Public Interest and Investment Treaty Arbitration

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I. Introduction

Treaty arbitration often raises fundamental issues of public interest which are usually absent from international commercial arbitration. It is said that arbitrators are not guardians of the public interest and should simply resolve the dispute inter partes without looking at the wider political and economic impact of the issues in debate. Such an approach may be appropriate in a private dispute but is that still the case when measures of democratically elected governments are reviewed for their compliance with norms of international law?

The conflict between the essentially private nature of arbitration and the often public nature of the issues at stake in investment treaty arbitrations have caused this nascent institution to come under increasing criticism from the media, public interest groups and even the states themselves. As the United States Government argued in the context of one such case: (1) [page "355"

[investor-state disputes are] to be distinguished from a typical commercial arbitration on the basis that a State [is] the Respondent, the issues [have] to be decided in accordance with a treaty and the principles of public international law and a decision on the dispute could have a significant effect extending beyond the two Disputing Parties.

A recent New York Times article (2) commenced as follows:

Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a group of international tribunals handles disputes between investors and foreign governments can lead to national laws being revoked and environmental regulations changed. And it is all in the name of protecting foreign investors under NAFTA.
The interests of states are at stake in these cases. Arbitrators’ awards, even if unable to declare state measures invalid, may have a direct and significant impact on the state's future conduct and the national budget. Taxpayers in states which are the subject of an adverse award may legitimately demand to know why their money is being paid out to disgruntled foreign investors. But the criticisms should not simply be dismissed as the ranting of anti-globalizationists. There is some legitimacy behind the hyperbole and the legitimate complaints need to be identified so that they can be addressed.

There is a risk of this new child in the world of international arbitration dying in infancy, delicate and overprotected by its parents from exposure to the outside world. The arbitration community should not take the role of the overprotective parents, suffocating its natural development and depriving it of survival skills in the outside world by reciting the mantra of confidentiality. Concrete steps can be taken to everyone’s advantage to ensure that investment treaty arbitration matures into a powerful tool for the effective protection of foreign investment and thereby a motor for international commerce, whilst at the same time balancing the legitimate concerns that have been expressed. To do that we need to understand and seek to reconcile competing public interests.

II. Public Interest in Investor Protection

I start from the proposition that there is an overriding public interest in effective foreign investment protection. It is no coincidence that the number of bilateral treaties for the promotion and protection of investment has mushroomed from about 500 treaties in 1992 to some 2,000 treaties today. States recognize that effective investor protection promotes foreign investment – they proudly display their record in this regard on their foreign investment propaganda, promising a secure environment for such investments underpinned by effective international law standards. As the tribunal in Amco v. Indonesia page "356" noted: (3)“To protect investment is to protect the general interest of development and of developing countries.”

Those standards are ineffective without a practical enforcement mechanism. Many early treaties stipulated a wide range of protection for foreign investment but were only backed up by inter-state remedies, little better than customary international law rights of diplomatic protection. These provided little comfort to the foreign investor. They depended on the willingness of the state to trigger formal inter-state arbitration by espousing the claim of the investor. The dispute was inevitably politicized as the state weighed up the
concerns of antagonizing the state against the importance of the investment in question. The small or medium investor would rarely carry the weight to cause the scales to tip in its favour.

It is simply unrealistic to assume that such remedies would ever effectively police an investment protection regime. Indeed, one of the motivating factors for the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) was to remove investment disputes from the realm of diplomatic protection through direct access to an international remedy. As Professor Schreuer notes in his Commentary: (4) “The dispute settlement process is depoliticized and subjected to objective legal criteria. Moreover there is no requirement to exhaust local remedies before resorting to ICSID arbitration unless this has been made an explicit condition of consent by the host State.”

In the recent Senate Ways and Means Committee Hearings on the Free Trade Area of the Americas, the question of an appropriate dispute resolution mechanism was discussed. Dan Price, one of the Chapter 11 NAFTA negotiators noted in these hearings that: “Limiting investment dispute settlement to a state-to-state procedure will politicize disputes, leaving investors, particularly small and medium sized enterprises, with little recourse save what their government cares to give them after weighing the diplomatic pros and cons of bringing any particular claim.”

