Courting the Critics of Investor-State Dispute Settlement: the EU proposal for a judicial system for investment disputes

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First Rough Draft-Citations to be Completed

Introduction

This September, in the context of the TTIP negotiations, the European Commission proposed that, instead of investor state arbitration, disputes under the investment chapter of TTIP be adjudicated by a new investment court, a standing body of jurists, which would be complemented by an appellate instance, hearing appeals on error of law but also able to review factual findings for manifest error of fact. The European Commission proposal has its origins in a wide on-line consultation the EU undertook with respect to investor protection in the TTIP; the consultation produced an astonishing number of responses-something like 150,000-with a huge number of them indicating hostility to investor-state dispute settlement. Last July in its guidance to TTIP negotiators, the European Parliament recommended that under TTIP investment disputes be settled by a standing judicial body, rather than conventional methods of investor-state arbitration. With the September proposal, the Commission has risen to the challenge of the Parliament, and European civil society, producing a detailed blueprint for an alternative, judicial system of ISDS. Last week, the Commission tabled a final version of the proposal, indicating that it would be negotiated in TTIP in January. This final version can be found here: http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf.

The Broad Implications of the EU Proposal

The implications of the proposal extend far beyond TTIP, as it is intended as a model for other agreements that the EU enters into that have investor protection provisions. Already New Zealand's trade minister, Tim Groser, has indicated his openness to such an approach in a future New Zealand EU trade and investment

[1] I am grateful for exchanges on some of these issues with Martins Paparinskis, Barry Appleton, Donald Donovan, Nikos Lavranos, Andrew Lang, Catherine Titi and Greg Schaffer. I emphasis strongly that the views expressed here are exclusively my own.

agreement. It is possible, depending on the attitude of the new Liberal government in part, that the Canada EU agreement (CETA) will be reopened to include a judicial mechanism for settling investment disputes. But there is another respect in which the EU proposal is a game changer, which may not even depend on its adoption in any actual agreement in the short term. Over the last few years, criticism of ISDS has become a major focus of opponents of "neoliberal" globalization. Despite the moves of a few countries to exit ICSID, the increasing attention of UNCTAD to the issues that ISDS raises for developing countries' policy space, and the attempt by Australia to negotiate agreements with investor protection that do not contain ISDS, the ISDS insider community has been able to push back to a large extent the critics, denouncing them as outsiders who do not really understand how and why investor-state arbitration works. The rejection of investor-state arbitration by the European Parliament and Commission has conferred unprecedented political legitimacy on the critics of the existing system of ISDS, even if some of the critics have responded that the EU proposals don't really answer their objections. The Commission and Parliament speak for a significant group of countries, some of whom have traditionally been among the largest users of ISDS. When DG Trade Cecilia Malmstrom introduced the Commission proposal she stated with bluntness its underlying foundation: a "fundamental lack of trust" in the existing ISDS system. After such a statement, at least in the EU, it will be very difficult to retreat to that system, whatever pressures come from the arbitration bar, and similar quarters.

"Fundamental Lack of Trust"

As someone who as acted in a number of disputes as a consultant on the investor side, I would be among the first to admit that some of the criticisms of the existing ISDS system are ill-informed and indeed irresponsible. Disputes where the bases of the complaint were very specific instances of egregiously arbitrary and/or discriminatory or highly politicized behavior towards investors have been mischaracterized by critics as attacks on general regulatory authority in areas such as the environment or public services. There is no real evidence that arbitrators are systematically biased toward investors, and indeed the statistics show that host states win a very large number of disputes. While there have been some cases where investors have tried to use or abuse ISDS to attack general public policies (such as *Methanex*) this strategy has met with little success, even if it continues to be pursued in some instances, most notably Philip Morris's attack on Australia's tobacco regulations.

