

ISDS Reform and the Proposal for a Multilateral Investment Court

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It is my great privilege to speak on this panel today in honor of David Caron, a brilliant scholar, a thoughtful jurist, a caring mentor, and a dear friend.¹ As this conference shows, David's interests and expertise in international law were broad and varied. One area that attracted David's attention was Investor-State Dispute Settlement, or "ISDS." My topic for discussion today is "ISDS reform and the proposal for a Multilateral Investment Court."

"ISDS," as many of you may know, stands for "Investor-State Dispute Settlement," and refers to the current system of *ad hoc* arbitration that foreign investors and host States use to resolve their investment disputes. Because the system is *ad hoc*—in other words, the disputing parties pick the arbitrators and the arbitrators decide only the case before them—it has come under increasing attack. Critics say that the one-off approach produces inconsistent results across similar cases and encourages arbitrators to act self-interestedly in search of their next appointment.²

What I would like to talk about today is the proposal to scrap the current *ad hoc* arbitration system in favor of a permanent, multilateral investment court. This initiative has been heavily driven by the European Commission (EC), which has already provided for bilateral investment courts in its latest free trade agreements, and the proposal is now in the early stages of consideration by the UN Commission on International Trade Law (UNCITRAL).³

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1. These remarks were presented on a panel entitled "International Dispute Resolution" as part of *The Elegance of International Law: A Conference in Commemoration of Professor David D. Caron*, Berkeley, California, September 15, 2018.

2. For an overview of the main criticisms of the current system, see GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTÀ, CAN THE MAURITIUS CONVENTION SERVE AS A MODEL FOR THE REFORM OF INVESTOR-STATE ARBITRATION IN CONNECTION WITH THE INTRODUCTION OF A PERMANENT INVESTMENT TRIBUNAL OR AN APPEAL MECHANISM?: ANALYSIS AND ROADMAP 10–15 (Jun. 3, 2016), http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf.

3. For works of UNCITRAL in this area, see UNCITRAL WORKING GROUP III, 2017 TO PRESENT: INVESTOR-STATE DISPUTE SETTLEMENT REFORM, http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html.

As everyone knows, David was a thought leader in the field of ISDS and, while he did not (as far as I know) write directly on the topic of a proposed investment court, he did address the issue of ISDS reform with his characteristic insightfulness. My comments today, oriented around David's writings, will touch on two issues: first, the challenges to investment policymaking posed by the current backlash against ISDS and, second, the pragmatism with which we should approach and test the investment court proposal.

I. BACKLASH AGAINST ISDS AND ITS CHALLENGES

Let me start with the issue of backlash and David's wonderful article he published with one of his PhD students at the time, Esmé Shirlow. The article is entitled: *Dissecting Backlash: The Unarticulated Causes of Backlash and its Unintended Consequences*.⁴ It examines the phenomenon of backlash against ISDS as expressed through the surging anti-globalist and populist movements.

Among other examples, he cites Senator Elizabeth Warren's now famous (perhaps infamous) *Washington Post* editorial in which she demonizes ISDS at the time when the U.S. Congress was beginning to consider ratification of the Trans-Pacific Partnership Agreement ("TPP"). You may recall that she wrote:

Who will benefit from the TPP? American workers? Consumers? Small businesses? Taxpayers? Or the biggest multinational corporations in the world? . . . Agreeing to ISDS in this enormous new treaty would tilt the playing field in the United States further in favor of big multinational corporations. . . . ISDS would allow foreign companies to challenge U.S. laws – and potentially to pick up huge payouts from taxpayers – without ever stepping foot in a U.S. court.⁵

The point made by David and his co-author in referencing Senator Warren's comments was to show how broader fears about the effects of globalization often translate into criticism of ISDS, because ISDS, it is argued, is often the most tangible and readily available target. They wrote:

We would suggest that investment arbitration has attracted such strong critique because it forms a focal point for the articulation of concerns about globalization. Globalization, as a diffuse force, does not itself form a concrete enough target . . .⁶

4. David D. Caron & Esmé Shirlow, *Dissecting Backlash: The Unarticulated Causes of Backlash and its Unintended Consequences*, in *THE JUDICIALIZATION OF INTERNATIONAL LAW A MIXED BLESSING?* 159 (Andreas Follesdal & Geir Ulfstein eds., 2018).

5. Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.dfa41e206caf.

