law, including human rights law, so as to develop a theory about its use and its limits in the investment context. Part III takes up the practical challenge of providing an illustrative list of the types of subsequent agreements and practices most readily available in the investment context. This list aims at providing a road map for states wishing to generate and plead, and tribunals wishing to identify and assess, such evidence.

This article is reproduced with permission from the April 2010 issue of the American Journal of International Law © American Society of International Law. All rights reserved. www.asil.org

Full article here

In Search of aRoadmap - Lessons for the ISDS Regime in the U.S. Experience of Lump-Sum Claims Settlement Processes

Timothy J. Feighery
Arent Fox LLP

Introduction

In considering reform of the investor-State dispute settlement (ISDS) regime, a fundamental question aside from the question of whether reform is needed, and if so what form it should take -- is whether that reform is likely to come from within (in the form of proactive "self-policing") or without (by outside pressure from a more attractive alternative). Generally, this forum represents the former; I would like in this particular paper to consider the latter. The very name, "investor-State dispute settlement," indicates the direct settlement between investors and the States in which they invest, whether that settlement is through arbitration or some other form of dispute resolution. ISDS has become so much a part of the international legal landscape over the past few decades that it is sometimes hard to recall that its original purpose was to replace an existing customary international law regime - the law of diplomatic protection - that worked well enough in the context of investment disputes to have predominated in this area from the latter part of the eighteenth century well into the twentieth century.

Full article here
Permanent Investment Tribunals: The Momentum is Building Up

Omar E. Garcia-Bolivar
BG Consulting, Inc

Introduction

One of key elements of international investment law is the dispute settlement mechanism where exceptionally under the standards of public international law disputes can be submitted against States in international fora by parties other than States themselves.

That mechanism of dispute settlement has been considered in and by itself as one of the main advantages of international investment law as it depoliticizes potential disputes between investors and host States by providing a neutral venue to settle the differences. But although arbitration has filled the gap of the venue where investment disputes can be settled, the neutral venue where disputes between investors and States are to be settled does not necessarily have to be arbitration.

The Challenges of Creating a Standing International Investment Court

Eduardo Zuleta
Gómez-Pinzón Zuleta Abogados S.A.

Abstract

This paper explores the challenges of adding a standing international investment court - as suggested in UNCTAD’s “Reform of Investor-State Dispute Settlement: In Search of a Roadmap” - to the existing investment dispute resolution system. The author addresses challenges on the elaboration of a multilateral treaty to establish the Court, issues on impartiality and independence of adjudicators, as well as concerns for predictability, party autonomy and transparency.

CHAPTER V - FURTHER ADVANCING THE REFORM OF ICSID

Achieving a Faster ICSID

Adam Raviv
Wilmer Cutler Pickering Hale and Dorr LLP

Abstract

This article examines the length of ICSID arbitrations as they are currently practiced and analyzes why they take as long as they do. It reviews each stage of an ICSID proceeding and offers a variety of suggestions for how to speed them up, focusing on amendments to the ICSID rules and institutional practices. If you don’t appreciate the irony of a very long article that decries very long cases, the author provides a summary of his recommendations.

Streamlining the ICSID Process: New Statistical Insights and Comparative Lessons from Other Institutions

Professor Joongi Kim
Yonsei Law School

Introduction

A central issue with the current investor-State dispute settlement system (ISDS) concerns the considerable time required for cases to reach a conclusion. The interval from the request for arbitration until the rendering of an arbitral award typically takes years, with several cases lasting over a decade.

For ICSID cases, parties have been known to then bring annulment proceedings not only to challenge awards but also to further prolong the process in the hopes of forcing a settlement. Excessive delays can undermine the credibility of the system to the detriment of all parties involved. Protracted legal contests burden states, particularly when they face questionable claims and when they lack sufficient resources, and deny recoveries for investors with legitimate grievances, exacting enormous costs for both sides.

This article will first offer in-depth analysis of the various stages of the arbitral proceedings at ICSID, the primary venue for ISDS. It provides comprehensive new statistical information on key stages that was previously unknown. It then examines the dispute settlement process of other international institutions to glean insight from a comparative perspective as to what might be considered to streamline the process so that parties can receive more expeditious awards.

Fragmentation and Harmonization in the ICSID Decision-Making Process

Roberto Castro de Figueiredo
Tauil & Chequer Advogados Associado a Mayer Brown LLP

Introduction

Since the end of the 1990s, international arbitration has become one of the main mechanisms for the settlement of disputes between foreign investors and host States. This phenomenon seems to be directly linked to the proliferation, in the same period, of international treaties entered into by States for the protection and promotion of foreign investments, most of them bilateral investment treaties, but also bilateral and regional free trade agreements containing investment protection rules, such as the North American Free Trade Agreement -
NAFTA, and sectorial multilateral investment treaties, such as the Energy Charter Treaty. In addition to the substantive rules of protection, most investment treaties grant foreign investors the option to pursue their claims against host States before international arbitral tribunals as an alternative to recourse to local courts and to diplomatic protection afforded by the foreign investors' home States. As a result, the number of disputes between foreign investors and host States referred to international arbitration has increased dramatically in the last years.

