International Investment Disputes: Ideological Fault Lines and an Evolving Zeitgeist

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A. INTRODUCTION

The zeitgeist of the 21st century in the field of investment treaty arbitrations comprises a rise in the number of such arbitrations and accompanying observations on the unwieldy jurisprudential effects of such a rise. The international investment arbitration community is alive with discussion over these effects, which discussion includes an examination of the value of prior awards as precedents. The existing regime based on treaty interpretation clearly provides no formal system of precedent and the ‘players’ (read: arbitrators) change from dispute to dispute as investment arbitration tribunals do not fall within a single, neat judicial hierarchical system. With the number of investor-State disputes and investment arbitration awards increasing, relatively new questions (and concerns) over these effects have therefore arisen.

Various writers have commented that there is no formal system of stare decisis (as the common law world knows it) in investment treaty dispute settlement. This, it is said, creates inconsistencies, incoherence and a lack of certainty (and possibly, even legitimacy) in investment arbitration decisions. Searching for the familiar, some have argued that a ‘de facto’ system of stare decisis has arisen in this sphere. Professor August

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Reinisch provides an example of such a view of de facto stare decisis. He has argued forcefully in favor of this, citing the following remarks from the ICSID arbitration award in AES v. Argentina:

"Indeed, it would be hard to imagine that the many ICSID tribunals, currently hearing factually similar claims against Argentina which are frequently based on similarly worded or even identical BIT provisions, should not take into account what earlier decisions have held with regard to similar issues. To act otherwise would deprive ICSID dispute settlement of its predictability and thus of an important facet of legal uncertainty. One may also expect that with the increased use of the ICSID-specific control mechanism of annulment proceedings under Article 52(1) of the ICSID Convention, a body of case-law will emerge similar to what happened in the context of WTO-jurisprudence resulting from decisions of the Appellate Body."  

A more sanguine view is that if inconsistent awards exist, it is to be expected as a fact of life in investment arbitrations. One is reminded by this evolving picture in the international investment landscape of the unwieldiness in views and materials faced by judges in the 4th to 6th centuries in Europe, which led first to a “Law of Citations” and then to codifications, in order to provide a more systematic and reliable set of authorities and rules. In investment arbitration however, there is no “codifier” of final authority. For this reason, this article postulates a view that tends toward the latter, albeit for different reasons. Rather than resting on the general view that inconsistencies are a fact of life (which they are) – and hence “vivez les différences” – this article suggests that the divergences are arising because of deep ideological fault lines on some emerging, fundamental issues among arbitrators. So while in a number of issues (perhaps such as in some of the benchmarks for “fair and equitable treatment”) a set of norms or criteria is emerging and has gained some level of consistency in a majority of investment decisions, there remain pockets of division which are not so harmonized or easily reconcilable.

These issues include the over-arching objective of an investment arbitration – which translates for instance into a certain view of how broadly or narrowly to interpret who is an “investor” or what is an “investment” – as well as the use of a treaty provision such as a most-favored-nation (MFN) clause vis-à-vis dispute settlement mechanisms. The quest for a precedential framework (even if de facto / informal) and establishing clear lines of authorities akin to what is witnessed in domestic legal systems will not fully work given these ideological differences, and the fact that there is no single unifying, final adjudicator on which philosophy should prevail.

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4 Decision on Jurisdiction, ICSID Case No. ARB/02/17, April 26, 2005.
5 Reinisch, supra, footnote 3. The debate on the existence (or lack) of a de jure/de facto precedent system in this sphere can also been seen in a series of four articles in the Spring 2010 (Vol. 25 No. 1) issue of the ICSID Review – Foreign Investment Law Journal, from pages 87 to 124.
7 So as to even warrant statement as a ‘rule’ in some cases, as has been attempted by Zachary Douglas: see infra, footnote 99.