6. Caron & Shirlow, *supra* note 4, at 165.

They also note the irony inherent in these fears in that “[m]any parts of [free trade agreements] will have far greater social impact than the [ISDS] arbitration scheme or the worst possible single [ISDS] arbitration one can imagine.”⁷

David and Esmé then end with two important notes of caution. First, they observe that reform of ISDS, in fact, may not address broader and deeper concerns about globalization. Second, they add that it is therefore necessary to separate out the motivations of backlash from its focal point before one is able to identify appropriate responses.⁸

In addition to these astute observations, I bring your attention to three factors that, in my view, have further aggravated the backlash against ISDS. First, for the first time in the history of their investment treaty programs, Western European countries, including Germany, Belgium, and Spain, have been the target of ISDS claims.⁹ This has set off alarm bells in capitals around the EU, revealing the risks of ISDS for even developed countries that are no longer exclusively capital exporters. Second, after the Lisbon Treaty, the EU assumed competence over significant aspects of its members’ investment policies,¹⁰ but without much, if any, hands-on experience defending against ISDS claims. Third, in the context of negotiating the Trans-Atlantic Trade and Investment Partnership, the EC engaged in a very broad, online stakeholder outreach process that resulted in an avalanche of public criticism about ISDS.¹¹ Most of it was from NGOs that generated approximately 145,000 of the 150,000 responses from citizens who, despite their concerns, likely had little specific understanding of the ISDS system.

These three aggravating factors may not only have fueled the backlash against ISDS, but they also may be clouding rational investment policymaking by the EC. Let me provide one concrete example of the problem. In a speech given in June 2018 by one of the senior EC officials spearheading the investment court initiative, the following argument was made in support of a permanent court:

Just as it would strike . . . *the man on the street* as strange that permitting the disputing parties to appoint judges in a constitutional case . . . , so it should

7. *Id.*

8. *Id.* at 165–66.

9. *See, e.g.*, Vattenfall AB and others v. Fed. Rep. of Germany, ICSID Case No. ARB/12/12, <https://www.italaw.com/cases/1654>; Ping An Life Ins. Co., Ltd. & Ping An Ins. (Grp.) Co, Ltd. v. Gov’t of Belgium, ICSID Case No. ARB/12/29, <https://www.italaw.com/cases/3088>; Antin Infrastructure Serv. Luxembourg S.à.r.l. & Antin Energia Termosolar B.V. v. Kingdom of Spain, ICSID Case No. ARB/13/31, <https://www.italaw.com/cases/2319>.

10. Note, for example, that the Court of Justice of the European Union, arguably strengthened this authority in its 2018 decision holding that the arbitration provisions in intra-EU investment treaties were incompatible with EU law. *See, e.g.*, Case C-248/16, *Slowakische Republik (Slovak Republic) v. Achmea BV.*, ECJ 2018 E.C.R., <http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2690705>.

11. *See* CONSULTATIONS, EUROPEAN COMMISSION, http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 (last updated Mar. 27, 2019).

strike us as strange that in [an ISDS] case dealing with similar issues it should be possible for the disputing parties to appoint adjudicators. It certainly strikes *the ordinary member of the public as strange*.¹²

Frankly, I find this argument somewhat strange. While at the U.S. State Department, I was deeply involved in the U.S. government's extensive review of its own investment treaty policy, which ended in 2010 after three years of intense, but controlled, stakeholder outreach. I certainly appreciate the importance of public input, especially because ISDS cases often involve significant issues affecting the public interest. However, putting too much emphasis on addressing the perceptions of "ordinary member[s] of the public" may unhelpfully distort an understanding of the true extent of the problem and may impede rational and effective investment policymaking in response.

This brings me back to David and Esmé's prescient point about how critical it is to dissect the motivations of backlash from its target in order to identify appropriate responses.

II. A CAREFUL ASSESSMENT OF ILLEGITIMACY

The second point I would like to raise is, in the fog of backlash, how do we accurately assess the proposal for a permanent investment court? Here, again, David's scholarship provides invaluable guidance, particularly his article entitled: *Investor-State Arbitration: Strategic and Tactical Perspectives on Legitimacy*.¹³ In this piece, David thoughtfully writes:

A critique of legitimacy is an argument for reform of an accepted system; a critique of illegitimacy is a plea for reform necessary to ensure the viability of a questioned system. Thus, I find it helpful to approach critiques of legitimacy also as assertions of illegitimacy The value of a focus on illegitimacy follows from the fact that legitimacy implies moving closer and closer to the center of a target where there is not always agreement as to what is the center. Illegitimacy in contrast asks whether the target is missed entirely¹⁴

David's wise words offer a useful way of thinking about the investment court proposal, which calls for the complete elimination and replacement of the current *ad hoc* system of arbitration. Its underlying premise, thus, seems undeniably that ISDS, in its current form, is completely *illegitimate*—in other words, it misses the target entirely.

But the evidence stands generally to the contrary. While a small number of States have taken steps to exit the system altogether, most have not. And while

12. COLIN BROWN, THE 3D VIENNA INVESTMENT ARBITRATION DEBATE: THE EUROPEAN UNION'S APPROACH TO INVESTMENT DISPUTE SETTLEMENT (June 22, 2018), http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157112.pdf.

13. David D. Caron, *Investor-State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 32(2) SUFFOLK TRANSNAT'L L. REV. 513 (2009).

14. *Id.* at 515.

many States are reconsidering and revising the content of their model investment treaties, most of these models still include basic provisions for ISDS. In this light, it arguably makes sense to view the investment court proposal more in terms of how legitimate it can be, as opposed to whether it is completely illegitimate. In other words, does it move us closer to the center of a generally agreed upon target, that is, the resolution of investment disputes by *some* type of third-party adjudicator?

