BALANCING INVESTOR PROTECTION AND SUSTAINABLE DEVELOPMENT IN INVESTMENT ARBITRATION

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ABSTRACT

Investment arbitration was originally developed primarily to protect investors from wealthy developed countries against arbitrary expropriations by governments in developing countries. However, over time, it has taken on a very broad dynamic and is nowadays often used to limit regulatory interference of any government with the business plans of any foreign or foreign owned companies. This is causing "regulatory chill" in many parts of the world, where governments, in particular in less developed or less affluent countries, are weary of changing or enforcing environmental protections, labor laws, consumer laws, etc., because they have already been forced to pay after costly arbitration proceedings in similar cases. We cite a number of examples where countries were trying to introduce sensible regulation in response to changing circumstances and ended up paying damages to investors who might never have been able to implement their business ideas even in the absence of the regulatory changes. As a result, we not only see an undue limitation on the sovereignty of many countries and governments and their ability to regulate in the best interest of their citizens. We also see more and more countries turning their backs on investor-state arbitration and on bilateral or multilateral protection treaties in general. A complete breakdown of the established system may not be imminent but talk about a crisis does no longer seem alarmist. What is needed, therefore, is a re-balancing of the rights and obligations of the investors and the host countries, and a better appreciation of sustainable development goals and other valid public interest considerations in the host countries. This idea is not new and we are not the first ones to postulate the need for change. However, we may be offering some new ideas and a new evaluation of some existing ideas on how such a change could be brought about in practice.

Keywords: *investor-state arbitration, FDI, investment, investment protection, bilateral investment treaties, ICSID.*

INTRODUCTION

International investment arbitration is one of the most widely relied upon mechanisms of resolving disputes between investors and host states. Since states

typically do not like to submit to the jurisdiction of foreign courts, and investors often do not want to assume that they would be treated with complete neutrality and fairness by the courts of the state they are in a dispute with, arbitration in front of a neutral panel is the obvious alternative. The International Centre for Settlement of Investment Disputes (ICSID) and many other arbitral institutions provide a platform for hearing claims by foreign investors against host states.[1] ICSID alone has served as an administering institution for more than 500 investment cases to date.[2] Investors prefer arbitration not only because it is generally considered to offer an impartial forum for bringing claims against host states, but also because it provides for an effective enforcement mechanism. All of these characteristics of the arbitration process make it important and often indispensable for the protection of investors' rights. Yet, despite all the advantages of arbitration as a dispute resolution system, there is now a rising backlash against it. This article explores the mounting *criticism* against investment arbitration and discusses possible solutions to address this criticism to balance investor protection and sustainable development in investment arbitration.

I. The Legitimacy Crisis in International Investment Arbitration

Investment arbitration is being criticized for becoming an alarmingly all-too powerful system which threatens the sovereignty of states. In the early decades of investment arbitration, cases were often about expropriation, and the question was less whether the state should pay compensation, but how much would be adequate. In a way, this period built a momentum in favor of investors, almost a presumption that a state may have been within its rights to expropriate or nationalize an investment, but generally had to do so for a public purpose and with payment of prompt, adequate, and effective compensation.

[1] 2 In this regard, Reinisch and Malintoppi state that the ICSID system "…has known tremendous success, particularly over the last ten years, and is likely to grow further due to the increase in the number of Bilateral Investment Treaties … all over the world". See August Reinisch and Loretta Malintoppi, Methods of Dispute Resolution, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Christoph Schreuer et al., eds, 2008), at 692; See also August Reinisch, The Future of Investment Arbitration, in INTERNATIONAL INVESTMENT LAW FOR THE 21STCENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (Christina Binder et al. eds, 2009), at 894.

[2] UNCTAD, ICSID CASES, 2018, http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution (last visited Aug. 29, 2018); For the analysis of the work of ICSID see Ibironke Odumosu, The Antinomies of the (Continued) Relevance of ICSID to the Third World, 8 San Diego International Law Journal 345 (2007), at 345-385; Elizabeth Moul, The International Centre for the Settlement of Investment Disputes and the Developing World: Creating a Mutual Confidence in the International Investment Regime, 55 Santa Clara Law Review 881 (2015), at 881-916.