The investment arbitration phenomenon brought, on the other hand, new challenges to international arbitration practice, rooted in its commercial dispute tradition. Arbitral tribunals constituted for the settlement of investment disputes became accountable to a much wider audience. Differently from the traditional commercial arbitration, where the decisions rendered by arbitral tribunals have little, if any, publicity and their relevance is, in most cases, essentially limited to the disputing parties, the overwhelming majority of decisions rendered in investment arbitration are made public and their content has consequences not only to the disputing parties, but to a worldwide community. In investment arbitration, arbitrators have to be concerned not only with the outcome of their decisions and their consequences for the disputing parties, but also, and perhaps more relevant, they must give much more attention to how the decisions are reached. The decisions rendered in investment disputes contribute directly to the consolidation and understanding of the relatively new field of international investment law.

Footnotes omitted from this introduction.

Full article here

ICSIAD Annulment Standards: Who Has Finally Won the Reisman vs Broches Debate Two Decades Ago?

Nikolaos TsoLakidis
White & Case LLP

Abstract

From the very first cases, Klöckner I and Amco I, prominent scholars and practitioners have debated and commented the scope of Article 52 and its actual application by ad hoc Committees. The debate continues. In fact, ICSID itself recently released a background paper on its annulment process in response to a request by the Solicitor General of the Philippines. This essay will reengage with the spirited debate between Professor Michael Reisman and Aaron Broches of two decades ago. It will try to assess, by reference to subsequent decided cases, which analysis has been more successful or whether both have been ignored. Finally, this essay will briefly address whether and to what extent the perceived shortcomings of ICSID's annulment process need to be remedied.

Footnotes omitted from this introduction.

Full article here

ICSIAD Annulment Reform: Are We Looking at the Right Problem?

Mallory B. Silberman
Arnold & Porter LLP

Introduction

Professor Schreuer noted in 2009, "[i]n every published annulment decision to date, ad hoc committees have stressed th[e] distinction [between annulment and appeal]. They have stated repeatedly that their functions are limited and that they do not have the powers of a court of appeal . . . . Committees have insisted that a decision to annul had to be based on one of the five reasons listed in Article 52(1) and they could not review the awards' findings for errors of fact or law." Committees also have stressed the importance of evaluating each claim against the particular Article 52(1) standard invoked, finding that "where a party objects to any particular aspect of a tribunal's process or decision, it must relate that objection to a specific ground for annulment under Article 52(1), explaining how and why the objection falls within the specific ground invoked," and that "[t]he fact that a particular set of facts may have a bearing on more than one ground of annulment does not, as such, render any error in support of any one of those grounds of annulment any the more manifest."

Naturally, there is room for debate regarding whether particular committees or annulment decisions have adhered to these principles sufficiently. But the "systemic problem" with annulment lies not so much in (arguably) unmeritorious decisions to annul, but in the submission of patently unmeritorious claims, which present significant costs that the parties and the system must bear without any real relief. The remainder of this article (1) details the costs associated with annulment petitions; and (2) examines potential avenues for reducing the number of unmeritorious claims, thereby reducing the costs borne by the parties and the system.

Footnotes omitted from this introduction.

Full article here

The trembling legitimacy of the ICSID annulment system in the light of decisions by Ad Hoc Committees vis-à-vis the Ad Hoc Committee decisions

Vanessa Giraud Martinelli
Mezgravis & Asociados

Introduction

Since 2001 there has been a considerable increase in annulment proceedings. According to the ICSID Convention, the annulment is an extraordinary remedy designed for a limited scope of review of five specific grounds provided under Article 52 of the ICSID Convention, which sets the general procedural framework for annulment proceedings. The Ad Hoc Committees are intended to review solely the arguments for annulment filed by the petitioning...
party and must only decide on aspects of five specific grounds of the Tribunal award. However, the extensive interpretations of Ad Hoc Committees are in some ways stretching the purposes of the ICSID system - such as legitimacy and adequacy - to the limit. For instance, one Ad Hoc Committee exceeded its mandate by criticizing the grounds for the award or the conduct of the original Tribunal and another one attempted to lecture the arbitral tribunal on law. Such behavior on the part of the Ad Hoc Committees undermines the system and threatens the enforceability of the award. Furthermore, Ad Hoc Committees have identified errors in the reasoning of the award yet the awards have not been annulled. These findings put the credibility of the ICSID system itself at risk, since, after all, the question is to what extent must the principle of finality be safeguarded?

**CHAPTER VI - AN APPELLATE SYSTEM**


Barton Legum
Dentons

**Introduction**

I count myself among the critics of the first round of proposals for an appellate mechanism for investment disputes. When the idea was first formally floated in 2003 or so, I published articles noting the many difficulties standing in the way of an appellate mechanism and noted that the case had not yet been made for its need.