As a consequence, the foreign investor’s interest is only guaranteed by a direct right of access to a neutral and effective dispute resolution procedure to enforce the specific rights afforded to their investment by the relevant treaty. This has the salutary effect of depoliticizing the dispute, reducing investment risk and thereby increasing cross-border investment. Nearly all modern treaties follow this model by providing investors with a right to trigger international arbitration unilaterally without the sanction of their home state once a “cooling-off” period for negotiations has been completed.

This public interest in investor protection needs to be balanced against the increasing concerns voiced as to the nature of the process which is then engaged. Unless these concerns are addressed, states themselves may step back in the next generation of such treaties or in a possible future multilateral investment protection treaty and limit direct access to adjudication of disputes by foreign investors.

Indeed, this “backlash” may already be starting. In the debate surrounding the dispute resolution provisions of the future Free
Trade Area of the Americas, it has been suggested that direct access to dispute resolution be abrogated. In an attempt to curb some of the wilder investor claims, the NAFTA Free Trade Commission has issued “Notes of Interpretation” of Art. 1105 by clarifying that its scope is not intended to go beyond that of customary international law. (5) Since the scope of this article is the subject of pending claims, the policy makers have been accused of “changing the rules in midgame”. (6)

A more drastic “backlash” through removal of the direct right of action for the investor might be stopped in its tracks by seeking to address the concerns expressed by the critics. We first need to understand the competing public interests at stake in this debate which might be resumed as the public interest in transparency, the public interest in an independent and impartial tribunal and the public interest in the uniform development of the law.

III. Public Interest in Transparency

The first and principal criticism of investor/state arbitration is its opacity. This stems from the nature of arbitration itself. The notion of three private individuals deciding a commercial dispute behind closed doors which will only affect the rights of the parties behind the doors does not offend fundamental principles of justice. Parties should be able to elect to dispose of their rights, including the disposal of their right to a judicial resolution of disputes by the inclusion of an arbitration clause.

The possibility of those same three private individuals deciding whether measures taken by a legitimate government are compatible with an international treaty is more problematic, especially where the decision on the merits is without appeal. This is a fortiori the case when those three individuals condemn that government to pay eight-figure dollar sums from its coffers, paid for by its taxpayers, who have not been permitted access to the process. When that process permits the provincial judge of one state to have the ultimate word on the legality of measures passed by another state in the context of annulment proceedings, (7) eyebrows may be raised. As Barton Legum, an attorney with the Office of the Legal Adviser of the US State Department recently observed: (8) “Conducting arbitrations implicating the public interest in conditions of secrecy is unacceptable.”

Many of the decisions issued by tribunals, especially in the NAFTA context, raise extremely sensitive issues: in SD Myers, a tribunal punished Canada for blocking the export to the United States of hazardous waste products; (9) in a settlement of the Ethyl
case, the Canadian government lifted restrictions on manufacturing an ethanol-based petrol additive that it considered hazardous; in Metalclad, the Mexican government was ordered to pay US$ 16 million compensation because it refused to permit the construction of a toxic waste processing plant; in Methanex, a Canadian corporation is challenging California’s decision to phase out the use of a gasoline additive containing methanol.

The public interests raised by these issues are not limited to NAFTA. A claim is pending against the Republic of Bolivia concerning the expropriation of a water concession following civil disturbances as a result of privatization and price increases necessary to improve the quality of the water system. In two cases brought against Argentina, the legality of the generalized government measures effectively revoking the legal framework applicable to tariff structures as a result of the economic crisis will be reviewed.

The current opacity occurs at various levels: first, the knowledge of the dispute’s existence; secondly, the access to the process itself and finally the access to the resulting decision.

1. Public Awareness of the Dispute

There is a concern that public awareness of an investor-state dispute, which may address issues of general public concern, and which will risk depleting that country’s resources through a damages award, may be under the control of the parties. Whilst the existence of ICSID cases is posted on its website with details of the tribunal and NAFTA cases benefit from publication as a result of access-to-information legislation, investor-state cases involving other jurisdictions decided ad hoc under the UNCITRAL rules, or pursuant to the rules of the ICC or Stockholm Chamber of Commerce may go wholly unnoticed unless the parties agree otherwise. In such a case how can public interest be protected?