At the same time, some of the critiques of principle against ISDS are not simply capable of dismissal as ignorant or misleading. Those who reject ISDS altogether question whether foreign investors deserve protections that extend beyond those that domestic law and judicial and administrative institutions provide to anyone affected by the actions of the government in question. One can offer some sophisticated answers to this question, but there is no simple knockout response, least of all that additional protections at the international level are required to attract optimal levels of foreign investment, as the best empirical evidence is very ambiguous on this front. If the rule of law is weak in a particular state, the more logical answer is to strengthen the rule of law there, not simply insulate foreign investors from the effects of bad governance. It is far from clear that ISDS is a more effective instrument of investor protection than political risk insurance, for example.[2]

If one is simply anti-globalization, then being anti-ISDS on principle is a consistent position. But if one thinks that overall the liberalization of trade and investment is a good thing, with appropriate safeguards, as I do, then wholesale rejection of any international standards or any international forum for dealing with investor protection seems a little dogmatic in itself. Investment is in many cases a crucial element in sustaining global value chains. Why should it not be a legitimate aim of international law and policy to minimize the disruption of such value chains through arbitrary and/or discriminatory actions against foreign investors, while protecting domestic policy space in an appropriate way? How to strike the balance and what institutions are appropriate for dispute settlement is eminently debatable, as with trade (the GATT, WTO etc.). Leaving the international aspect of investment disputes entirely to power politics and state-to-state relations and preferring a normative and institutional vacuum beyond the state seems at odds not just with the thickening of the international normative universe in related spheres of transboundary economic activity such as trade but also the increasing human rights or humanity law orientation in international law. A Marxist could consistently question whether the organization of human productive activity through profit-maximizing corporations is just or efficient, and advocate an alternative economic system, and I could certainly see from that point of view that allowing corporations to sue states at the international level would be profoundly undesirable-simply a further extension of a rotten unjust economic system. But if

[2] Cite forthcoming work co-authored with Efi Chalamish on MIGA and political risk insurance as an alternative to ISDS.

one accepts in principle the organization of human productive activity through market institutions like corporations (albeit subject to regulatory control and safeguards), it seems rather unjustified to say that considerations of fairness and rule of law play no role at the international level, just because human beings are engaged in productive activity through corporations and not simply as natural persons. At any rate, there is a rich jurisprudence in the European Court of Human Rights where legal persons have been claimants, including corporations challenging expropriations for instance. Widespread European values seem entirely consistent with the protection of human activity through corporations from certain forms of government conduct.

In my scholarship on international trade law over more than two decades I have been urging critics of the multilateral trade regime who are not simply opposed to globalization or to capitalism to avoid straightforward rejectionism of international economic institutions and instead focus debate on what norms, what institutions, what policies at the international level strike the right balance between the different human values and interests at stake. This has happened with the WTO to some real extent, and I think with constructive results. Unfortunately, the non-transparent and non-participatory way that TPP and TTIP have been negotiated has incited harder kind of rhetoric, where sensible critique often gets drowned in the language of rejection and resistance. The consultation the EU undertook with respect to TTIP was an exception, and now it has produced a constructive proposal for change that implies the desirability of international norms and institutions for investor protection but also implies that the status quo lacks fundamental legitimacy. The proposal indicates the belief that there is a constituency for reform not rejection. I consider myself in that very camp.

Main Features of the EU Court proposal

-an optional ADR alternative (mediation)

-90 day obligatory period of consultations before filing a claim

-at least as a transitional arrangement, dispute settlement rules from arbitral institutions (ICSID, PCA, etc.) as chosen by claimant will apply, subject to any rules established by the parties or the new investment court

-15 judge tribunal of first instance, 5 judges of EU, 5 of US nationality, and 5 of 3rd country nationality. Requirements: judges must be at a minimum "jurists of recognized competence…demonstrated expertise in public international law."

-cases heard by divisions of 3 judges; one of EU, one of US and one of third-country nationality. Divisions appointed by the president of the court, on a rotating, random basis.

-division chaired by judge of 3rd country nationality.

-"judges shall be available at all times and on short notice,…"

-2000 Euro monthly retainer plus fees for time spent on individual cases, at least as a transitional measure determined on ICSID fee rules but eventually a possible salary instead.

-first instance must issue provisional award (provisional here means still subject to appeal) within 18 months of date of submission of a claim. Extension only permitted if deadline "cannot" be respected, and explanation of the impossibility must be given.

-tribunal decides its own rules of procedure

-first instance to be supported by secretariat of PCA or ICSID

-6 member appellate tribunal, similar qualifications as for first instance, hearing appeals in divisions of 3.Similar diversity of nationality requirements as with first instsance.