Two important initiatives today provide a different context for an appellate mechanism. Together, the proposed Trans-Pacific Partnership and EU-US free trade agreement will join over half the world’s gross domestic product under agreements that are likely to resemble each other in key respects. While I am not yet persuaded that an appellate mechanism is needed, I argue in this short opinion piece that these two initiatives provide a context in which a second look at an appellate mechanism may be merited.

**Appellate Review in Investor State Arbitration**

Dr. Eun Young Park
Kim & Chang

**Abstract**

Because investor-state arbitral tribunals are created on an ad hoc basis for the purpose of resolving a single dispute regarding a specific investment treaty, arbitral tribunals may reach inconsistent decisions on issues which at the outset appear similar. While in some cases these diverging results are attributable to meaningful factual differences or differing treaty provisions, in a growing number of cases separate tribunals have reached contradictory results that cannot be explained by factual or legal differences in the claims.

This phenomenon can be clearly seen in the series of investor-state arbitrations against Argentina in which Argentina raised the defense of necessity arising from Argentina’s financial crisis. The tribunals in these arbitrations reached significantly different interpretations on the application of the necessity defense despite facing virtually identical factual circumstances. Further, several of these awards reflecting irreconcilable differences in their interpretation of the necessity defense were upheld in annulment proceedings.
Such inconsistencies have caused a loss of confidence in the investment arbitration system and have contributed to calls for the establishment of a centralized appellate review process for investment arbitration awards. While such an appellate review process may be necessary in order to promote consistency and predictability in legal interpretations, such process would need to be devised so as not to undermine the basic underlying pillar of investor-state arbitrations, namely party autonomy.

Full article here

Reform of the investor-State arbitration regime: the appeal proposal

Gabriel Bottini
Arbitrator and Advisor on Issues of Int’l Law and Int’l Litigation

Introduction

The discontent with the current functioning of investment arbitration is hard to measure. And whether the criticisms that are generally leveled against this type of arbitration are justified or not is, at least to some extent, in the eye of the beholder. But probably even the most optimistic views of investment arbitration see room for improvement, particularly in certain areas. Further, after the first decade of (increasingly) intense recourse to investment arbitration, the view that its most acute problems were due to the system’s infancy and would somehow resolve themselves over time, is now (more) open to question. Among the different ideas that have been put forward to resolve these problems, the creation of some sort of appeals procedure is probably the most consequential one, short of a complete overhaul of the system.

The availability of appeals against decisions of international tribunals is nothing new. Neither is the discussion about the desirability to create an appeal mechanism in the specific context of international arbitration or in the more specific one of investment arbitration. But despite several initiatives in the recent years by some governments, in particular the U.S., and arbitral institutions such as ICSID, no appeals mechanism has so far been created or indeed appears imminent. This is so even if, for example, several Free Trade Agreements concluded by the U.S.-CAFTA-DR, Chile, Colombia, Korea, Morocco, Oman, Panama, Peru, and Singapore provide for negotiations to be held between the parties “to establish an appellate body or similar mechanism to review awards”. Yet, as recent publications by UNCTAD, the OECD and other institutions show, concerns about the functioning of investment arbitration linger in many quarters. Notwithstanding the failure of prior proposals, the creation of an appeal mechanism is still generally suggested as one of the ways to improve the functioning of investment arbitration and strengthen its legitimacy. Further, even more states, including some of the main capital exporting ones, appear to be particularly interested in creating an appellate mechanism as one of the ways to improve investment arbitration.

This paper will first consider the merits of the ICSID 2004 Proposal on an appeals facility. Secondly, it will discuss whether the creation of an appeal mechanism in international investment law could contribute to address the main concerns recently summarized in UNCTAD’s publication “Reform of Investor-State Dispute Settlement: In Search of a Roadmap”. These concerns, which are considered here in the order set by this UNCTAD publication, include: deficit of transparency and legitimacy; inconsistent and erroneous decisions; lack of independence or impartiality of arbitrators; and cost and duration of arbitrations. Finally, this paper concludes by suggesting that some of the recurrent objections to the creation of an appeal mechanism are based on questionable assumptions, and that this mechanism could considerably contribute to the legitimacy of investment arbitration.

Full article here

Introduction of an Appellate Review Mechanism for International Investment Disputes - Expected Benefits and Remaining Tasks

Prof. Dr. Jaemin Lee
School of Law, Seoul National University

Introduction

For a long time, international dispute settlement proceedings have not been receptive of the idea of introducing an appellate mechanism. For instance, the legal proceedings at the Permanent Court of International Justice and the succeeding International Court of Justice have not had an appellate mechanism in place. Neither do international arbitration proceedings between two sovereign states conducted under public international law. In fact, the World Trade Organization (“WTO”) dispute settlement mechanism and some of recent Free Trade Agreement (“FTA”) dispute settlement mechanisms represent rare instances in which an appellate mechanism is introduced in international litigation. As can be seen from the rarity of the prior examples, an appellate mechanism in international dispute settlement proceedings seems to have both pluses and minuses: by way of example, while an appellate mechanism obviously helps ensure the establishment and spread of key jurisprudence, it also translates into mobilization of more time and resources to settle disputes. Also, the introduction of an appellate mechanism would mean increased complexities - both substantively and procedurally - regarding the issues being examined. This reality may pose an additional hurdle to some sovereign states, particularly to those with limited resources and capacity, in terms of participating in international investment arbitration.

