Assessing the legitimacy of investment arbitration: Can the EU's 'Investment Court' make Investor-State Dispute Settlement (ISDS) legitimate?

Lisa Diependaele, Universiteit Gent, Lisa.Diependaele@UGent.be

Keywords: investment arbitration, EU, CETA, TTIP, international adjudication, state consent, democratic legitimacy.

Since the entry into force of the Lisbon Treaty in 2009, the European Union (EU) has competence for the negotiation and conclusion of international investment agreements (IIAs), as a part of the common commercial policy. Unsurprisingly, as foreign direct investment (FDI) has become an important driver of the global economy, investment protection has taken a prominent place in the EU's recent trade negotiations.

Although some agreements also aim to liberalize cross-border investments, the main objective of IIAs is to protect investment in the post-entry phase. The most crucial aspect of international investment law is its distinct mechanisms for the settlement of disputes, known as Investor-State Arbitration or Investor-State Dispute Settlement (ISDS). Contrary to traditional international legal disputes which take place between states, ISDS *gives foreign investors direct access to an international remedy* to pursue claims against states for violations of their treaty obligations. Consequently, the relevant investment treaty provisions become *directly applicable* to investor-state relations. Moreover, even though the procedural rules remain similar to private commercial arbitration, a broad range of governmental activities can be at issue in investor-state disputes, transforming many cases into 'regulatory disputes' rather than private conflicts.[1]

In contrast to the scarce attention paid to the numerous IIAs which were previously concluded by almost all European countries, the inclusion of investment provisions in the prospective comprehensive economic agreements with Canada and especially the US have stirred up the debate on the desirability and legitimacy of the international standards of investment protection, specifically in relation to ISDS. For many commentators, ISDS is a dangerously unbalanced and flawed system.

Faced with the growing controversy over ISDS, the EU is trying to redefine its position. Both in the context of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) negotiations and the ongoing Transatlantic Trade and Investment Partnership (TTIP) negotiations, the EU has proposed several changes to the rules regarding ISDS, including the establishment of an 'Investment Court System' (ICS). The key question, however, is whether or not these reforms are sufficient to address the most fundamental problems of the system and increase its normative

[1] In this context, it is also important to note that IIAs and arbitral awards often define the concept of 'investment' very broad. By implication, the scope of the jurisdiction of the arbitrators can extend to almost any domain of governmental regulation, on the condition that it directly or indirectly influences a foreign investment.

legitimacy - i.e. 'the moral right' to take binding decisions regarding states' compliance with the relevant substantive standards of investment protection.

Accordingly, we examine what adequate criteria for the legitimacy of ISDS as a mechanism for international adjudication could be and subsequently compare these with the current adaptations to ISDS procedures in the CETA and TTIP texts. In order to address this question, we will draw form insights in legal theory and political philosophy that deal with the question of the legitimacy of international law and institutions more generally. More specifically, we will explain why both traditional approaches to legitimacy of international institutions – i.e. state consent and the goals or expected outcomes of international institutions – are not satisfactory criteria for assessing the legitimacy of ISDS. Based on this analysis, it will become clear that an international investment tribunal can only be minimally legitimate if (1) its procedures guarantee the effective participation of 'all those affected' and (2) legal mechanisms are included that ensure their legitimate interests can be taken into account.

References

Besson, S., 'Legal Philosophical Issues of International Adjudication', in Romano, C., Alter, K., Shany, J., *The Oxford Handbook of International Adjudication* (Oxford: OUP, 2014), 413-433.

Besson, S., 'The Authority of International Law – Lifting the State Veil', *Sydney Law Review* 31, 2009, 343-380.

Buchanan, A., 'The Legitimacy of International Law' in S. Besson, J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: OUP, 2010), 79-116.

Buchanan, A., Keohane, R.O., 'The Legitimacy of Global Governance Institutions', *Ethics & International Affairs* 20, 2006, 405-437.

De Brabandere, E., *Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications* (Cambridge: CUP, 2014).

Dolzer, R., Schreuer, C., *Principles of International Investment Law* (Oxford: OUP, 2008).

Franck, S.D., 'The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law Through Inconsistent Decisions', *Fordham Law Review* 73, 2005, 1521-1624.

Grossman, N., 'The Normative Legitimacy of International Courts', *Temple Law Review* 86, 2013, 61-106.

Johnson, O.T., Gibson, C.H., 'The Objections of Developed and Developing States to Investor-State Dispute Settlement, and What They Are Doing about Them' in A.W. Rovine (ed.) *The Fordham Papers 2013: Contemporary Issues in International Arbitration and Mediation* (Leiden: Brill Nijhoff, 2015), 253-269.

Mills, A., 'The public-private dualities of international investment law and arbitration' in C. Brown & K. Miles (eds.) *Evolution in Investment Treaty Law and Arbitration* (Cambridge: CUP, 2011), 97-116.

Titi, C., 'The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration', *The Journal of World Investment & Trade* 14, 2013, 829-851.

Von Bogdandy, A., Venzke, I., 'In Whose Name? An Investigation of International Court' Public Authority and Its Democratic Justification', *The European Journal of International Law* 23, 2012, 7-41.

Waldron, J., 'Judicial Review of Legislation', in A. Marmor (ed.), *The Routledge Companion to Philosophy of Law* (Abingdon: Routledge, 2012), 434-448.