-monthly retainer similar to that provided to WTO AB judges. Additional remuneration/

-90 days to file appeal from date of final award

-appeals to be decided within 6 months. Extension to 9 months possible with reasoned explanation.

--transparency based on UNCITRAL rules, but in addition pleadings to be publically available subject to redaction of confidential or protected information.

-possibility of 3rd-party intervention: 3rd party must have "direct and present interest in the result of the dispute"

-in addition possibility of submission of amicus briefs by others as well as 3rd parties so defined.

-appeal based on error of law as well as manifest error in appreciation of the facts

-once finalized (either by appellate revision or because no appeal filed after 90 dasy) award shall be treated by parties as a final award of their judicial system, "not subject to appeal, review, set aside, annulment or any other remedy."

-for enforcement purposes, award shall be deemed to be arbitral award within meaning of New York Convention or ICSID Convention if applicable.

-strict conflict of interest rules, code of conduct for both levels: judges must discontinue any counsel work upon appointment (i.e. no "two hats")

The Legitimacy Problems of the current ISDS system

Investor-state arbitration is not a natural or self-evident means of settling investment disputes between foreign firms and host states. Its current predominance is a matter of path dependency as much as logic. If one accepts, as do I as noted above, that some form of international dispute settlement is appropriate then one still has to confront with an open mind whether an arbitration model is appropriate. Investor-state arbitration evolved, particularly through ICSID, as a means of depoliticizing investment disputes at a time of high East-West and North-South tensions. In part the aim was to put these disputes in a forum where the power imbalance between developed and developing countries would not count or count for less. The directing mind behind ICSID is widely considered to be Aaron Broches: Broches seems to have been conversant with commercial arbitration and private international law, and borrowed freely and inventively from the context of commercial disputes to develop a blueprint for a mechanism that would address disputes between states and investors. One naturally begins from one's own intellectual architecture. Broches may have thought that much of ICSID's case load would be contractual disputes, not those under treaties, i.e. under pure public international law. The trajectory of ISDS might have been quite different, if for instance, its founder had started not from notions drawn from the arbitration of commercial disputes but rather say the European Court of Human Rights, which, as was already noted, litigates claims by

legal as well as natural persons against states, judging the state's conduct towards private actors against public international law norms of human rights. Much like human rights litigation, an investor-state dispute under a treaty, whether a BIT or a comprehensive trade and investment agreement, is essentially, as others have pointed out a public law inquiry, where standards of state behavior are used to judge the conduct of the state toward the investor. Fundamentally, the adjudication of these disputes is an exercise of public authority, in the sense meant by Professors Bogdandy and Venzke in their important work on the legitimacy of international adjudication. This being said, when investor-state arbitration came into being international adjudicative institutions that allowed claims by non-state-actors were in their infancy. But if we had a chance to build system from scratch today, would there be a need to resort to the commercial arbitration model?

In fact, notions such as consent and party autonomy as conceived in commercial arbitration don't really graft that well onto dispute settlement based upon compromissary clauses in treaties and state responsibility in public international law. This creates messiness and confusion often when investor-state tribunals tackle issues of jurisdiction, consent, and applicable law. Hundreds of hours of arbitrators' time and counsel's billable hours gets taken up in all of this, and especially so under ICSID, with the apparent additional requirements in Article 25 of the Convention superimposed upon the compromissary or jurisdiction-granting provisions of treaties.

In fact if we were designing the equivalent of ICSID today, with more models of functioning transnational or international tribunals to draw on, it would look much I would bet more like the EU TTIP proposal. So then why hasn't investor-state arbitration been reformed or reshaped with the times, and based upon learning, as one would expect with any dynamic, fast-growing legal regime? Path dependency is profound, when you have a system based upon multilateral rules that requires consensus of over a hundred or more of countries to change. And where professional reputations and practices are heavily invested in expertise linked to the intricacies of the status quo. In sum, we should look at the EU's proposed transformation of ISDS with open minds, not starting from a presumption that there is a logical fit somehow between the kind of arbitration model we have become familiar with and the needs of international investment law and policy in a dynamic global economy. At the same time, we shouldn't attribute features of the existing model that are problematic through today's lenses to some kind of

corporate or neoliberal conspiracy, presuming bias, bad faith or a hidden ideological agenda.