Footnotes omitted from this introduction.

Full article here
**Why ICSID Doesn't Need an Appellate Procedure, and What to Do Instead**

Kristina Andelic
University of Ni, Faculty of Law

**Abstract**

Due to the changes that have taken place in the international environment in the last decade, the system for settlement of investment disputes is now, more than ever, subject to public scrutiny, leading to questioning its adequacy to current relations. The further development of this system, as well as its survival, are both at stake. In addressing what should be done, this paper focuses specifically on the ICSID rules. It concludes that there should be no appellate procedure under ISCID, because the lack of confidence in the system is based not on imperfections of the prescribed mechanisms for settlement of disputes, but rather on changed circumstances in economic relations. Considering that in times of crisis there is a greater need for stability of existing institutions, it argues that more attention should be paid to creation of that specific sentiment in the international arena. Changing a functional procedure does not contribute to that cause. As a more appropriate solution responsive to the circumstances, this paper proposes the adaptation of existing procedures in a way that enables a shift towards greater social legitimacy.

© Full article here

---

**CHAPTER VII - INVESTOR-STATE MEDIATION**

**Mediation use in ISDS**

Fatma Khalifa
Egyptian State Lawsuits Authority (ESLA)

**Abstract**

Investor State Dispute Settlement (ISDS) has been largely dominated by arbitration as a means of dispute settlement. The problems encountered by parties in ISDS cases and the concerns voiced by multiple stake holders call for attempting new mechanisms, such as mediation, for settling Investor State Disputes (ISD). Mediation in ISDS is rather a new combination of terms. In this paper the author will first identify mediation (1), compare it to other dispute settlement mechanisms (2), identify the players in the mediation process and the consent of the Parties (3), briefly explain the mediation process (4), and finally conclude by shedding some remarks on the current status and proposals for a way forward.

© Full article here

---

**Enabling Early Settlement in Investor-State Arbitration - The Time to Introduce Mediation Has Come**

Jeremy Lack
Independent ADR Neutral & Attorney-at-Law

Michael Leathes
International Mediation Institute (IMI)

Wolf Juergen Kumberg
Northrop Grumman Corporation

**Introduction**

In October 2012, Rules for Investor-State Mediation were published by the International Bar Association's Mediation Committee. It is suggested that the investor-State arbitral forums find ways to adopt, encourage and enable the IBA Rules, with some important support mechanisms mentioned below, to make mediation a far more practical and attractive option - whether making them part of the Regulations and Rules or operating in parallel alongside them. How can mediation be accommodated into investment treaty dispute resolution, having regard to the particular features of this class of dispute? Are there ways that the special challenges presented by typical investor-State disputes can be addressed through mediation? What further steps would aid parties to achieve just and quick outcomes? The objective of the article is to demonstrate how investor-State disputes can benefit from mediation.


© Full article here

---

**Integrating Mediation Into Investor-State Arbitration**

Professor Nancy A. Welsh
Penn State Law

Professor Andrea Kupfer Schneider
Marquette Law School

**Introduction**

While the current system of investment treaty arbitration has definitely improved upon the “gunboat diplomacy” used at times to address disputes between states and foreign investors, there are signs that reform is needed: states and investors increasingly express concerns regarding the costs associated with the arbitration process, some states refuse to comply with arbitral awards, other states hesitate to sign new bilateral investment treaties, and citizens have begun to engage in popular unrest.
at the prospect of investment treaty arbitration. As a result, both investors and states are advocating for the use of mediation to supplement investor-state arbitration.

This chapter examines the models of mediation that have been shown to be effective, the importance of ensuring that mediation offers something different from the other procedural options available to resolve investor-state disputes, and the mechanisms that increase the likelihood that disputing parties and stakeholders will perceive individual outcomes and the larger system as fair. The chapter also examines the U.S. domestic experience to identify the elements of the mediation process that can be, and have been, made compulsory and the effects of this choice, as well as different approaches for ensuring the quality of the mediation process and its accountability to the disputing parties and other stakeholders. Ultimately, the chapter recommends the integration of a default model of mediation into the investor-state context that begins in a facilitative manner, in order to increase the likelihood of trust-building and information exchange regarding important underlying interests, but also permits both evaluative interventions by the mediator and discussion of relevant legal norms.

