

SYMPOSIUM ON INVESTOR RESPONSIBILITY: THE NEXT FRONTIER IN INTERNATIONAL INVESTMENT LAW

INVESTOR RESPONSIBILITY AS FAMILIAR FRONTIER

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This essay suggests that amidst the various criticisms of investor-state arbitration, the most potent is the present inadequacy of this mechanism to establish a reciprocal responsibility of foreign investors. The founders of the modern era of international investment arbitration never intended to build a one-way street. In this sense, to seek a regime of investor responsibility may not be to reach toward a new frontier so much as to return to one that is familiar, though underexplored.

The Origins of Modern International Investment Law

While certain customary obligations comprising the origins of international investment law have a long and storied history in the law of nations, there is no denying that the drafters of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (commonly known as the ICSID Convention) in the mid-1960s reached boldly toward a new frontier. The ICSID Convention inaugurated a dedicated procedural framework for the adjudication of international investment disputes, and would soon be supplemented by successive generations of treaty instruments containing substantive guarantees of investment protection. Aggrieved investors would no longer be required to seek the espousal of their claims through diplomatic protection, which entails entreating diplomatic machineries that might be disinclined to hold their interests close. Instead, they were afforded a direct right of action against the host state. Investors could henceforth pursue their own causes in international arbitration with the single-mindedness that successful litigation often requires. This fusing of binding substantive norms and an individual right of access to arbitration remains the exception rather than the rule in international law.

As investor-state arbitration reaches the fifty-year mark, there is a perception that investor “overuse” has strained its foundations to a breaking point. Investors often argue for expansive interpretations of open-textured treaty standards that may well depart from the intent of the instruments’ crafters. As a result, states are sometimes held liable for large or even debilitating awards of monetary damages for conduct falling far short of the high threshold that exists in customary international law. Some have argued, in relation to these concerns regarding the content of investment protection guarantees, that the international investment regime is structurally incapable of rendering consistent or coherent jurisprudence where decisions are made by unaccountable ad hoc tribunals detached from any constraint of binding precedent.

Investors have sometimes structured or restructured their investments via a given treaty partner of the host state in seeking to avail themselves of the protections of a particular investment treaty, even after the time that a dispute

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with the host state arises. Some tribunals have found postdispute restructuring to be an “abuse of process” or “abuse of rights” that would bar an investor’s claim.¹ In fact, I recently heard it argued (rather convincingly) that, if it is impermissible for an investor to reach toward a treaty’s protections *after* the time that a dispute arises, there can be no principled basis upon which to allow the anticipatory structuring of an investment *before* the time that any dispute arises, either. Under this view, tolerance of “treaty planning” whereby an investor structures his investment for the purpose of gaining a given treaty’s protections, without establishing any *bona fide* presence within the relevant treaty partner of the host state, is arguably another indicator of a latent proinvestor bias.

The ICSID Convention as a Two-Way System

It is often overlooked that the first bilateral investment treaty, concluded between West Germany and Pakistan in 1959, did not include an investor-state arbitration mechanism.² That treaty thus served, in a sense, only to codify certain substantive norms, presumably leaving them to be enforced by diplomatic protection. The ICSID Convention came into force in 1966, and the accompanying Report of the Executive Directors of the International Bank for Reconstruction and Development notes that “[t]he Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases.”³ Ibrahim Shihata, the former longtime General Counsel to the World Bank, reaffirmed this posture nearly three decades later, writing in 1995 that “[t]he ‘balance’ which pervades the provisions of the [ICSID Convention] is only natural; the system provides conciliation and arbitration facilities to host States and foreign investors alike, and the proceedings may be initiated by either party.”⁴

It appears that the drafters of the ICSID Convention largely envisioned arbitral jurisdiction that would arise from contractual instruments rather than from a standing offer to investors made via treaty, as is often the case today. Such contractual instruments include concession agreements that grant extractive privileges, contracts for the construction of infrastructure, contracts for the provision of public services, and other investment agreements as between foreign investor and host state. These private law instruments naturally enable their parties to specifically consent (or decline to consent) to arbitrate disputes over their respective rights and obligations at the time of original contracting.

The standing offer of arbitration came to life with the advent of the modern bilateral investment treaty. Under a now-pervasive model, each state party to such a treaty extends a standing offer of arbitration to investor-nationals of the other state party, but those investor-nationals only give their own consent to arbitration (and thus give rise to arbitral jurisdiction) at the time they file a claim (at which point the investor accepts the host state’s standing offer).⁵

¹ See, e.g., [Philip Morris Asia v. The Commonwealth of Austl.](#), PCA Case No. 2012-12, Award on Jurisdiction and Admissibility para. 554 (Dec. 17, 2015).

² [Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments](#), Nov. 25, 1959, 457 UNTS 23.

³ Exec. Dir. of the Int’l Bank for Reconstruction & Dev., [Report on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States](#) para. 13.