Professional Qualifications and Standards for Arbitrators

When one thinks of a tribunal charged with the grave duty of determining whether the conduct of a state towards a private entity rises to the level of international wrongfulness, with consequent state responsibility that could include an enforceable damages award of hundreds of millions of dollars, one would, as a naïve outsider, imagine that the professional qualifications required of those appointed to such tribunals would be precise, strict and high. Sometimes students and even well-established academics in other fields of international law ask me: what does it take to become an arbitrator in investor-state disputes? Often they imagine a college with formal training, a requirement of a PhD in public international law, or distinction at the litigation bar, etc.

I have to tell them that there are, essentially, no real formal stipulated professional qualifications or training. Basically anyone can be an arbitrator in an investor-state dispute, if one of the parties feels like appointing them. Now if you look at the group of people who are repeat arbitrators, you will see many distinguished jurists. But that's not a function of qualification requirements. The way you get started in arbitration is you find someone who will appoint you to your first case. You might be working in a law firm that does investor-state arbitration and an experienced arbitrator/practitioner might spot you as promising talent. Or you might have friends who are connected to a government that is being sued. It's a combination of luck and networking, basically. Since appointments are dominated effectively by the larger law firms that repeatedly represent either investors or states or both in these cases, you happen to fall outside their universe, broadly understood, the possibility of ever being appointed as an arbitrator will be remote. In a number of situations arbitrators may be appointed by appointing authorities, such as the Secretary General of ICSID. In many respects though this is a largely overlapping professional world. Once you start arbitrating, it is not some august, distant, autonomous appellate court that will judge your work, but the very same rather narrow professional universe.

You might think that letting, as a matter of formal requirements, anyone arbitrate would be emancipatory and egalitarian, allowing for much greater diversity than where there is a strict attitude to professional qualifications of a legal

nature. But in fact the lack of formal qualifications combined with party appointments means that the narrow professional universe just described performs the gatekeeper function according to its own sniff tests. Of course counsel do have a professional responsibility to their clients to appoint someone who will be competent to understand and evaluate in an open-minded way the client's position in the arbitration. However that duty or what is involved in discharging it is understood, diversity there isn't-investor-state arbitral tribunals are dominated by male Europeans of middle age or beyond. I'm not saying that all international courts and tribunals do better than arbitration in that respect. Only that the current vacuum in specified objective professional qualifications does not serve legitimacy in facilitating diversity, while it disserves legitimacy in other respects.(In a recent paper, Joost Pauwelyn has observed, based on extensive data, that the WTO does considerably better in terms of some kinds of diversity than the ISDS system as presently constituted).

The Misuse of Party Autonomy

As already noted, the concept of party autonomy derives from commercial arbitration, which addresses disputes between two private entities, normally. It is often thought that the ability to determine who decides the dispute, the applicable law etc. is advantageous relative to going to court. International commercial disputes may be very fact-intensive, with specialized financial or engineering or other expertise very useful to understanding the dispute, as well as knowledge of corporate and commercial law and transactions. The jurisdiction of an investor-state arbitral tribunal under a treaty is established not by, fundamentally, by agreement between the disputing parties but rather by agreement between the states that are treaty parties (as noted a notion of consent from commercial arbitration has been confusingly grafted on but that is really an artifice). An investor state tribunal operating under a treaty is not concerned with resolving a commercial dispute in a manner acceptable to two private parties, but rather judging in an objective and impartial manner the conduct of a state towards a legal or natural person under norms of public international law. At a very basic intellectual or conceptual level I question what party autonomy has to do with such an exercise.

Thus, the criticism that the EU proposal for an investment court deviates from party autonomy seems rather question-begging. Under public law litigation

domestically one does not get to choose any of one's judges, normally; that is not considered part of the integrity of public law litigation. Nor does one choose in the case of regional human rights tribunals either. Or international criminal tribunals. Why should investors, unlike other non-state parties before international courts and tribunals where at least equally weighty matters are at stake, have an entitlement to choose one of their judges and be involved in the appointment process of another? In these other instances, the tribunal is appointed by the states parties that establish its jurisdiction.