The chapter further concludes that if stakeholders’ input is sought and considered regarding mechanisms for the referral of disputes to mediation, some elements of mediation could be made compulsory. More specifically, the dispute resolution clauses in investment treaties could require the parties to participate in an initial meeting to discuss the potential use of mediation or other consensual procedures, with the parties themselves then choosing whether to proceed further, when, and with what process. Finally, the chapter recommends the establishment of a small pool of well-known and well-respected investment treaty mediators who will offer a reasonably strong and pragmatic guarantee of quality in the short-term and engender a heightened perception of trust in the process. These mediators should also possess the temperament and skills to provide the default model of mediation. In the long term, however, evaluation and mentoring must be put into place to permit thoughtful cultivation of both the model of mediation that is best suited for the investor-state context and the next generation of mediators.

This chapter is based on Nancy A. Welsh & Andrea Kupfer Schneider, "The Thoughtful Integration of Mediation into Bilateral Investment Arbitration", 18 HARV. NEGOT. L. REV. 71 (2013).

The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes

Introduction

In June of 2013 UNCTAD released its IIA Issues Note entitled Reform of Investor State Dispute Settlement: In Search of a Roadmap ("Roadmap"). UNCTAD identified concerns with the current investor state dispute settlement system: lack of legitimacy and transparency, inconsistent and erroneous arbitral decisions, concerns about party appointments and undue incentives and the great cost and time intensity of arbitration. While these concerns have received extensive attention in recent years, the growth of investor state arbitration has continued unabated. In 2012 alone 58 new cases were initiated, the highest number yet filed in one year.

The Roadmap sketches out five main possible avenues for reform and suggests as one path increasing resort to alternative dispute resolution (ADR) methods. The proposal that further utilization of ADR be pursued as a path for addressing concerns about investor state dispute settlement follows increasing attention to the possibilities ADR offers and the issuance by the International Bar Association in 2012 of Rules for Investor-State Mediation.

The subject first caught my attention in 2008 when Arthur Rovine asked me to organize a mediation program for the annual Fordham International Arbitration and Mediation Conference. In search of a subject, the idea of exploring the utilization of ADR in investor state disputes, then a relatively unexplored subject, came to mind and was the subject of my session and the genesis of the article that follows. The article outlines the many benefits that a mediation process offers, reviews whether mediation can usefully be employed for investor state disputes and discusses the many unique obstacles that are presented when a state is a party.

This article originally appeared in Revista Brasileira de Arbitragem, vo. 27, jul/ago/set 2010, pgs. 54-67and is reprinted with permission. It is adapted from a chapter entitled Investor State Dispute Mediation: The Benefits and Obstacles, published in Contemporary Issues in International Arbitration and Mediation, The Fordham Papers 2009, Arthur W. Rovine Ed. (Martinus Nijhoff Publisher).

Full article here
CHAPTER VIII - REFORMING FROM WITHIN

The Sixth Path: Reforming Investment Law from Within

Dr. Stephan W. Schill
Max Planck Institute for Comparative Public Law and International Law

Introduction

In this paper the author sketches out a sixth path for investment law reform that is based on a system-interval re-conceptualization of investor-State arbitration as a form of public law-based judicial review. It can be reformed, the author argues, by arbitrators and parties making increasing use of comparative public law methodology that allows them to draw on the experience of more sophisticated systems of public law adjudication at the national and international level without the need for institutional reform to investor-State arbitration. First the benefits of the existing system of investor-State arbitration will be pointed out again, in order to show that investor-State arbitration is an institution worth reforming from within (Part I). In Part II, the basic framework to re-conceptualize investment law as a system of public law and governance and point out shortcomings in the currently prevailing approaches to understanding investor-State arbitration will be laid out. Part III will indicate the methodological consequences of a re-conceptualization of investor-State arbitration as a public law system of governance, namely the need for arbitrators to make increased use of comparative public law in resolving disputes. Finally, in Part IV it will show how public law ideas and comparative public law methodology can be brought into investment arbitration in its present form and why arbitrators have an interest in conforming to these standards even without fundamental institutional reform.

Introduction

After the introduction this note includes five additional sections. Section 2 provides a background fundamental to frame the discussion on the need for conflict management mechanisms. Section 3 focuses on the clarification of the concept. Section 4 presents a preliminary sketch of the key elements to enable governments to operate conflict management mechanisms. Section 5 suggests some basic points that an international agenda could address to enable conflict management mechanisms to further develop, and Section 6 presents some final reflections and conclusions.

Full article here

Investor-State Conflict Management: A Preliminary Sketch

Roberto Echandi
International Finance Corporation, World Bank

Introduction

Investment treaties tend to say nothing, or only very little, about the appropriate standard of review for arbitrating disputes between sovereign states and foreign investors. Most treaties do not address whether states should be afforded any deference in their own assessment of their treaty obligations. Neither do they specify the converse, that state action must be strictly reviewed. They are simply silent and their silence has been interpreted in innumerable ways by different tribunals. This interpretive chaos has generated calls for a unified approach—one that would resolve the uncertain and fragmented status quo, while being sufficiently flexible as to admit the application of different standards of review in different contexts. To some,
the venerable doctrine of the margin of appreciation appears to fit just this bill-a solution finding growing favor among tribunals and commentators, not to mention advocates for respondent states.

