Permanent Investment Tribunals: The Momentum is Building Up

Omar E. García-Bolívar

A key element of international investment law is the dispute settlement mechanism where—exceptionally under the standards of public international law—disputes can be submitted against States in international fora by parties other than the States themselves.

That mechanism of dispute settlement has been considered in and of itself as one of the main advantages of international investment law, as it depoliticizes potential disputes between investors and host States by providing a neutral venue to settle the indifferences. But although arbitration provided a venue where investment disputes can be settled, the neutral venue for settling disputes between investors and States does not necessarily have to be arbitration.

1 Arbitration under Scrutiny

Arbitration as the means to solve disputes between investors and States is a concept borrowed by international investment law from international commercial disputes. However, investment disputes are essentially different from commercial disputes. Not only are issues of public policy, sovereignty and international law constantly at stake and in a way not commonly seen in commercial arbitration, but the source of law and the players differ noticeably.

Legitimacy of the investment arbitral tribunals has been a weak spot for international investment law.¹ For example, the authority of arbitrators to examine the legality of sovereign decisions of States and to impose compensation for seemingly legal actions has been questioned frequently.

* A version of this article has been published at http://works.bepress.com/omar_garcia_bolivar/15/. The author thanks Chester Brown and Karsten Nowrot for their comments on an earlier text.

¹ See Franklin Berman, Evolution or revolution?, in Evolution in Investment Treaty Law & Arbitration (Chester Brown & Kate Miles eds., Cambrige Univ. Press 2012).
The same can be said about consistency at the investment arbitral tribunals, which frequently decide similar issues—albeit occasionally based on different treaties—in markedly different ways.2

Perhaps all this can be explained because investment treaty arbitration is not a court at all. Granted, it is the closest the world has come to an international universal constitutional or administrative court, one with compulsory jurisdiction that would allow individuals directly to initiate an adjudicative review of the regulatory conduct of a State under international law, and to obtain a binding determination of the legality of that State conduct as well as a powerful remedy.3 But that strength is also its main weakness: review of States’ actions is conducted by arbitrators with unparalleled power.

This area of the regime of international protection of investments is currently being scrutinized. But as a whole, the system of international investment law, including investment arbitration, is increasingly the subject of review4 and wide criticism,5 not only by States’ advocates but also by investors, as the time and costs involved and the amounts awarded have not been satisfactory.

In that vein, some criticize the process of arbitrators’ appointments and the interchangeable role of some arbitrators—sometimes advocates, sometimes adjudicators.6 Others criticize the poor representation of arbitrators from developing countries, the usefulness of the panels’ lists, the repetition of appointments, the gender representation of arbitrators7 and the lack of public law focus.8

---

2 See, e.g., Omar E. García-Bolívar, RR. Dev. Corp. v. Republic of Guatemala, at 28 ICSID Rev. No. 1 (Spring 2013), for a reference to a seemingly inconsistent approach by an arbitral tribunal to certain standards of treatment under the same treaty.


5 See M. Sornarajah, Evolution or revolution in international investment arbitration? The descent into normlessness in Evolution in Investment Treaty Law & Arbitration (Chester Brown & Kate Miles eds., Cambridge Univ. Press 2012).

6 See Hans Smit, The pernicious institution of the party-appointed arbitrator, 33 Columbia FDI Perspectives, (14 Dec. 2010); see also Giorgio Sacerdoti, Is the party-appointed arbitrator a “pernicious institution”? A reply to Professor. Hans Smit. 35 Columbia FDI Perspectives, at last paragraph (15 Apr. 2011).