In more recent years, states are less in the business of taking away an entire investment, and the focus has shifted in many cases to regulatory interventions by host states that are messing with business plans or profit expectations of investors. Since many bilateral and multilateral investment protection agreements are quite broad when it comes to obligations of host states, countries are increasingly concerned with the impact that investment arbitration provided in most of these international investment agreements may have on their right to regulate and undertake other measures in the public interest.[3] States have faced multi-million and multi-billion dollar arbitration claims by investors for the alleged violation of investment protection standards. For instance, in Micula v. Romania (2013), Romania was held liable for breaching the SwedenRomania bilateral investment treaty (BIT) due to its revocation of economic incentives offered to investors under its national law.[4] The tribunal ruled in favor of the investor even though Romania was required to repeal its law in order to comply with EU state aid obligations, and the investor was from Sweden, another Member State of the EU bound by EU state aid rules, just like Romania. It is interesting to note that the European Commission has adopted a decision ordering Romania not to pay the compensation awarded to investors by the ICSID tribunal. The Commission has also submitted that the Micula award is "…illegal and unenforceable under E.U. law" and that "….as a matter of E.U. law, Romania is squarely prohibited from complying with the Award".[5] At present, enforcement proceedings are pending in the United States. It remains to be seen whether the award will be enforceable. Similarly, in Eiser v. Spain (2017), the tribunal found Spain liable to pay compensation in the amount of 128 million Euro to the investor. According to the tribunal, Spain violated the fair and equitable treatment standard under the Energy Charter Treaty due to its adoption of measures that reduced the level of subsidies paid to investors in the

[3] Karl Sauvant and José Alvarez, International Investment Law in Transition, in THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS (José Alvarez et al. eds., 2011), at xxxviii. For a comprehensive analysis of the growing backlash against the international investment law regime see Asha Kaushal, Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime, 50 Harvard International Law Journal 491 (2009), at 491-534.

[4] IOAN MICULA, VIOREL MICULA AND OTHERS V.ROMANIA.International Centre for Settlement of Investment Disputes [ICSID], ARB/05/20, December 11, 2013. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf

[5] EU Commission, BRIEF FOR AMICUS CURIAE THE COMMISSION OF THE EUROPEAN UNION IN SUPPORT OF DEFENDANT-APPELLANT IN THE CASE OF IOAN MICULA, EUROPEAN FOOD S.A., S.C. STARMILL S.R.L., MULTIPACK S.R.L., PLAINTIFFS-APPELLEES V. GOVERNMENT OF ROMANIA, at 10, https://www.italaw.com/sites/default/files/case-documents/italaw9198.pdf

Concentrated Solar Power sector and other renewables generators. The European Commission has warned Spain not to pay investor-state awards in this and several other solar energy cases, on EU state aid grounds.

Investment arbitration is being criticized by states for being overly protective of investors' rights and not considering state interests adequately. One example is the recent case of Bear Creek v. Peru (2017). Bear Creek Mining Corporation was successful in an arbitration against Peru under the Free Trade Agreement between Canada and Peru. Bear Creek, a Canadian company, invested in the Santa Ana Mining Project in Peru. The mining project turned out to be highly contentious. Local communities, in particular, were against it due to environmental and various other concerns. The protests resulted in the burning of a mining camp in 2008 and continued with anti-mining marches, massive demonstrations, strikes, and other activities through 2011. The number of protesters grew to 13,000 people in Puno with protests becoming violent and resulting in the looting of governmental institutions and destruction of commercial establishments in May of 2011.[6] According to the Amici submissions, Bear Creek Mining Corporation "… did not do what was necessary to understand the doubts, worries and anxieties of the Aymara culture and religiosity, and did not do the necessary to identify and assess the risks that their own operations could entail for the population and their rights over their lands and water". Moreover, as noted in the expert report, "Bear Creek did not engage in sufficient efforts to inform all the communities within its area of influence of the effects and benefits the project could bring". As a result of the intense protests against the mining project, the Peruvian government revoked Supreme Decree 083 which entitled the investor to "… acquire, own, and operate the…mining concessions and to exercise any rights derived from the ownership". At the time of the revocation, Claimant Bear Creek had not yet secured 99 agreements for the use of land and still had to have its Environmental and Social Impact Assessment approved. Apart from this, according to witness testimony, it would have been highly unlikely for the investor's mining project to continue amidst the strong anti-mining protests. Despite Bear Creek's lack of permits and widespread protests against its mining project, the Tribunal decided that Peru had indirectly expropriated Bear Creek's investment and ordered it to pay damages in the amount of US$ 18,237,592, as well as reimburse 75% of Claimant's arbitration

[6] BEAR CREEK MINING CORPORATION V. REPUBLIC OF PERÚ. International Centre for Settlement of Investment Disputes [ICSID], ARB/14/21, Nov. 30, 2017, https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf

costs.[7] This case shows the problem investment arbitration proceedings have with the adequate consideration of state and local community interests.