This Article challenges the suitability of the margin of appreciation in the adjudication of investment disputes. This judge-made doctrine is famously a product of Strasbourg, manufactured by the European Court of Human Rights ("ECHR"). Its halting import into the global investment regime is only a recent phenomenon. Through comparison to the ECtHR, I suggest that certain key grounds for affording the margin in its original context do not obtain within investment law-calling into question the doctrine’s propriety in its new setting.

Beyond questioning the suitability of the margin of appreciation within ad hoc investment disputes, this Article challenges the broader premise that the problem of fragmented approaches to the standard of review among investment tribunals can be best resolved through judicial recourse to a unified a priori doctrine of deference. As evidenced by the adventures of the margin in several recent arbitral awards, such attempts tend to produce only a pernicious illusion of unity. I argue, instead, that the desired certainty can be achieved only gradually, through judicial practice and dialogue over the medium to long term.


Full article here

By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations

Professor Frédéric G. Sourgens
Washburn University School of Law

Abstract

Much of the criticism of the ISDS system has a common substantive focus: creating better formal international investment law rules. No matter the perspective of the critique, it appears agreed upon that what we need is a different definition of the term "investment," a better substantive grasp of the jurisdictional reach of most-favored-nations clauses, or a rule-based approach to the incorporation of investors in a foreign jurisdiction solely for the purpose of obtaining treaty protection. The perspective of most critiques merely proposes different formal rules rather than questioning that the purpose of the critique is to arrive at such rules. The criticism thus tries to force substantive, rule-based reform either by seeking the redrafting of treaties to reflect the new rules or indirectly by instituting an appeals mechanism that would "harmonize" jurisprudence. This Article submits that these critics do not address the legitimacy problem in investor-state arbitration, they (unwittingly, perhaps) are the legitimacy problem. These critics, the Article submits, lose sight of the purpose of dispute resolution at public international law; submission of public international law disputes to courts and tribunals has always been a balancing act. On the one hand, courts and tribunals must be mindful of the limitations placed upon their jurisdiction by the simple fact that there are no international law courts of general jurisdiction. The default manner in which international legal disputes are resolved, for good or ill, remains "diplomacy," or in the case of disputes with non-state actors, "negotiation." Submission to adjudication or arbitration is the exception from this rule.

As the Article will show, the formalist push of the critics of investor-state arbitration has already done significant damage in several jurisdictional decisions. Tribunals have attempted to use live cases to create or strengthen formal legal rules consistent with the goals of certain critics of investor-state arbitration. Dangerously, their manner of doing so was untenable in light of the record before the respective tribunals. This in turn is doing significant damage to the legitimacy of investor-state arbitration in the eyes of the parties litigating their disputes as a form of dispute resolution. It is this response by tribunals to the critics of investor-state arbitration rather than the ordinary practice of investor-state arbitration which presents the biggest threat to its long term success.

This Article presents as a roadmap to reform that differs from most approaches. It proposes a return to the roots of investor-state dispute resolution as a public international law form of dispute resolution. The International Court of Justice explained that under international law, "there is no burden of proof to be discharged in the matter of jurisdiction[,]" but a tribunal instead must determine from the record "whether the force of the arguments militating in favour of jurisdiction is preponderant." Inherent in this explanation is that are no absolutely "correct" results, no perfect rules of adjudication. Instead of imposing a rules-based paradigm, the International Court of Justice thus imposes a balancing test. This test takes into consideration (a) that exercise of jurisdiction provides the claimant with the sole access to justice for claims against the respondent state and (b) that the respondent state made a policy decision to limit jurisdiction according to the terms of the consent instrument. This balance does not turn on the existence of any formal rule of law but rather upon the relative merit, or preponderance, of the positions of the parties viewed as a whole.

It is the application of an even-handed balancing test to the jurisdiction of investor-state tribunals, not the formulation of formal rules, that ultimately moots complaints that investor-state arbitration lacks legitimacy. Jurisdictional decisions precisely balance the interests of each party in determining which party's jurisdictional case is closer to the jurisdictional equilibrium point. This analysis turns exclusively upon the submissions of the parties and does not place the proverbial thumb on the scales to approximate this equilibrium. A losing party, in short, generally should find fault in its own jurisdictional case, rather than in the ultimate conclusion reached by a tribunal. A broad majority of investor-state decisions follow this approach and future Tribunals should stay the course.


Full article here
Interim Costs Orders: The Tribunal’s Tool to Encourage Procedural Economy

Jeffrey Sullivan
David Ingle
Allen & Overy LLP

Introduction

One of the chief complaints of investment arbitration is that it has become a slow and expensive process. It often requires States to expend huge sums defending frivolous claims and, even when it has won a case, a respondent State may consider it to be something of a pyrrhic victory after the vast legal fees and the huge administrative burden have been taken into account. Equally, claimants that have been unfairly treated by governments have no option but to spend millions in legal fees (and wait many years) to obtain a remedy, often in face of a State party that seeks delay at every step. For investors without deep pockets, this form of dispute resolution offers no real access to justice.