2. Public Access to the Process

Even if the existence of the dispute is public, the hearings remain private, thereby preventing an informed debate on either the quality of the process itself or substantive issues which might touch on matters of public interest, such as environmental protection. The clamour for public access to the hearings on such issues of public importance is therefore understandable. At the same time, it is important that the process is not re-politicized or turned into a media circus.
One means of addressing the concern is to permit the access and/or intervention of interested third parties in the procedure as amici curiae. The arbitrators in the Methanex case concluded that their tribunal had the power to accept submissions from amici curiae as a matter of jurisdiction in an arbitration governed by the UNCITRAL Rules but, considering the matter to be premature, declined to articulate detailed criteria. The tribunal concluded that the public interest could play an important role in the decision and that admission of amicus briefs could counter some of the suspicion which had built up in connection with the secrecy of the proceedings.

Transparency is not merely aimed at ensuring that third parties get their say on issues of public importance. It also encourages good government. Citizens of Mexico, India or Russia ought not simply to be told: "your money has just been used to satisfy an international arbitration award", the details of which cannot be divulged. Democratically elected governments are accountable to their electorate and should come under scrutiny in the political process if they are engaged in conduct contrary to their international obligations. Transparency through access to the record and to hearings ought therefore to discourage governments from acting in an arbitrary way towards foreign investors.

Public access is unlikely to open the floodgates. The arbitrations are often of a technical nature and only of specific interest to a small number of public interest groups. Public access to the European Court in Luxembourg has not caused lines to form before the commencement of each hearing and that institution has not been turned into a media circus.

3. Public Access to the Awards

A related issue of transparency is the publicity and availability of awards. In a new and developing area of law such as this where there are few decided cases, nearly every decision draws new lines. Yet access to such decisions can remain a lottery. ICSID does an excellent job in encouraging parties to consent to publication and then offers the widest circulation through its Foreign Investment Law Journal. However, is it right that these cases, all of which (for better or worse) take on an exaggerated precedential value due to the dearth of authority, are only accessible at the parties’ discretion? This affects not only the general public’s right to access and consider the substantive decision but also the lawyer’s right to present the best case for his or her client by accessing and addressing all relevant precedent.

This is a real problem. Access to many of the decisions is through a
network of law firms active in this area: whilst it benefits the members of that “magic circle” it is not right that those firms should have a wider array of jurisprudence with which to fight their case. Access should be equal to all – whether the sole practitioners in middle America (who have been active in these cases) or the international law firm in Paris or Washington.

IV. Public Interest in an Independent and Impartial Tribunal

Most commentators suggest that the role of an arbitrator is private and contractual: the arbitrator is charged with the “mission” of resolving a particular dispute between specific parties. But international arbitrators have traditionally had an advantage over their judicial colleagues: their decisions are usually not published. They can focus on the case at hand and ignore wider implications on the development of jurisprudence since, absent enforcement measures or an application for setting aside, the decision will be known only to a few. The sporadic nature of such publication has deterred a general culture of looking for arbitral precedents other than with respect to purely procedural issues. As a result, the judicial tension between the need for justice in the specific case and the danger of creating an unfortunate precedent, particularly acute in common law systems of stare decisis, does not arise for the arbitrator. There is not the same underlying fear that (as any English or American law student will recall) “hard cases make bad law”.

In the light of the increased publicity of investor-state awards, the treaty arbitrator has a new responsibility for establishing a corpus of law. This responsibility may cause problems where the arbitrator is instructed as counsel in a similar case. Unlike commercial arbitration where applicable law varies, the arbitrators in these cases are consistently applying a limited number of concepts under public international law. It is important therefore that the arbitrator's mind not be subconsciously influenced against a certain interpretation of a treaty if the published award would cause him or her problems in a pending case in which they were acting as counsel.

The other concern voiced is that of “secret courts” of which “the members are generally unknown”. Arbitration clearly provides parties with the right to select a decision-maker of their choice, but there is no minimum requirement to be an ICSID or investment treaty arbitrator. Whilst there is a corpus of eminent lawyers who act as arbitrators in this area, there is no means of preventing the appointment of decision-makers whose abilities or knowledge of the area of law are questionable. In the absence of any right of appeal on matters of substance, the complete liberty with which the parties may act can give rise to concerns.
V. Public Interest in the Uniform Development of the Law

Recent criticism has also been focused as a result of two allegedly inconsistent awards brought under two investment treaties and two different tribunals but on the basis of identical facts (the Lauder cases). Such inconsistency in decisions on state liability is a matter of concern. Yet it is difficult to see how it can be avoided given that individual shareholders up a chain of ownership might establish a separate and independent right to bring such a claim and start a separate arbitration under different treaties depending on their nationality.

