International Politics vs International Justice: No Room for Investor-State Arbitration?

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Critics of the current investor-state arbitration regime may yet have their best days ahead of them. In the midst of tarnished FTA negotiations and in times of political uncertainty, they have captured a global audience. Their message is disconcerting: Investor-State Dispute Settlement (ISDS) is a system designed by and for multinational corporations. It allows faceless conglomerates to bypass national courts and thus strips sovereign nations of their policy-making powers and taxpayers of their money.

From a political perspective, ISDS originally emerged from a bilateral bargaining process of post-colonial developing states with capital-exporting developed states. From a legal perspective, ISDS provided a much needed international legal framework that allowed investors to invest in emerging economies while at the same time affording them protection against local political turmoil. The dispute resolution system of the International Centre for the Settlement of Investment Disputes (ICSID) was created to incentivise investors to specifically venture into new territory and to bolster international development by doing so. As some commentators have rightly noted, the link between investment arbitration and international economic development justified the connection between ICSID and the World Bank. Today, ISDS critics perceive this link as a "dangerous liaison". It

supposedly illustrates how big corporations, backed by the international financial system, manipulate public policy and undermine democracy.

So far, the polemics of the anti-ISDS front are hardly convincing. Take, for example, the oft-repeated complaint that the triggering of a treaty clause by a private party deprives states of their sovereignty. It is not only dishonest; it also shows a blatant ignorance of basic principles of public international law. Bilateral Investment Treaties are legal instruments entered into by sovereign nations. That, in itself, is a sovereign act. The triggering of the dispute settlement clause contained in a Bilateral Investment Treaty guarantees compliance of the sovereign nation with the international obligations it assumed under the treaty. In their diatribe against globalisation, the critics of ISDS likewise tend to forget this. For instance, ISDS has proven to be the only efficient mechanism to protect foreign investments in the oil and gas sector against political risks and "economic nationalism".

Nor is ISDS a privilege exclusive to multinational corporations. It very much benefits small and medium enterprises (SMEs) as well. More often than not, investor-state arbitration constitutes the only forum in which SMEs may effectively seek justice. In the same vein, for economic, political and legal reasons, the number of nationals of capital-exporting states suing other capital-exporting states is rising sharply (e.g. *Vattenfall AB and others v. Federal Republic of Germany,* ICSID Case No. ARB/12/12). And the scales of Justice do not always tip exclusively to the detriment of state respondents. Moreover, cost decisions against claimants are an effective tool that is increasingly applied to penalise frivolous claims (e.g. *Philip Morris v. Australia*, PCA Case No. 2012-12, Final Awards Regarding Costs, 8 March 2017)

To be fair, ISDS is a still-developing and thus perfectible system at the crossroads of international justice and politics. Ultimately, it provides a peaceful dispute settlement forum and prevents economic disagreements from growing into political and diplomatic conflicts. The latest trends show there is a political will to reform the system, pushing for more institutionalisation (e.g. the process of analysis and reform of ISDS initiated within the framework of Working Group III of UNCITRAL; the European Commission's project of a Multilateral Investment Court). Yet, spreading falsities will not assist in adapting the system such that it will serve its purpose in today's political environment.