⁴ I. F. I. SHIHATA, [THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS AND LECTURES](#) 426 (1995).

⁵ There is evidence that the ICSID drafters considered the possibility of arbitral jurisdiction originating from a host state’s standing offer as in its municipal investment laws. See Exec. Dir. of the Int’l Bank for Reconstruction & Dev., [supra note 3](#), at para. 24.

But one might consider, in this regard, “[t]he first [bilateral investment treaty] that incorporated a reference to ICSID to permit independent investor claims,”⁶ which stated:

The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national *and any such national shall comply with any request of the former Contracting Party*, to submit, for conciliation or arbitration, to [ICSID] *any dispute that may arise in connection with the investment.*⁷

Upon a moment’s inspection, this early provision openly establishes not a one-way but rather a two-way street, marking a dramatic departure from the now-prevalent treaty language that recognizes the investor’s right alone to arbitrate.⁸

The “New” Frontier

Many view today’s prevailing treaty framework, which permits justiciable obligations to flow in a single direction (upon the states) and allows states to be sued without extending a reciprocal right to states to sue investors, as irreconcilable with their sense of fundamental justice and equality of arms. Investors often do not share this distaste for the one-way street that has generously allowed them to sue, but not be sued.

For example, in *Urbaser et al. v. Argentina*, upon being confronted by an unforeseen Argentine counterclaim, the claimants argued vigorously for its exclusion from the tribunal’s consideration on grounds of both competence and admissibility.⁹ In so doing, the claimants argued that to allow Argentina’s claim “would run counter to the object and purpose of treaty arbitration, which is to grant the investors a one-sided right of quasi-judicial review of national regulatory action.”¹⁰ They further contended that, aside from the treaty’s objective limitations, there could be no jurisdiction over any counterclaim because they had not consented to it. The *Urbaser* claimants thus sought to constrain the scope of the tribunal’s jurisdiction by reference to the instruments that conferred their own consent to arbitrate.

For the claimants, while the state is the master of the offer, the investor is the master of the acceptance (and, thus, of the arbitration agreement). Such acceptance was “delimited in the terms established by their respective Boards” and “circumscribed to what constituted the subject-matter of their claim.”¹¹ In the words of the *Urbaser* S.A. board resolution, the tribunal’s jurisdiction was confined to “any dispute arising between this company and

⁶ ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* 136 n.66 (2006).

⁷ *Netherlands-Indonesia Agreement on Economic Cooperation (with Protocol and Exchanges of Letters dated 17 June 1968)* art. 11, July 7, 1968, 799 UNTS 13 (emphasis added).

⁸ In the words of one observer, “[t]he language referring to the national’s compliance with a host state demand for arbitration quickly disappeared from the provision.” KENNETH VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY AND INTERPRETATION* 458 (2010). He seems to mean that such language did not feature in any future Dutch (or other) treaties. In any event, this treaty was terminated, and replaced in 1994 by another agreement containing the more typical arbitration provision in favor of investors alone. See *Agreement Between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia on Promotion and Protection of Investment* art. 9, Apr. 6, 1994 (“the dispute shall, *at the request of the national concerned*, be submitted . . . to international arbitration”) (emphasis added). Indonesia has since terminated this agreement. There is no known evidence that either state ever invoked the language requiring an investor’s compliance with a host state demand for arbitration.

⁹ See *Urbaser v. Arg.*, ICISD Case No. ARB/07/26, Award (Dec. 8, 2016).

¹⁰ *Id.* at para. 1120.

¹¹ *Id.* at para. 1123.

the Argentine Republic as a result of the damage caused to the company's investments in that country."¹² While the claimants conceded that the resolution "did not literally exclude potential counterclaims by the respondent state," they nonetheless argued that "the terms of their offer to arbitrate produce[d] the same results as a direct exclusion of counterclaims."¹³ Lastly, the claimants submitted that the tribunal's consideration might extend to a counterclaim only "where there is a connection that renders it virtually impossible to determine the investor's claim without also adjudicating" the counterclaim, and that such a situation did not arise in the case.¹⁴

While counsel to the *Urbaser* claimants were engaged in an exercise of advocacy on behalf of a client, such pleading may do little to aid the public perception of investor-state arbitration. The tribunal did ultimately accept jurisdiction over Argentina's counterclaim only to dismiss it on its merits, finding no justiciable investor obligation of the sort urged by Argentina.¹⁵

Turning back in time, an investor's conduct far from the hearing room, at the time he establishes an investment or begins operations, may also contribute to his own injury. Perhaps the best example is seen in environmental deprivations by investors (or the rational fear thereof) that may invite (sometimes violent) action or reaction by local communities or indigenous peoples. In addition to causing possible breach by the host state of such classic international law standards as the guarantee of full protection and security, such local reactions may cause individual or collective liability to the investor. The investor may be harmed directly by property damage or other unlawful conduct, or indirectly where rendered unable to pursue the profits of an obstructed investment.