The classic investor-state arbitration scenario arises out of a specific state measure taken in respect of a specific foreign investment, often involving claims of expropriation or discrimination. A new and far more radical scenario arises where the state has passed general measures which affect whole classes of foreign investor in alleged breaches of standard treaty protections. This is the current case with the Argentine crisis. Argentina's Emergency Law and related regulations removed the right for public utilities to charge in dollars, converted tariffs from dollars to pesos at a rate of 1:1 and abolished the indexation of tariffs to US dollar indices. These measures affect all regulated public utilities in the gas, electricity and water sectors in a virtually identical manner. Most of these public utilities were privatized in the 1990s and bought by foreign investors who have now lost all value in their Argentine assets as they are unable to fund dollar denominated debt. Many of the foreign investors have sought to benefit from Argentina's extensive network of bilateral investment treaties (BITs) and two claims are already pending before ICSID on virtually identical facts. In a few months time the number of claims could have tripled as the compulsory negotiation periods expire.

In such circumstances, each tribunal will have to reach an independent decision on the compatibility of the measures with the treaty rights in question with a corresponding risk of inconsistent decisions. The prestige of the arbitration institution risks severe erosion if such inconsistencies occur. This is the first time that the institution of investor-state arbitration has faced such concerns – in earlier financial crises, the state in question had either concluded few BITs or investors did not seek to enforce their rights.

VI. Possible Solutions

Returning to the overriding public interest in effective investor-state dispute resolution, how can this be achieved whilst at the same time responding to the issues raised? There are two approaches. The first is the “bottom up” approach that takes into account the current
position with all its faults and vested interests. The “top down” approach takes a more utopian view and asks the question how the concerns could be best addressed without taking account of any of the existing constraints. Neither approach will be able to result in an overnight revolution.

1. “Bottom-up” Reform

Many of the problems are inherent in the current model treaty structures and 2000 treaties are unlikely to be renegotiated quickly. The better hope would be for a true multilateral investment treaty which would gradually replace all bilateral treaties between signatory states and incorporate the modifications to the dispute settlement process. A first review could be undertaken in the context of the negotiation of the Free Trade Area of the Americas Agreement which, if successful, could provide a model for a wider multilateral investment treaty. Another approach could be at the level of the capital exporting states’ model treaties. Many such states negotiate with capital importing states on the basis of a model which is then modified in the course of the negotiation. (18)

Another means of engineering change (also not easy) could be through modifications to the ICSID Rules or the execution of a supplement to the ICC or UNCITRAL Rules to apply in the event of arbitrations commenced pursuant to investment treaties.

So what changes could be proposed?

a. Existence of claims

A new generation treaty (or rule changes) could provide for express publicity of all new claims, along the lines of the information provided by ICSID on its website. Consideration could also be given to ensure that, subject to business confidentiality concerns, the main submissions be made publicly available. As Dan Price noted in his evidence to the Senate as to how the NAFTA system might be improved in the future FTAA Treaty:

The FTAA parties should consider increasing the transparency of the process by ensuring that the briefs and arbitration proceedings are open to public view, subject to reasonable protections for confidential business information.

b. Access to hearings
The next generation of treaties or rule changes should consider allowing access to the arbitration hearings from affected third parties, upon prior application as amici curiae. Whilst the Methanex decision is to be welcomed, it would be appropriate to institutionalize the rules for admission of third-party public-interest groups, either as participants or observers. There are as yet no clear rules with respect to this delicate question. Arbitrators might wish to look to the experience of the WTO Appellate Body which has permitted such intervention.

c. Access to awards

There should be a systematic publication of all awards in investor-state cases to ensure the development of a proper corpus of law with equal access to investors and states. This will also reduce the risk of inconsistent decisions.

d. Arbitrators

In order to avoid criticism of the arbitrators, consideration should be given to the establishment of minimum criteria for the admission of arbitrators to act in these types of disputes. There should also be consideration of a reform to the manner in which the "363" ICSID List is established. It includes many names with little or no experience in this field and omits some of the major practitioners. A more radical approach (dependent on the creation of a more appropriate list) could be the nomination of all members of the tribunal by a neutral institution such as ICSID.