It has been put about that if the parties appoint the judges to a standing investment court, as is proposed by the EU, that they will choose persons who are favorable to states as defendants. But when the parties appoint to a standing court, as opposed to an ad hoc arbitral tribunal, they also have to bear in mind, not just their interests as defendants, but the interests of their own business and industry in effective investor protection. Thus, one would expect reasonably balanced appointments. The EU proposal also has another feature that is worth noting in this respect: a third of the appointments are to be of nationals of third states, which will not be defendants before the court, nor their nationals, claimants. Indeed, there is a special role for these judges of third-country nationality, as presiding judges in each case.

Appointment by states parties has not led generally to inordinate deference to state conduct in the Inter-American Court of Human Rights or the European Court of Human Rights. I see no reason why this would be the case with a standing investment court, as proposed by the EU.

Conflict of Interest

Perhaps one of the most egregious ethical lapses in the existing system of investor-state arbitration is the tolerance of arbitrators who at the same time act as counsel in investor-state disputes. Many ISDS insiders see this as entirely normal and appropriate. I find it shocking. It is true that there is no stare decisis, as a formal matter in ISDS and that is a problem, as I will discuss below. But how is it that an arbitrator who is in active practice can avoid being perceived, in the legal interpretation made as an arbitrator, as swayed either consciously or a subconsciously, by a wanting to create a jurisprudential universe on balance more rather than less favorable to the clients they continue to represent as counsel in other disputes? The perception of non-impartiality would have to be especially

acute where an arbitrator is deciding a specific legal issue in one case knowing that they have another case as counsel where how the very same legal issue is decided has high stakes for their client.

In fact, it is much cleaner to have adjudicators who neither have a strong interest in being reappointed by parties in future cases as well as in cultivating a clientele for their services as counsel among the same universe of actors, more or less. The EU proposal does exactly this, by appointing judges to a standing tribunal (who are not therefore always out seeking further ad hoc appointments) and who are prohibited from further counsel work once appointed.

The Meaning of Expertise

It has been suggested that, through requiring that investment judges be the kinds of persons qualified for a domestic judicial appointment and excluding the possibility of appointment of those who do ongoing counsel work in investor-state arbitration, one will end up with almost no one qualified to adjudicate investor state disputes. The idea is apparently that the universe of qualified adjudicators is largely determined by those who need to make a living in legal practice representing clients in investor-state cases. Perhaps this is true as long as one remains with the existing system of ISDS, because there is technical procedural competence in that system that resides to no small extent in individuals who are wedded to the kind of compensation that one receives as a partner in a major law firm. A lot of this expertise is specific to ICSID and like arbitral facilities. One of the exciting aspects of the EU proposal is that it moves toward the creation of an alternative system, one that may well be simplified with respect to issues of jurisdiction and procedure and where the judges themselves will become experts through developing the rules of court and practices of the system. Because so much of the expertise of the current professional community in ISDS centers on the procedural and jurisdictional idiosyncracies of a system that is an uneasy hybrid of commercial arbitration and public international law adjudication, in fact depth of analysis of substantive norms such as National Treatment or Fair and Equitable Treatment has been rather rare or uncharacteristic. Findings on substantive obligations are often scantily motivated in legal analysis compared with jurisdictional or admissibility determinations. Worse, different tribunals take very different and opposing views on some quite basic questions, such as what is the nature and ambit of customary international law or whether and how MFN applies to dispute settlement provisions in BITS. How can one expect taxpayers to accept

large awards against a state, where it is perfectly evident that crucial interpretations of substantial legal norms are simply the views of the particular arbitrators chosen, for which they are essentially accountable to no one and on which other arbitral tribunals have taken diametrically opposed positions, with little interest and no institutional mechanism for reconciliation or consistency? Ad hoc arbitration is quite simply the wrong model. The legitimacy of a system that sits in judgments on the propriety of state conduct against international standards much surely hinge on the real legal craft involved in articulating and interpreting substantive standards of treatment that determine the balance of human values and interests, especially between the needs of a dynamic integrated global economy and the protection of policy space for good legitimate domestic governance. This is a point made well by Toby Landau, one of the outstanding arbitrator practitioners of his generation, in an essay entitled "Saving Investment Arbitration From Itself" (2011 Freshfields Lecture).