The controversial nature of international investment arbitration largely stems from the fact that it deals both with private and public law matters. It is the latter aspect that triggers a variety of legitimacy related arguments against investment arbitration. In this respect, addressing the negative outcomes of international arbitration for host states, Gus Van Harten rightfully observes that "…flaws in the system [are] a consequence of the unhappy marriage of international arbitration and public law".[8] This "unhappy marriage" has already resulted in "divorce" for some states, as they have taken the decision to leave ICSID. In particular, Bolivia denounced ICSID in 2007, Ecuador withdrew from ICSID in 2009, and Venezuela did the same in 2012.[9] The strong criticism of Investor-State Dispute Settlement (ISDS) is also being advanced by developed states. For instance, after facing an investment arbitration claim by Philip Morris Company against its new tobacco packaging requirements Australia decided not to include investment arbitration as a means of dispute resolution in a number of its newer FTAs and has even officially announced that it is against signing investment agreements that would limit its right to regulate in the public interest. It is also important to note the EU's criticism of ISDS. In Achmea v. Slovakia (2018) the arbitral tribunal found Slovakia liable for violating the 1992 Agreement on Encouragement and Reciprocal Protection of Investments with the Kingdom of the Netherlands due to its reversal of the liberalization of the private sickness insurance market and ordered it to pay damages to the investor in the amount of approximately 22 million Euro.[10] Slovakia moved to set the award aside in Germany, and the Federal Court of Justice of Germany (Bundesgerichtshof) submitted a request to the European Court of Justice (CJEU) for a preliminary ruling under Article 267 TFEU regarding the compatibility of the arbitration clause in the BIT with EU law. The CJEU has ruled that EU law precludes "…a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and

[7] BEAR CREEK V. PERÚ, at paras. 416, 738.
[8] 5 GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2008), at 153.
[9] Federico Lavopa et al., How to Kill a BIT and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties, 16 Journal of International Economic Law 869 (2013), at 871; For greater analysis of States' withdrawing from investment arbitration see Muthucumaraswamy Sornarajah, The Retreat of NeoLiberalism in Investment Treaty Arbitration, in THE FUTURE OF INVESTMENT ARBITRATION (Catherine Rogers and Roger Alford eds., 2009), at 291-293
[10] ACHMEA B.V. V. THE SLOVAK REPUBLIC. Permanent Court of Arbitration [PCA], Case No. 2008-13, Dec. 7, 2012, at para. 352, https://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf

reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept". The implication of the Achmea decision is that courts in EU will be able to set aside arbitral awards rendered under intra-EU BITs, thereby reinforcing the EU's critical stance against the existing investor-State arbitration model.

As can be seen, there is a rising backlash against ISDS. This backlash is understandable considering that the outcome of investment disputes may affect not only the business operations of a particular company, but entire communities, the work of governments, and national budgets. One cannot but agree with Gottwald that "…even a single successful investor claim could wreak havoc on [a state's] economy, weaken its capacity to regulate in the public interest, and damage its reputation as a desirable investment location".[11] How should this growing criticism of international investment arbitration as a system for settlement of disputes be addressed? If the international investment arbitration system is to remain successful, it needs to be aligned with sustainable development goals!

