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Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)
Managing Editor: Maree Newson (mareenewson@gmail.com)

An International Investment Court: panacea or purgatory?

by
M. Sornarajah *

The proposal for an International Investment Court is a red herring. The central issue is whether investment treaties should exist at all. The secondary issue is whether, if they do, an Investment Court is better than the present settlement of disputes through arbitration. The first issue is the more important one. But since the second issue has been raised, it is best to stop the idea at the outset.

Given the disenchantment with the present investor-state dispute-settlement (ISDS) system, the alternative suggested, especially in recent documents of the European Union (EU) in the context of the Transatlantic Trade and Investment Partnership negotiations, is a standing International Investment Tribunal. Does the idea cure the charges of illegitimacy leveled at the present ISDS system? The illegitimacy of ISDS flows, according to its critics, from the allegation that a select few arbitrators routinely decide disputes in favor of multinational enterprises in an ideologically prejudiced manner, articulating doctrines more extensively than agreed upon by governments negotiating the treaties, thereby also curtailing those governments' regulatory functions.

An Investment Court would not cure such illegitimacy. A Court would become a device for neoliberal rules of investment protection with even greater authority. Judges of the International Court of Justice (ICJ) have been sitting as investment arbitrators. A study of their record does not show that they avoid the prejudices of those arbitrators who had not also served as judges at such a high level. On the few occasions ICJ judges from developing countries sat on investment arbitration panels, they dissented from the (developed country) majority.[1] Having a minority of five judges from developing countries is no help. They are in a minority, even assuming those appointed are not already acculturated to the neoliberal vision. They could be strong-armed into complying with majority decisions. There is no indication as to the geographical areas they may come from or how they would be chosen.

Judges of domestic courts (the EU uses domestic courts as the model) are drawn from elite classes that have uniform views. Baroness Hale, Deputy President of the United Kingdom Supreme Court, has observed that most top English judges are white, male, attended the same elite universities, and specialized in commercial law.[2] Apart from the lack of expertise in public law issues that abound in investment arbitration, these judges, of whatever court, most likely have the same ideological predispositions. Judges chosen from other EU countries are unlikely to be different. The affirmation of slanted positions in a more authoritative fashion is the likely outcome of an Investment Court.

Take the existing European Court of Human Rights. It has dealt with the right to property, an issue featuring in investment arbitration. The European Convention on Human Rights did not originally include that right, since socialists had problems with it. It was included through the first protocol to the Convention. The Court's interpretation of that provision indicates that it reserves the power to apply a proportionality test to any regulatory interference with property rights. The proportionality rule is now used in investment arbitration to overcome the rule that regulatory interference does not amount to compensable takings. Such creativity in favor of investment protection would become more intense through an Investment Court. Proportionality adds to indeterminacy and subjectivity. Critics argue that proportionality ensures that courts impede democratic state functions by arrogating to themselves a continuing power to review regulation.

The establishment of an Investment Court would dissociate that Court from democratic control. As in the case of other permanent international tribunals, the Court would arrogate additional powers and create regimes through precedents in the area in which it operates. Academic opinion supports such creative expansion into the constitutionalization of fragmented law. The danger is that neoliberal principles will become set in stone beyond the power of democratic processes. To date, there is no doctrine of precedent in investment arbitration. This will not be so when there is a permanent judicial body.

The EU proposal suggests that an International Investment Court is not different from a domestic court. If so, why not permit existing domestic courts to perform the function of deciding investment disputes? They are more familiar with the circumstances in which a state interfered with foreign investments and can assess the fairness of the interference in its political and social context more effectively. This is the way chosen in South Africa and Brazil. Domestic courts are part of a democratic system. In the face of the experience of investment arbitration, the proposal to set up an Investment Court will enhance the worst features of the existing ISDS system.

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* M. Sornarajah (lawsorna@nus.edu.sg) is CJ Koh Professor of Law at the National University of Singapore. The author is grateful to Anna Joubin-Bret, David Schneiderman and one anonymous reviewer for their helpful peer reviews.

[1] Judge Shahabuddeen in *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Annulment Tribunal (Apr. 16, 2009); Judge ad hoc Abi-Saab in *Abaclat and others v.*

Argentina, ICSID Case No. ARB/07/5, Dissenting Opinion to Decision on Jurisdiction and Admissibility (Aug. 4, 2011).

[2] Brenda Hale, "Kuttan Menon memorial lecture: Equality in the judiciary," Feb. 21, 2013, available at https://www.supremecourt.uk/docs/speech-130221.pdf. These views were echoed by the late Justice Scalia in *Obergefell v. Hodges* 576 U.S. (2015), dissenting, p. 6.

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