e. Appeal process

Arbitration is usually a process without appeal. This sits well with the exigencies of commerce but needs to be reconsidered in the field of investor-state arbitration where the policies of a state are under question and the precedential value of a particular case can become exaggerated due to the dearth of other authority. An appeal on specific points of law would avoid the risk of an aberrant decision and be more likely to result in coherent jurisprudence. It would also (in non-ICSID cases) avoid the implication of national courts in the review process as happened in the case of Metalclad. The process could be engineered along the lines of the ICSID ad hoc annulment panels but with a wider remit.

2. “Top-down” Reform

A more radical solution which could be considered in the context of
the FTAA or any multilateral investment agreement would be the creation of a permanent judicial body, whose members would be drawn from eminent practitioners with an equal balance of members from capital-importing and capital-exporting states.

The hearings of such an institution would be public, and its decisions published and developed into a consistent body of jurisprudence. One need only look at the use of Iran-US Claims Tribunal jurisprudence in investor-state cases to see what a valuable source of law that institution has been. There would be no lengthy tribunal appointment process and a panel of judges would be selected randomly upon filing of a claim (possibly respecting a balance of at least one judge from a capital-exporting country and a capital-importing country on each panel). There would be a procedure for the admission of amicus curiae briefs from third parties.

In this way, the overriding public interest in investor-triggered dispute resolution would be preserved but it would be insulated from much of the criticism levelled at the current process by the public and the states alike. The process would be fully transparent, there would be an institutionalised right of access to third party groups, there would be a developing and accessible case law and no risk of arbitrator/counsel conflict of interest. There would be no appeal from its decisions and no equivalent of a setting aside procedure other than claims of judicial bias. Its process would include a procedure where cases with identical or similar issues would be stayed to avoid the risk of inconsistent decisions.

Such an institution, I believe, would have the necessary authority to silence the current critics while protecting the investor.

Detractors might decry a transfer of sovereignty to a supranational court. But its authority would stem from the state’s consent in the applicable treaty – it would have no compulsory jurisdiction. Others might claim that there is already a plethora of judicial institutions and there is no need for another. But this institution would be at the very heart of investor protection and have an ever-increasing role given the growth in world trade.

Of course, the implementation of such an institution would be an enormous exercise – it is highly unlikely that states will sit down and renegotiate their 2000 BITs. However, in the context of a possible multilateral investment treaty or even initially in the context of the FTAA, it is an idea which should not be ignored.

One thing is clear: unless the criticisms of the current system are addressed (either more modestly or in the grand plan), this new child
of the arbitration world may be stunted in its growth. International trade and investment would suffer as a result and a great opportunity would have been lost.  

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1 Methanex Corporation v. United States of America.
3 Amco v. Indonesia (Decision on Jurisdiction), 1 ICSID Reports 400.
5 Reproduced in 13 World Trade & Arbitration Materials (2001, no. 6) pp. 139-140.
7 In the case of Metalclad v. United Mexican States, ICSID Case No. ARB 97/1, the seat of the arbitration under an ICSID Additional Facility case had been fixed as Vancouver. The Mexican Government was unhappy with the award and petitioned to have it set aside by the British Columbia Supreme Court. The Court took jurisdiction and partially set the award aside.
10 Metalclad Corporation v. United Mexican States, Award of 25 August 2000.
11 Methanex Corporation v. United States of America, claim pending.
12 Aguas del Tiunari S.A. v. Republic of Bolivia (ARB/02/3) (the author declares his interest as counsel to the claimant). The issues arising from the case are discussed in “Leasing the Rain”, The New Yorker (8 April 2002).
13 CMS Gas and Transmission Company v. Republic of Argentina (ARB/01/8) (the author declares his interest as counsel to the claimant) and LG&E Energy Corp. (and others) v. Republic of Argentina (ARB/02/1). The cases were discussed in a Bloomberg News article “CMS Energy, Powergen Unit, Lenders Challenge
15 See, for example, the website www.naftaclaims.com which contains all publicly available material on the NAFTA claims, including briefs and interim decisions.
18 See, e.g., the Model Treaties annexed to DOLZER and STEVENS, Bilateral Investment Treaties (1995).