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Access to Justice in Investment Dispute Settlement

Stephan Schill (General Editor, ICCA Publications; Amsterdam Center for International Law, University of Amsterdam) · Monday, February 10th, 2020 · Institute for Transnational Arbitration (ITA)

As UNCITRAL Working Group III is proceeding to address concrete proposals to reform treaty-based investor-state arbitration, the future of investor-state dispute settlement (ISDS) is at a historic juncture. Reform proposals include both incremental changes to investor-state arbitration and proposals for further institutionalization, such as the call of the European Union (EU) to establish a Multilateral Investment Court (MIC) or China's suggestion for an appeals facility for arbitral awards. But there are also suggestions out there to go back to domestic courts or limit international recourses to state-to-state dispute settlement.

This post does not provide a full evaluation of the different reform options; it focuses on one particularly salient aspect: the issue of why investor access to international dispute settlement is a core feature that any reformed system should maintain, independently of whether disputes will be settled through arbitration or by a permanent international court. As further detailed below, the main reason for this is that ISDS provides a form of access to justice and allows for the review of government conduct under international legal standards that cannot be performed with equal vigor by domestic courts or inter-state mechanisms.

Protection against political risk in host countries

The principal reason for providing foreign investors with an international recourse against host governments relates to concerns with domestic courts. The domestic judiciary may be, or may be perceived to be, insufficiently independent, impartial, or neutral, or may not offer effective dispute settlement mechanisms, for example due to clogged dockets and excessively lengthy procedures, or because of access limitations for foreign investors. Providing foreign investors with the possibility for recourse in an international forum substitutes for such shortcomings. It provides a form of access to justice in order to have the lawfulness of host state conduct reviewed, and thus reflects an essential tenet of the rule of law.

Granting access to justice to foreign investors is a concern not limited to host countries with weak governance structures. Contrary to often heard arguments that ISDS mechanisms are not needed in countries with well-developed legal systems, deficits with access to justice may also exist there. Such countries, too, may limit or exclude the review of certain government acts, for examples under doctrines, such as the 'political questions'-doctrine in the United States, or because foreign corporations do not enjoy constitutional protection in the same way as domestic corporations, as is

the case *inter alia* under Article 19(3) of the German Constitution. Furthermore, there is a concern that the host state's courts, even when they are independent and impartial, may favor their own state to the detriment of the foreign party. Last, but not least, legal systems that have well-functioning judiciaries may change over time. International recourses respond to such concerns and provide access to justice that is independent from domestic courts.

Effective enforcement of Investment treaty obligations

A further aspect militating in favor of providing foreign investors with international recourses to settle investor-state disputes relates to applicable law. What investors vindicate under an ISDS mechanism are regularly not rights granted to them under domestic law. Instead, their claims concern alleged breaches of international investment agreements (IIAs). Domestic courts, however, do not necessarily apply IIAs within the internal legal order and do not necessarily give it primacy over conflicting national law. Art 30.6 of the EU-Canada Comprehensive and Economic Trade Agreement (CETA), for example, expressly provides that claims for breach of CETA cannot be brought before the contracting parties' domestic courts.

Inter-governmental or inter-state mechanisms, such as diplomatic protection, or formal inter-state dispute settlement, in turn, do not provide an adequate substitute for an ISDS mechanism. Affected investors regularly do not have a right vis-à-vis their government to have their claim espoused against a foreign sovereign, making investors dependent on the goodwill of their home country and likely prejudicing smaller compared to larger investors. Giving investors access to an international forum is the most effective means to enforce the substantive rights granted under IIAs.

Actively shaping global governance

A third reason that militates for settling investment disputes through ISDS mechanisms consists in the contribution this can make to international cooperation and global governance. In an inter-state system, exercising diplomatic protection could burden the political climate between states, which may be counterproductive to solving other problems for which international cooperation is necessary, be it environmental protection or international security. Granting investors access to ISDS thus creates space for states to cooperate more effectively in other fields without investment disputes clouding their relations, a phenomenon that is also referred to as 'de-politicization'.

In this context, it is worth stressing that reform solutions to be developed for ISDS preferably are of a multilateral nature, as the protection against political risk is difficult to confine to specific bilateral relationships. This becomes clear when considering that investment flows can be structured so as to fall within the scope of almost any IIA. Even if, for example, CETA had not provided for access to ISDS, Canadian companies could structure their investment into the EU through a company protected by an EU agreement with a third country that contains an ISDS mechanism. The same would apply vice versa for EU investors who invest in Canada. For this reason, it is difficult to limit ISDS to specific bilateral relations. The issue is one of principle: either ISDS is not sought at all, or it is structured so as to be acceptable, in principle, for any foreign investor.

Asymmetry problem: investor obligations and enforcement

Yet, ISDS mechanisms also create concerns from an access-to-justice perspective: they asymmetrically provide access to justice for, but hardly against, foreign investors. They serve to protect investor rights, but not to enforce investor obligations and sanction investor misconduct. This is a significant concern as one justification for granting investors access to ISDS, namely deficits in domestic courts, would support granting those affected by investor misconduct access to an international forum as well.

There are, however, also important differences between investor rights and investor obligations that mitigate the asymmetry problem considerably:

- First, international dispute settlement mechanisms are in many situations not strictly necessary to enforce investor obligations. Investor misconduct can, in many circumstances, be addressed through the means of administrative law and the enforcement mechanisms it provides. Host states regularly do not need to have recourse to dispute settlement to enforce duties they have imposed on investors.
- Second, ISDS mechanisms, already at present, can be used to enforce investor duties in certain circumstances. Depending on the applicable IIA, breaches of domestic law can bar an investor's access to ISDS; and counterclaims by states against investors are increasingly accepted as a means to sanction investor misconduct.
- Third, investor obligations are first and foremost imposed under domestic law; they only appear gradually in IIAs, and often enough only in the form of soft law, such as through references to the OECD Guidelines for Multinational Enterprises. The argument that access to justice in an international forum is needed to enforce obligations that are of an international legal character would therefore not apply.

In any event, the concern for asymmetry should not be resolved by opposing investor access to an international dispute settlement forum, or by not supporting the present UNCITRAL reform process for ISDS. ISDS mechanisms are worth preserving because they can serve as an accountability mechanism for host government conduct, implementing the rule of law's central idea of subjecting government conduct to effective legal constraints. In this sense, investment dispute settlement, whether through arbitration or before an international court, constitutes a form of access to justice. An appropriate solution to the asymmetry problem could then consist in creating investment dispute settlement mechanisms, for example as part of the current UNCITRAL process, that are sufficiently open, so that its jurisdiction can cover not only claims by, but also claims against, foreign investors. This could constitute an important step in addressing gaps in investor accountability and provide comprehensive access to justice in respect of international investment projects for all actors affected.

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