These problems are not new and there have been many suggestions aimed at improving the investment arbitration system. Some commentators have argued that investment agreements must be renegotiated and redrafted to try to fend off unmeritorious claims. Others have suggested that the entire investment arbitration regime should be scrapped in favour of a world investment court. These are drastic changes and, even if they were capable of being put into action, it would take many years before any benefit could be realised. It is therefore necessary to look for mechanisms currently available which may assist in improving the investment arbitration process.

The source of the problem must be understood before a proper solution can be identified. One of the reasons parties to investment arbitration disputes bring frivolous claims and employ dilatory tactics is because there is no effective deterrent for such conduct. Consequently, there is no immediate downside for an investor in bringing a frivolous claim. Even a hopeless claim may put an inexperienced government under acute pressure to accede to the investor’s demands. Equally, it is easy for a respondent State to delay or even derail arbitrations entirely by simply running up costs for the investor. Both parties can be guilty of using nefarious tactics to gain an advantage.

The authors argue that tribunals already have the tools necessary to encourage procedural economy by using interim costs orders to deter nefarious tactics while also balancing the two seemingly irreconcilable goals of due process and procedural economy.

Reforming the Approach to Costs in Investment Treaty Arbitration

Matthew Hodgson
Allen & Overy LLP

Abstract

Despite the considerable costs of the investment arbitration process, the vast majority of investment tribunals devote just a few paragraphs of their award to the subject of cost allocation and many fail to enunciate a clear starting point for their analysis.

Even where tribunals do adopt a particular starting point, the approaches taken are divergent. Some tribunals assert that “pay your own way” is the “rule” for treaty cases, following the traditional approach of public international law, while others subscribe to the “costs follow the event” or “loser pays” principle. A third group, applying a more nuanced “hybrid” approach, determine costs by the relative success of the parties on particular issues. There is also a notable difference between the approach to costs under the UNCITRAL and ICSID rules which is, unsurprisingly, reflected in tribunal decisions.

Drawing on a recent survey of costs in investment treaty arbitrations, this article argues for a more reasoned and consistent approach to costs. Establishing a default position as to costs would promote consistency and predictability across the field of treaty arbitration. Such an approach could be achieved by wording in bilateral investment treaties or a change to the ICSID rules to bring them into line with the UNCITRAL position.

It will be further argued that the most appropriate default position is “loser pays”. This is for several reasons. First, the broad aim of damages in international law is to wipe out the consequences of the unlawful act. Where an investor is forced to achieve its remedy for breach of treaty through a costly arbitration process, it will be left substantially out of pocket if it does not also recover its reasonable costs. Further, a “loser pays” approach benefits the smaller investor with a strong but modest-sized claim for whom the costs of the process may otherwise make a claim uneconomic. Conversely, from the State’s perspective such approach should discourage unmeritorious claims which are commenced merely to exert pressure as part of a negotiating strategy. It is also notable that, whilst the majority of claims by investors are dismissed, successful States are considerably less likely than successful investors to be awarded their costs. A default “loser pays” rule would redress this imbalance.

Full article here
Distinguishing Investors from Exporters under Investment Treaties

Mark Feldman
Peking University School of Transnational Law

Introduction

This article makes two recommendations. First, when distinguishing investors from exporters, tribunals should look primarily to the capacity limitation, rather than the causation limitation (which lacks effectiveness) or the territorial limitation (which lacks flexibility). Second, when applying the capacity limitation, tribunals should be guided by the nature of a claimant’s global business. The above two recommendations can be applied not only in NAFTA Chapter Eleven cases, but also more generally in investment treaty disputes under other agreements, so long as textual support for the limitation exists under the applicable treaty. Many investment treaties provide such textual support, as illustrated by the Canada-China and ASEAN-Australia-New Zealand agreements, which are discussed below. Thus, the capacity limitation can serve as a widely-available and effective resource for tribunals facing challenging questions concerning the proper application of investment treaty protections to integrated investment and export operations of multinational corporations.

Full article here

Collective Action in Investment Arbitration to Enforce Small Claims Justice to the Deprived or Death Knell for the System of Investor-State Arbitration?

Dr. Stephan Wilkske
Gleiss Lutz Rechtsanwälte

Abstract

This paper deals with whether collective action can be a way to seek justice for small investors or would rather be the “the straw that breaks the camel’s back” and damage the system of investment arbitration. The author, first of all, points out the challenges faced by small claimants in bringing an investment arbitration claim against a State, which mostly concern the costs of investment arbitration. With respect to those obstacles, the author then introduces some methods to overcome such challenges, including collective action. Finally, the author suggests that the system of investment arbitration will be robust enough to deal with collective action and may find its own tools to make the system fair and workable. Meanwhile, the author simply does not follow the skepticism with respect to the future of investment arbitration, keeping in mind that mechanisms declared dead by the pessimists often live considerably longer.