Delay and Cost Control

Quite simply, the current system of ISDS has, essentially, no effective means of controlling delay and costs (and these are closely related). The average period of time for an ICSID final award is more than 3.5 years; it is quite common for arbitrators to take 14 months or more from the end of the hearing to issue an award. The average cost of an ISDS dispute is around $8,000,000. These kinds of ballpark figures do not in themselves prove that ISDS is working badly or well. The time frames in question may be considerably speedier than many countries' domestic court systems, thus actually supporting one of the justifications for making an international procedure available to investors. As for the costs, some might say that a significant outlay to bring a case, and certainly all agree that the figure in question is significant, may deter investors from bringing frivolous cases, which is a good thing. But governments also face a significant cost defending. Deep pocket plaintiffs, large multinational corporations are likely to be better able to bear the costs of the system than small and medium-sized enterprises, yet (contrary to the image of the system suggested by some critics) these latter are heavy users.

The relevant question is whether if ISDS had delay and cost control built in it would be a more legitimate and more user-friendly system. I think the answer is clearly yes. As far as delay goes, the EU court proposal imposes an 18 month

deadline for an award from the tribunal of first instance, which runs from the submission of the claim. Any delay beyond this must be explained. There are shorter deadlines for appeals. This is how the WTO system works. Two decades of WTO experience suggest that there will be a certain percentage of disputes that run over the deadline, but that it can function as a parameter that is respected in almost all cases. Moreover, delays at the first instance stage especially in the WTO are often due, according to the Secretariat, to the requirements of translation of panel reports into the official languages of the WTO.

Apart from a deadline for which the judges are accountable, there are a number of reasons why a court system like the one proposed by the EU is likely to feature speedier dispute settlement than the current ISDS system. A standing court with judges on retainer entails a commitment of the judges to be regularly available (as for example with the WTO Appellate Body), and this commitment is very clearly stated in the EU proposal. Prohibiting the judges from continuing to practice investment law, necessary as discussed above, for ethical reasons, will contribute significantly at the same time to removing one of the main reasons for delay in the current system: many of the arbitrators also have very busy law practices that they are managing at the same time. In the current system, incredibly, a not insignificant number of arbitrators in investor-state disputes not only practice both in ISDS and commercial arbitration but hold academic appointments too, and arbitrate non-ISDS disputes. Some deal with this by extensively using back offices of assistants or clerks, a practice that raises its own legitimacy concerns, as this is not controlled by collegial practice and accountability as it is in judicial systems where law clerks are used, or in the WTO, where the legal assistance is provided by a Secretariat (whose role in the first instance, where ad hoc arbitration is still used at the WTO, albeit raises its own legitimacy concerns).

I have already alluded above to the extensive jurisdictional and procedural wrangling often involved in investor-state disputes under the current system. As noted, such formal rules and practices as have developed reflect the awkward complexity of merging commercial arbitration concepts with public international law adjudication concerning state responsibility. Each three member panel addresses these thorny questions as ones of first impression, given the lack of a jurisprudence constante. Three different individuals negotiate among themselves de novo how to approach, for instance, document discovery, without the guidance of real rules of court or a common practice developed collegially by a bench of

judges. Even basic preliminary procedural rulings and orders that are needed simply in order for counsel to get on with preparing their case can take many months and require extensive pleadings (at least, written pleadings). I would add that not surprisingly counsel fees mount as well, since counsel are put in the position of developing arguments on all these questions in an environment where little is settled, and on many issues there are diverging tendencies in the different prior arbitral awards. The kinds of matters easily settled for once and for all (or at least for a long time, until a really hard case comes along) in a judicial system, often have to be briefed in the dozens of pages in the case of investor-state arbitration. I am not suggesting that by having a court system like that proposed by the EU all jurisdictional and procedural complexities and controversies will magically disappear. Rather there is now an opportunity for liberation from *some* of the needless complexities of the ICSID system for instance, to evolve relatively clear and straightforward rules of court on issues like discovery and privilege (while of course employing such broader parameters in public international law as currently exist in some of these areas), and fundamentally a court as a collegial body can settle on a consistent approach and practice that will be well-known to advocates.

Will the Actual Decisions of an Investment Court be Legally Sounder, Better Reasoned, More Legitimate than those of ISDS arbitrators?