II. Balancing Investor Protection and Advancement of Sustainable Development in Investment Arbitration as the Way Forward

As the world is approaching the end of the third decade of the 21st century, there is an increasing recognition of the need for a modern legal framework of investment that provides not only for the protection of investors' rights, but also properly addresses the investments' wider social, economic, and environmental effects. Although historically the emphasis of investment law was placed primarily on investment protection, such an asymmetrical treatment of foreign direct investment (FDI) is slowly but steadily giving way to a new generation legal framework of FDI, the objective of which is not only to promote and protect investment, but also to advance host states' sustainable economic, social, and environmental development. According to the 2015 UNCTAD Investment Law Policy Framework for Sustainable Development, "…'new generation' investment policies place inclusive growth and sustainable development at the heart of efforts

[11] Eric Gottwald, Leveling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration? 22 American University International Law Review 237 (2007), at 239.

to attract and benefit from investment".[12] Similarly, the Report on "Investment Promotion Agencies and Sustainable FDI: Moving toward the Fourth Generation of Investment Promotion" emphasizes the current move to the promotion of not simply any kind of FDI, but sustainable FDI.[13] The underlying idea is to ensure a proper balance between the protection of investors' rights and those of other relevant stakeholders. While efforts at reforming the legal framework of FDI in line with this paradigm shift in investment law are still fragmented, it is clear that sustainable development has emerged as the foundation of this new generation legal regime of FDI. Accordingly, investment law reforms must be aligned with goals broadly associated with sustainable development Failure to achieve this paradigm shift may destroy ISDS as we know it. How is it possible to align international investment arbitration with sustainability objectives?

The sections below advance both substantive and procedural solutions:

1. New Generation International Investment Agreements (IIAs)

One obvious way to address the balance between investor protection and sustainable development is the negotiation and implementation of new generation investment treaties and the re-negotiation of old generation treaties in line with sustainable development goals. This is important, as it is the language of these treaties that ultimately shapes the outcome of arbitral proceedings. In this regard, Brigitte Stern, currently one of the most frequently appointed arbitrators by respondents in investor-State arbitration proceedings, is correct when noting that "…if states do not include provisions [advancing sustainable development]…in their investment treaties…, arbitration can only play a very marginal, or even non-existent role, in making investments foster sustainable development".[14] Indeed, arbitrators have to apply existing rules. If these rules provide for or at least allow a balance between the protection of investors' rights and those of other stakeholders, then such balanced considerations will be reflected in arbitral tribunal awards.

2. Public Interest Attorneys

One of the key problems, as we seek a better representation of sustainable development goals in ISDS, is the lack of a good advocate for the laudable cause. A good solution could be the involvement of a public interest attorney to represent

[12] UNCTAD, INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT (United Nations, 2015).

[13] Columbia Center on Sustainable Investment and the World Association of Investment Promotion Agencies, REPORT OF THE FINDINGS OF THE SURVEY ON FOREIGN DIRECT INVESTMENT AND SUSTAINABLE DEVELOPMENT, 2010, at 4, http://ccsi.columbia.edu/files/2013/12/fdi.pdf (last visited Aug. 3, 2018).

[14] Brigitte Stern, The Future of International Investment Law: A Balance between the Protection of Investors and the States' Capacity to Regulate, in THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS (José Alvarez et al. eds., 2011), at 175.

sustainable development goals in general, even if the investor does not bring them up for lack of interest, and the host state does not bring them up because they do not know how to or otherwise choose not to. The model of the "Advocate General" who is an independent member of the European Court of Justice and represents the European interest in cases before the CJEU and makes recommendations for the judges how a case should be decided, has proven extremely successful. The Advocate General is able to consider the impact of a particular case on a broader scale, removed from the self-interest of the parties and the more narrow considerations that may inform the judges. His or her recommendations address not only the arguments advanced by the parties, but also other arguments that could or should be taken into account to get the best possible outcome from a broader perspective of European integration, all Member States, and all peoples of the EU. In many cases, the Opinions of the Advocate General, therefore, make for more interesting reading than the judgments adopted later. Indeed, the CJEU follows the recommendations of its Advocate Generals in more than 80% of its decisions.[15]

The problem is, of course, that investors are quite happy with the way things are in ISDS and have no reason to agree to the involvement of a public interest attorney unless such an involvement is mandated by a new generation investment treaty. Thus, it is highly unlikely that we will see a systematic involvement of independent voices for the advancement of sustainable development in front of investment arbitration tribunals any time soon.