Viewed from the opposing side, an investor's environmental harms may lay a basis for investor liability in a host state counterclaim or, one step further, in third party claims that might be brought by impacted individuals or collectives within the host state.¹⁶ Instances of investor misconduct have given rise to a generation of well-informed local inhabitants (particularly in Latin America) who rationally fear that they may be bereft of any remedy should things go wrong. This may be because the investor does not hold sufficient assets within the jurisdiction of the host state to remediate harms incurred, or because the investor might challenge the quality of justice available in the host state's courts before an international tribunal, or because attempts to obtain transnational or international remedies have historically not fared well. These ever-present realities call for the establishment of a unitary forum in which multiparty international investment disputes may be globally and finally resolved for the benefit of all.

The Alternatives for Recalibrating the System

In the face of these and other challenges, there is a broad consensus that the architecture of international investment law now requires recalibration. There can be no denying that the advent of investment arbitration marks a leap forward for the right of access to justice. Nonstate actors are granted access to an international remedy. But it bestows this favor upon a single class of beneficiary. As noted, it grants to investors not only a bundle of rights, but a privileged jurisdictional space in which to pursue their enforcement. The time has perhaps come to ask: in the course of advancement, why stop here? If the mechanism has delivered benefits for investors, it is equally capable of doing so on behalf of host states and their peoples.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at paras. 1132-33.

¹⁵ *Id.* at paras. 1143-55, 1182-1221.

¹⁶ For instances in which the investor has voluntarily consented to the arbitration of an environmental counterclaim by the host state, *see, e.g., Perenco Ecuador v. Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (Aug. 11, 2015) and *Burlington Resources v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims paras. 60-62 (Feb. 7, 2017).

Possible reforms fall across a spectrum in terms of how far each departs from what has become the norm in international investment arbitration. The following concepts are intended for use where existing instruments are inadequate to achieve a desired access to justice.¹⁷ In the first of four models, aggrieved host states and their nationals might be afforded the right to claim directly against the foreign investor for breach of specified obligations.¹⁸ This most basic of the models may enjoy efficiency advantages by virtue of its simplicity. In the second, the host state might “espouse” claims of a host state national on its national’s behalf, perhaps in order to enlist greater resources or expertise.¹⁹ In the third, a host state might designate one or more of its nationals as representatives for purposes of prosecuting its claims vis-à-vis the foreign investor, thus enabling interested nationals to take up the cause (and perhaps earn a reward) as a sort of deputized private prosecutor or people’s attorney general.²⁰ The fourth and final model is a hybrid of the second and third, whereby a host state national first assigns his claim to his state (for purposes of espousal) and the state in turn appoints such national as its representative to prosecute the claim.²¹ In this way, a given host state national might enjoy a heightened control over his claim while also achieving the presence of the host state as party to the dispute (which may be desirable, among other reasons, to ensure ICSID jurisdiction).²² Investor consent to such claims might be attained as a condition to the initiation of any claim by the investor himself, or as a condition to admission or establishment of the investor’s investment *ab initio*.²³

An opportunity for widespread restoration of the two-way street, for reinstatement of the mutuality that is arbitration’s essence, might be found in an opt-in convention to establish claims via any of the four models, thus altering the effect of thousands of bilateral investment treaties presently in force.²⁴ Another opportunity may exist in the present European initiative to establish a permanent investment court system.²⁵ If either comes to life, the drafters might craft language to establish that an investor’s initiation of a claim (or an investor’s investment in itself) entails the investor’s consent to claims by the state (or to claims by host state nationals). By so doing, states would establish that certain investor behavior constitutes the investor’s acceptance of jurisdiction to hear pleading of breaches of investor conduct standards, which may be enumerated in accompanying international rules.

Where desired, such an approach might deliver a more harmonized resolution of international investment disputes for greater legal certainty and finality, thus better fostering flows of foreign investment. If states adopt such an approach, a broader range of participants in international investment might reasonably elect to pursue remedies that enjoy broad international enforceability, thus narrowing the present gap in access to justice.

¹⁷ See JOSE DANIEL AMADO ET AL., [ARBITRATING THE CONDUCT OF INTERNATIONAL INVESTORS](#) (2018). For a summary explication of the models in table format, see *id.* at 68-69. For textual tools to assist in their implementation, see *id.* at 172-90.

¹⁸ *Id.* at 19-24. For other reform alternatives, see Sergio Puig & Gregory Shaffer, [Imperfect Alternatives: Institutional Choice and the Reform of Investment Law](#), 112 AJIL 361 (2018).

¹⁹ AMADO ET AL., [supra note 17](#), at 42-54.

²⁰ *Id.* at 55-65.

²¹ *Id.* at 66-67.

²² *Id.*

²³ *Id.* at 82-92.

²⁴ *Id.* at 93-97.

²⁵ See European Commission, [Press Release, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations](#) (Sept. 16, 2015).