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Being appointed by and paid by the parties, it would not be surprising if arbitrators often viewed their role as serving the interests of the parties in settling a particular dispute rather than maintaining the integrity of and clarifying the norms of a system of international law; they will be inclined to demonstrate their suitability for appointment in future cases by investors or governments, or both. The EU proposal would eliminate these delegitimizing dynamics.

Arbitrating investor-state disputes is lucrative and it can be addictive, even for those who come out of public international law backgrounds or are full-time academics (or both). These factors may well shape whom the arbitrators view as their "audience". Although this is starting to change, international investment law lacks what WTO law has developed-an interpretive community of scholars and experts, who in a sense mediate between the positions or concerns of outsider stakeholders and the legal development of the system through jurisprudence, who are careful critics of the jurisprudence but not in implacable ideological or

principled opposition to the system as a whole. In my experience, academics working in international investment law are overwhelmingly either persons themselves interested in arbitral appointments and/or counsel work or opponents of the system as a whole The former may well be an "audience" that arbitrators pay attention to (many come out of it) but it is one that is unlikely to be sufficiently critical. The latter may well not be viewed as a relevant audience at all but rather a nuisance or mere "noise"-to be discounted as allegedly ill-informed and non-expert.

Contrary to the impression often given by general critics or opponents of the system, arbitral awards often side with the host state in cases that are policy-space sensitive; but on the other hand rarely do those awards articulate any kind of broad principle concerning the need for balance or the importance of not impugning legitimate general regulation. With some notable exceptions, arbitrators are uninclined to draw from general international law for normative depth. On the other hand, in cases that are policy-space sensitive, where the investor wins, arbitrators may well pull punches in the way they describe government misconduct; the most damning facts about corruption, fraud, and political bias in government behavior may be soft-peddled or left out of the public award. Metalclad is a great example of that: it is possible, unless one reads the lines carefully or looks between the lines, to see the case as a pure "regulatory taking" decision, indifferent to the serious consequences for publically interested regulation of finding a compensable expropriation just because the government makes legal or policy changes with expropriation-like effects on the investor. That's how activists and critics of the system have read Metalclad and it is hard to blame them too much for it. Arbitrators also often decide cases, including in favor of host governments, on jurisdictional or procedural grounds. They tend to avoid coming to clear common positions on substantive norms on matters such as national treatment/non-discrimination, regulatory takings, fair and equitable treatment, all instances where policy space and balancing of values are clearly at stake.

The devices that arbitrators often use when they do appear to be protecting policy space, such as the reading into NAFTA of a requirement of exhaustion of domestic remedies in Loewen or the absurd conceit in Glamis Gold that one should presume customary international law has been frozen at some point close to a century ago, do not send clear messages about the policy space protected by the substantive norms or how values are or can be legitimate balanced in the interpretation and application of the substantive norms. Often how expansive or restrictive the system is in accepting investor claims is played out in arcane rulings about whether the

MFN clause should be read as providing more favorable dispute settlement arrangements under another treaty to the investor, on what claims come under an umbrella clause, and what or who counts as an investor or investment under the treaty or the ICSID Convention. There are big issues here about the balance of private and public interests in global governance but few and far between are the awards that reach into the rich normative universe that is international law today to find or evolve juridical constructs that do justice to these big issues. Instead, all too often, tribunals in individual cases build obscure or formalistic sandcastles that apply to that dispute that will not ever be used again by any other arbitral tribunal. In fairness, it is true that the Appellate Body of the WTO has sometimes been delphic in its rulings but as a standing judicial body of course it has the chance to further clarify or nuance its previous judgments in response to reactions and criticisms.

There is at least one far-sighted super-arbitrator, Toby Landau, already mentioned, who has acknowledged some of the difficulties discussed above and urged the "community" to address them in the way that arbitral decisions and awards are crafted. But can this kind of consciousness-raising work? The question is whether the problems in question are not, as speculated above, products of the structural features of investor-state arbitration, how and why and by whom arbitrators are appointed and re-appointed, how they are compensated and by whom, and thus whom they see as their "audience." If so we cannot expect that the investment arbitration "community" will wake up, even to the voice of one among them as articulate and persuasive as Landau. Instead, it may be necessary to switch to a different path. From this point of view, and especially given the experience with the WTO Appellate Body, the EU proposal for a standing judicial body merits serious consideration.