3. A Multilateral Investment Court

As traditional ISDS is facing mounting criticism, another procedural solution advanced by commentators is the call for the establishment of an international investment court. For example, Asif Qureshi calls for a "…Supreme Investment Court … [to be]…set up as such, or as part of a chamber in the ICJ…" in order to "…contribute to greater transparency, accountability, and legitimacy in the adjudicative process; deal with the asymmetry in the manner in which different types of investment are currently dealt with; and provide certain safeguards".[16] Similarly, Gus Van Harten states that "…the lack of an appellate body to review awards makes it difficult, if not impossible, to unify the jurisprudence into a stable system of state liability" and, therefore, proposes "…an international court with

[15] For further analysis see also Frank Emmert, Der europäische gerichtshof als garant der rechtsgemeinschaft (1998),https://www.researchgate.net/publication/259848618_Der_Europaische_Gerichtshof_als_Garant_der_Rechtsgemeinschaft

[16] Asif Qureshi, An Appellate System? in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Christoph Schreuer et al. eds., 2008), at 1165.

comprehensive jurisdiction over the adjudication of investor claims". These ideas for reforming the current system of international investment arbitration may be good to implement in order to advance greater consistency in the arbitral process. As before, the problem is that the ideas need to be implemented via treaties and those have to be drafted, negotiated, supported, and ratified by home states and host states, and preferably many of them.

Apart from including the provision on an investment court in these investment agreements, the EU has been actively promoting its proposal of a multilateral investment court as "…a logical next step in the approach to set up a more transparent, coherent and fair system to deal with investor complaints under investment protection agreements".[17] The EU Council of Ministers has issued "negotiating directives" for a Convention establishing a multilateral court for the settlement of investment disputes. The negotiations are to take place under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). The Convention is to establish a multilateral investment court in the form of a tribunal of first instance and an appeals tribunal. The Directives stipulate that members of the multilateral court must be "…subject to stringent requirements regarding their qualifications and impartiality," "…appointed for a fixed, long and non-renewable period of time and enjoy security of tenure" and have to "…receive a permanent remuneration".[18]

Although having a multilateral court instead of the existing ISDS system would be a step forward, widespread implementation of this idea may be very difficult in practice due to opposition both to ISDS and to a multilateral investment court coming from various countries around the world. For example, Brazil does not allow investors to have direct recourse to investment arbitration in its investment agreements. Brazil's 2015 Cooperation and Facilitation Investment Agreement provides for a Joint Committee to "…resolve any issues or disputes concerning investments of investors of a Party in an amicable manner". It also establishes a National Focal Point or "Ombudsman" to support the investor and to "…seek to prevent differences in investment matters, in collaboration with

[17] EU Commission, A MULTILATERAL INVESTMENT COURT. Available at: http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf

[18] 4 Council of the European Union, NEGOTIATING DIRECTIVES FOR A CONVENTION ESTABLISHING A MULTILATERAL COURT FOR THE SETTLEMENT OF INVESTMENT DISPUTES, Mar. 1, 2018, para. 11, http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf

government authorities and relevant private entities".[19] The Model Agreement only gives Parties the right to a State-to-State arbitration. Another example of a State that opposes international investment arbitration is South Africa. South Africa's domestic law provides investors with recourse to mediation instead of arbitration.

The topic of reforming ISDS and the possible creation of a multilateral investment court is now being discussed as part of UNCITRAL Working Group III.[20] It remains to be seen whether this idea will be implemented. Even if it is implemented, the multilateral investment court per se may not be able to solve all problems related to the current imbalance between the protection of investors and advancement of sustainable development. Therefore, the negotiation and renegotiation of BITs and IIAs in line with sustainable development goals remains indispensable.

III. CONCLUDING OBSERVATIONS

International investment arbitration is one of the most widely relied upon forms of alternative dispute resolution, as it offers a neutral and impartial forum for resolving disputes between foreign investors and host states. However, despite all the advantages of arbitration, there is now a mounting criticism against investment arbitration due to problems related to inconsistency of arbitral awards, lack of transparency, and other issues. As has been discussed in the article, if the international investment arbitration system is to remain successful, it needs to be aligned with sustainable development goals. Failure to achieve this paradigm shift may destroy ISDS as we know it. The traditional approach to investment protection favoring investor rights and ignoring other stakeholders has already become unsustainable. It is the hope of the authors that both substantive and procedural solutions advanced in this article will be applied in practice and very soon in order to balance investor protection and sustainable development in investment arbitration. As Jack Welch has famously said, "change before you have to."

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[20] UNCITRAL, WORKING GROUP III, http://www.uncitral.org/uncitral/en/commission/working_groups/3Online_Dispute_Resolution.html

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