Investor-state dispute settlement: the importance of an informed, fact-based debate

In the ongoing discussions of the Transatlantic Trade and Investment Partnership (**TTIP**) and the Trans-Pacific Partnership (**TPP**), the system of investor-state dispute settlement (**ISDS**) has given rise to an intense public debate. The **International Bar Association** (**IBA**) has observed, with concern, that misconceptions and inaccurate information have, in some instances, subverted the discussion. The purpose of this note is to identify and correct the major misconceptions informing the current public debate. Where positions are advocated on the basis of misconceptions or inaccurate information, the integrity of this valuable debate is compromised.

Consequently, the IBA Arbitration Committee – particularly, its Subcommittee on Investment Treaty Arbitration – is undertaking an in-depth analysis of the perceived benefits of ISDS and the spectrum of criticisms and concerns voiced regarding ISDS, in order to identify which criticisms and concerns are fact-based and which are not, and to recommend actions for those aspects of ISDS that may benefit from change. The members of the Subcommittee are drawn from governments from both developed and developing countries, arbitral institutions, corporate users and the legal profession.

In support of its work, the Subcommittee will shortly invite members of the public with an interest in the matter to participate in a detailed survey.

There are in the meantime misconceptions in the present discourse about ISDS that can be identified and addressed before completion of the Subcommittee's survey. The erroneous assertions together with correcting facts include:

- **Assertion**: Investors always win.

  Fact: Data show that states have won a higher percentage of cases than investors, and that around one-third of all cases end in settlement.[1]

- **Assertion**: ISDS enables investors to reap huge windfalls.

  Fact: Data show that claimant investors, when successful, recover on average less than half of the amounts claimed.[2]

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1 UNCTAD, *Recent Trends in IIAs and ISDS*, IIA Issue Note, No 1, 2015, UNCTAD/WEB/DIAE/PCB/2015/1, p 8; The ICSID Caseload – Statistics, Issue 2015-1.

2 Susan Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration', *North Carolina Law Review*, Vol 86, pp 57–59; Credibility International, *Study of Damages in International Center for the Settlement of Investment Disputes Cases*, June 2014, Section 4.

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- **Assertion**: ISDS is most often used by very large multinational corporations.

  Fact: Data show that only 8 per cent of ISDS proceedings are commenced by very large multinational corporations.[3]

- **Assertion**: ISDS is biased against developing countries.

  Fact: Data on ISDS show no correlation between the success rates of claims against states and their income levels or development status.[4]

- **Assertion:** ISDS cases are brought by investors from developed countries against developing countries.

  Fact: Investor claimants come from developed and developing countries, and state respondents have also been both developed and developing countries.

- **Assertion**: ISDS forces states to change their policies and laws.

  Fact: When a state is found to have breached its treaty obligations, it is typically ordered to pay monetary compensation to the investor and, less frequently, to refrain from taking specific action against the investor. But, unlike in the WTO system, states subject to investment treaty arbitration cannot be ordered to amend their laws or change their policies, and awards issued by investment tribunals do not order states to change their policies or laws.

- **Assertion**: ISDS permits investors to re-litigate cases already decided in domestic courts.

  Fact: Investment treaty tribunals have consistently held that they do not act as an appellate body for domestic court decisions. Investment treaties provide an independent international law standard to review host state conduct. An action that is consistent with domestic law may violate international law, just as an action that may violate domestic law may not infringe international law.

- **Assertion**: ISDS is not needed when domestic courts are sophisticated.

  Fact: For the reasons previously mentioned, an international tribunal is needed to resolve issues of international law. In addition, a national legislature may remove remedies under domestic law, which would leave the court unable to remedy even a violation of domestic law.

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[3] Organisation for Economic Co-operation and Development, *Investor-State Dispute Settlement: Public Consultation: 16 May – 9 July 2012*, p 17; Stockholm Chamber of Commerce, *A Guide to ISDS: The Facts.*

[4] Susan Franck, 'Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes', *Virginia Journal of International Law*, Vol 55, 2014.

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- **Assertion**: ISDS permits investors to recover their damages more than once, subjecting states to double-recovery.

  Fact: There is no known instance in which an investor has achieved double recovery through ISDS. General principles of law, which form part of the applicable law in ISDS arbitrations, militate against such an outcome.

- **Assertion:** ISDS prevents states from regulating in the public interest.

  Fact: When a state enters into a treaty – any treaty – it freely exercises its sovereignty to place limitations on its sovereignty. While investment treaties limit states' ability to inflict arbitrary or discriminatory treatment, they do not limit (and, in fact, expressly safeguard) a state's sovereign right to regulate in the public interest in a fair, reasonable and non-discriminatory manner.

- **Assertion**: States have no say in who decides investment claims against them.

  Fact: States have the same rights as investors with respect to appointing arbitrators. A state and an investor typically each appoint one arbitrator to a three-member investment treaty tribunal, and ICSID – the most common forum for ISDS – draws its appointments for tribunal chairpersons from a panel of arbitrators appointed by states when no chair can be agreed otherwise.

- **Assertion**: ISDS uses 'secret tribunals' and ISDS proceedings are insulated from public scrutiny.

  Fact: Most ISDS awards are published, some ISDS proceedings are broadcast live via internet web feeds, and the investment chapters in recent investment treaties contain provisions allowing members of the public to attend proceedings. Efforts are ongoing to increase the transparency of the ISDS process (eg, through the transparency rules established by the United Nations Commission on International Trade Law and the 2014 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration).

- **Assertion**: States cannot bring claims in investment treaty arbitrations.

  Fact: States may be able to claim or counterclaim in ISDS proceedings, depending in each instance on the wording of the treaty's dispute resolution provision on which the tribunal's jurisdiction is based. State-owned entities frequently claim under international investment agreements (eg, Vattenfall's claim against Germany).

- **Assertion**: States always bear the costs of investment treaty arbitration.

  Fact: When a state prevails, it does not bear the entire costs of a case. Increasingly, awards require the losing party to pay arbitration costs and legal fees to the winning party, meaning

that claimant investors undertake the risk of significant liability if they bring an unmeritorious claim.

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