The Value of Appeal

If the EU proposal for an investment court of first instance addresses so many of the problems of the existing system, including the need for a jurisprudence constante, is there still a case for an appellate level as the EU suggests? In the case of the WTO, it is the Appellate Body that corrects or compensates for some of the problems of ad hoc arbitration of first instance that would ideally in the EU scheme be dealt with already by the first instance being a standing court of high competence. Appellate review exists with respect to some but far from all international or transnational judicial systems. However, there is a particular feature of the system being proposed by the EU, which is that it is

intended to result in awards that are final and not subject to review or modification at the domestic level (or, presumably, by the ECJ). Accountability is a fundamental element of the rule of law, and it is no surprise, especially where matters of considerable seriousness, such as the propriety of state conduct, are at stake, the existence of appellate review is fairly pervasive in developed legal systems. Often the judgments of international tribunals don't have direct effect or at least not an unfiltered direct effect in domestic legal systems; there is some de facto review or scrutiny of the court's ruling in the process by which domestic judicial or administrative or political actors go about deciding how to implement the international tribunal's ruling. The quid quo pro for excluding any kind of domestic process of review or accountability and making an award simply final once is comes out of the investment judicial system, is that review or accountability is provided for already within that system through the appellate instance. Indeed, with the ICSID annulment process as erratic in its standards and as ad hoc as the initial panels, rule of law has been honored only in the breach by annulment committees. They have lurched between levels of deference that almost mean no accountability at all to approaches that seem to entail a cryptic or obscure kind of review for error of law (e.g. Enron). (The reductio ad absurdum of this oscillation was the CMS annulment committee, which told Argentina that, on the one hand, it was the victim of highly erroneous legal interpretations by the tribunal, but on the other hand, because ICSID somehow stands for deference even to messing up the law bigtime, it still had to pay the award.)

But besides providing the accountability required for finality to be consistent with the rule of law, the appellate instance in the EU's proposals may have additional legitimizing affects. When a decision comes down from the first instance that is inherently controversial, not only the losing party but other stakeholders may well be extremely upset, and feel that the ruling was fundamentally unbalanced and/or unreasoned. Instead of being challenged into delegitimizing attacks on the system or system-damaging threats not to pay awards or to delay as long as possible paying them, the concerns in question, where there is an appeal available, may be directed to the attempt to persuade the appellate judges, in other words expressed in a way that supports rather than weakens the system, potentially. In a number of instances, in the WTO system, potential systemic crises from highly controversial dispute settlement rulings have been diffused by taking the controversies to the Appellate Body. Sometimes modest corrections of approach and emphasis have

sufficed to show that concerns of those outraged by the initial ruling have been properly addressed or at least thoroughly vetted.

Conclusion

If there is anything that can put investor-state dispute settlement on a new, more promising, more efficient, more legitimate path it is something along the lines of the judicial system proposed by the EU. Yet transitioning from the current ISDS system to the new one is complex and challenging. There are certain transitional dimensions in the EU proposal that may be quite tricky to apply. One example is that the proposal involves the use of rules from existing arbitral regimes at least until a full set of rules of court or code of procedure is developed for the new court system. Yes these rules have been developed for arbitration and not for a court system. I am not sure how they could be easily grafted on to the kind of institution the EU has in mind. It would probably be advisable to fast-track the development of a set of sui generis rules and keep ICSID and UNCITRAL out of it entirely, if possible. Automatic enforcement of the judgments of the investment court in non-EU, non-US jurisdictions seems to require that those jurisdictions accept that the judgments of the investment court are arbitral awards that they are obligated to recognize and enforce in accordance with either the Washington Convention or the New York Convention. And that is perhaps a reason that ICSID and UNCITRAL can't so easily be dispensed with. At least not until there is a multilateralization of the EU proposal, which the EU does foresee. But multilateralizing a series of courts established under bilateral or regional agreements is itself a tall institutional challenge (perhaps it could be done, at least initially, by deeming the bilateral courts to be chambers of a new, growing multilateral judicial institution). But the proposal is an excellent starting point for a process of needed fundamental reform even if getting to the endpoint of that reform will require further efforts of institutional design and reimagination.