One way to approach the question is to test each of the basic premises on which the investment court proposal rests, and ask whether a court would, in fact, remedy the problem posed (and whether it would do so in the most efficient manner) or whether it would create new problems. In other words, does a rigorous cost-benefit analysis favor a court over arbitration?

One basic premise is that a permanent court would produce more consistent and predictable outcomes than an *ad hoc* system of arbitration.¹⁵ Critics have argued that the current system has generated different results across cases involving similar facts and law. This raises a number of important questions:

What are the sources of inconsistency? Is it only the arbitrators? The outcomes across similar cases would seem to depend, at least in part, on the way the parties frame the legal and factual arguments for decision. Would a court change the approach of the parties? Moreover, in my mind, the greatest source of inconsistency is the underlying investment protection norms, some of which (particularly in early-generation investment treaties) are intentionally broad and vague in order to afford arbitrators wide discretion to reach a just result. Would a court be expected to redefine the content of these norms by fulfilling a greater law-making function, or would it find them only capable of application on a case-by-case basis, which might in the end still produce seemingly inconsistent results?

How much inconsistency currently exists and how much is too much? There are about 580 known ISDS awards¹⁶ and a relatively small subset of these are the subject of regular criticism. I am not aware of any study that has assessed the scope of the issue comprehensively. Without such a study, how can we really understand if there is a problem and, if so, the extent of it?

What might States lose in the transition from an *ad hoc* system of arbitration to a court? Take, for example, the U.S. experience before the International Court of Justice on the question of whether the so-called essential security provisions in its treaties were self-judging. Based on the ruling in the *Nicaragua* case under

15. *A New System of Resolving Disputes Between Foreign Investors and States in a Fair and Efficient Way*, A Multilateral Investment Court, State of the Union 2017, European Commission 3 (2017) [hereinafter *A New System*], http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf.

16. See INVESTMENT DISPUTE SETTLEMENT NAVIGATOR, UNCTAD, <https://investmentpolicyhub.unctad.org/ISDS> (last visited Feb. 18, 2019).

one treaty,¹⁷ the United States appeared to be limited, at least as a matter of litigation strategy, in its ability to raise the same point of interpretation under another treaty in the *Oil Platforms* case¹⁸—even though as a matter of law and policy, the U.S. position had never changed. Consistency, achieved in the context of a court through a system of precedent, might restrict a State’s ability to re-argue points of law and policy, and for some States on some issues, it may be important to have a second bite at the apple.

Finally, we might ask if there are any less onerous alternatives to a court, such as ways in which States can directly clarify and refine standards of investment protection through more expedited treaty-making. Might it be worth considering whether older-generation standards of protection could be replaced or sharpened, on an à la carte basis, by way of a multilateral convention in the same vein as the Mauritius Convention on Transparency?¹⁹

Another key premise is that judges on a permanent court, with longer tenures, would be more impartial and independent than *ad hoc* arbitrators.²⁰ This premise should also be fully tested.

Is it really possible to appoint judges to an investment court in an apolitical manner? The Honorable Charles Brower argues very forcefully in a recent article criticizing the court proposal that it cannot be done, as demonstrated by the politicized appointment practices of many existing international courts, including the International Court of Justice.²¹ Further, is it possible to select a truly independent judiciary when that judiciary would ultimately be beholden to the States that created it for political and financial support? And, does the current *ad hoc* system, in which each party has the right to select one arbitrator, not balance the interests more evenly?

Also, again, what do States lose by moving to a court? The right to choose one’s own adjudicator has long been held as a highly valued attribute of international arbitration. This may be particularly so in the context of investor-State disputes where specialized knowledge not only of international law, but also of the host State’s law and the workings of the host State’s government, may enrich the deliberative process to the benefit of the respondent State. Are States really ready to submit to a panel of judges with no connection to or specialized knowledge of their own sensitivities?

17. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 222 (June 27, 1986).

18. Oil Platforms (Iran v. U.S.), Preliminary Objection, 2003 I.C.J. 161, ¶ 20 (Dec. 12, 1996).

19. See UNCITRAL, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2015), as adopted by G.A. Res. 69/116, U.N. Doc. A/68/496 (Dec. 10, 2014), www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf.

20. *A New System*, *supra* note 15, at 3.

21. Charles N. Brower & Jawad Ahmad, *From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court*, 41(4) FORDHAM INT’L L. J. 791, 809 (2018).

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Finally, again, are there less onerous alternatives? A stringent code of conduct for arbitrators may go a very long way, and is a lot less expensive than establishing a court.

CONCLUSION

Let me conclude with an expression of hope that these and many other questions will be approached and answered carefully by the international investment community in the coming months as it considers a multilateral investment court. David very sadly can no longer help guide us through the issues. However, his legacy of scholarship and pragmatic reasoning in this area and many others still inspire us to find thoughtful solutions to international law challenges.

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