Full article here

ICSID Treaty Counterclaims: Case Law and Treaty Evolution

José Antonio Rivas
Arnold & Porter LLP

Introduction

This article analyzes the ICSID case law on investment treaty counterclaims, exploring how tribunals have interpreted the requirements for submission of counterclaims under the Convention and the Rules of Arbitration. It also considers treaty and model investment treaty developments in an attempt to explore the evolution of investment arbitration case law and new treaties that could transform the system into one where counterclaims are practicable possible. In addressing this question, this article first sets out the provisions of the Convention and the Rules of Arbitration and explains how a State can submit treaty counterclaims at ICSID. Second, it analyzes ICSID case law on counterclaims with particular emphasis on recent awards and decisions involving investment treaty counterclaims which do not reflect a consistent line of cases. Third, it reviews language of existing investment treaties which include references to counterclaims and interprets them in light of certain lines of ICSID cases on counterclaims. Recognizing that international investment law is an evolving system, this article also explores the direction that case law and investment treaties could eventually take for counterclaims to be heard by tribunals and to be substantially effective in cases involving violations of obligations by the investor. It also analyzes investors’ violations of investment treaty obligations (and their sources) which may constitute a basis for investment treaty counterclaims. And fourth, it presents the conclusions acknowledging a tension between a scenario of future treaties with robust clauses on counterclaims and on obligations of investors, versus a practical approach explaining that States can submit counterclaims pursuant to existing treaties and consent clauses, current general principles of law, and international investment jurisprudence.

Certainly, international investment law on counterclaims could dramatically evolve into a system where sovereign States effectively use counterclaims to demand compliance from investors with their obligations if new treaties incorporated explicit language on disputing parties’ consent to counterclaims, and on investors' obligations. However, evolution through treaty negotiations is slow and it may not be necessary to wait long for an effective use of ICSID treaty counterclaims. Already, there are treaties with consent clauses which, based on existing ICSID case law, may be interpreted as giving rise to an ICSID tribunal’s jurisdiction to hear counterclaims. In addition, currently investors must comply with general principles of law - e.g., the obligation no to incur in corrupt practices - even in the absence of any treaty language to that effect.

Full article here
Transnational Dispute Management

Published issues and specials:

- TDM 6 (2013) - FDI Moot 2013
- TDM 5 (2013) - Art and Heritage Disputes in International and Comparative Law
- TDM 4 (2013) - Ten Years of Transnational Dispute Management
- TDM 3 (2013) - Corruption and Arbitration
- TDM 1 (2013) - Aligning Human Rights and Investment Protection
- TDM 5 (2012) - Legal Issues in Tobacco Control
- TDM 4 (2012) - 7th Biennial Symposium on International Arbitration and Dispute Resolution
- TDM 3 (2012) - Regular issue
- TDM 2 (2012) - FDI Moot 2011
- TDM 5 (2011) - Resolving International Business Disputes by ADR in Asia
- TDM 4 (2011) - Contingent Fees and Third Party Funding in Investment Arbitration Disputes
- TDM 3 (2011) - Intersections: Dissemblance or Convergence between International Trade and Investment Law
- TDM 2 (2011)
- TDM 1 (2011)
- TDM 4 (2010) - China
- TDM 3 (2010) - FDI Moot 2010
- TDM 2 (2010) - Guerrilla Tactics in International Arbitration & Litigation
- TDM 1 (2010)
- TDM 4 (2009) - Latin America
- TDM 3 (2009) - NAFTA - Fifteen Years Later. Experiences and Future
- TDM 2 (2009) - The Protection of Intellectual Property Rights through International Investments Agreements
- TDM 1 (2009)
- TDM 4 (2008) - Arbitrator Bias
- TDM 3 (2008) - Precedent in Investment Arbitration
- TDM 1 (2008) - UNCTAD Expert Meeting on Development Implications of International Investment Rule Making
- TDM 6 (2007) - Compensation and Damages in International Investment Arbitration
- TDM 5 (2007)
- TDM 2 (2007) - The Legacy and Lessons of Distressed and Failed Infrastructure Investments during the 1990s
- TDM 1 (2007) - Arbitration & Mediation
- TDM 5 (2006)
- TDM 4 (2006) - Alternative Dispute Resolution in Asia
- TDM 2 (2006)
- TDM 1 (2006) - Litigating Across Borders: Hot Topics and Recent Developments in Transnational Litigation
- TDM 5 (2005)
- TDM 4 (2005)
- TDM 3 (2005) - Relationship Between Local Courts and Investment Treaty Arbitration
- TDM 2 (2005) - Appeals and Challenges to Investment Treaty Awards
- TDM 1 (2005)
- TDM 3 (2004)
- TDM 1 (2004)