The growth in investment litigation: perspectives and challenges

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In their chapters, Margrete Stevens and Roberto Echandi have both advanced some thought-provoking ideas on investor-state dispute settlement. A few points raised by their contributions will be addressed below.

Let me first refer to the proposal for having rules of ethics for counsel acting before International Centre for Settlement of Investment Disputes (ICSID) tribunals and supposedly also before other investment tribunals. Although I consider that it is important to have a set of international rules of ethics governing counsel, as well as rules of ethics governing arbitrators and experts, I would be cautious about making it a sort of lex specialis in the investment area. We should have a lex professionalis that is closely modelled on similar rules that also apply to international courts and tribunals and reinforce systemic integrity.¹

I would like to refer to the recently adopted International Law Association (ILA) Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals, which concern counsel in ICSID and other dispute settlement proceedings to which a state is party. These Principles constitute an attempt to establish minimal common standards of conduct for counsel in international fora. They were intended to stimulate discussion in the international community of lawyers and practitioners and to encourage further developments.²

Having been involved in the drafting process of these rules, I believe that

¹ See, e.g., Chapter 4 of the Regulations of the International Criminal Court ('Counsel Issues and Legal Assistance'); the Code of Conduct for European Lawyers (produced by the Council of Bars and Law Societies of Europe); and the ongoing work of the IBA Arbitration Committee’s Task Force on Counsel Ethics, www.ibanet.org/Article/Detail.aspx?ArticleUid=610bb66e-cf02-45ae-8c3a-70dfdb274a5.

the Principles have greatly benefited from an exchange of knowledge concerning counsels' experiences and the practices of various courts and tribunals. In this context I believe that, if it is necessary to have a specific set of rules in the investment field, investment arbitration should draw from this experience in other international dispute settlement fora.

However, while we should not isolate ICSID, we should still take into account its peculiarities. ICSID is one of the institutions of the World Bank Group, and much of the desired change and restructuring would have to rely on World Bank decision-makers for its implementation. There is thus a need to raise the profile of the Centre within the World Bank Group. In this respect, it is interesting to note that in the reports produced in the context of the last round of Bretton Woods reforms (catalysed in large part by the initiative of the Group of Twenty (G20)), no mention was made of ICSID. This need to strengthen ICSID within the World Bank Group is particularly timely, as the World Bank – and not just the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) – is increasingly involved in activities linked to the private sector. The World Bank and the ICSID clearly have a common interest in strengthening the capabilities of the latter, particularly the solidity and fairness of its procedures.

A second issue with a similar thrust concerns the enforcement of awards. Stevens' chapter reminds us of Articles 53 and 54 of the ICSID Convention. Obviously, these provisions do not have the legal persuasiveness that they should. There is room for creativity so as to ensure better compliance with ICSID awards, and ways to strengthen compliance should be explored.

There, too, inspiration could be drawn from other fora for ensuring compliance with awards. It is interesting in this context to note the initiatives that the United Nations (UN) Secretary-General and other UN bodies took to ensure compliance with the decisions of the International Court of Justice (ICJ) through the establishment of mixed commissions or the sending of observers. The President of the World Bank as well as the Administrative Council of ICSID might be inspired to develop similar initiatives. These initiatives could, inter alia, allow for the monitoring of compliance with awards. At present, there is no such monitoring system. The practice of the World Trade Organization (WTO) could also

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provide some insights in this respect, if one considers its surveillance mechanism.\(^4\)

Another avenue that could be explored is the establishment of a group of ‘friends of ICSID’. Many international organisations have established such groups to help them confront the future. With this, I mean a group of state representatives or a group of people with a high profile on the international scene – working or not with the World Bank – and possibly with a connection to the ICSID dispute settlement practice. Such a group could devise new ways of thinking about the importance of ensuring the viability of ICSID in the long term and about ensuring compliance with arbitration decisions in particular.

The third point I would like to raise concerns the ‘finality’ of an award. Echandi alludes to this point in an *a contrario* manner when discussing the sensitive political consequences of voluntary settlement through diplomatic means. He rightly reminds us that, for political reasons, it is often easier to permit an independent international tribunal to take decisions in the last resort. This relieves states of the responsibility to resolve disputes through negotiations and to face the domestic political consequences arising from the concessions inevitably made in the process. This behaviour pattern is also familiar in other dispute settlement fora, such as the WTO and the ICJ.

In this context, the investor-state dispute prevention concept that was introduced has great virtues. Obviously, there is a need for better coordination in the way governments internally manage and respond to investment decisions and issues. This can be achieved through the development of dispute prevention policies. In particular, the creation of ‘focal points’ within host state governments – to which parties can turn when difficulties arise – could prevent conflicts from evolving into legal disputes. Here I would refer to the so-called Internal Market Problem Solving System (SOLVIT) system introduced by the European Commission to take some pressure off the normal infringement procedure against Member States. In this system a Member State citizen or business that alleges a public authority’s misapplication of internal market law can submit its case to its local SOLVIT centre, which generally proposes a resolution within ten weeks.\(^5\)


Now turning to the internationally concerted mechanisms that Echandi proposed, they raise a challenging paradox or an 'open dialectic'. In an area where encouraging private sector foreign investment through direct access to remedies used to be an article of faith, more and more interstate mechanisms are now proposed for consultation and conciliation purposes. This emerging interstate trend has the colour of diplomatic protection without the content. Owing to the risk of politicisation of investment disputes that states' intervention carries, safeguards should be considered to ensure that these mechanisms do not create hurdles to investor remedies. Principles of global administrative law, such as the principles of accountability and openness, might be able to play the role of procedural safeguards. \(^6\) Principles of comity may also play a role in this context.

My fourth point is that alternative dispute resolution (ADR) techniques have positive features that should also be promoted in investment disputes. They play both a preventive and a remedial role. As suggested by both authors, there is room to persuade the stakeholders of the advantages of ADR. In the first place, Echandi has rightly targeted the economic costs, but he has also mentioned the political and social costs attached to international litigation. In this context, ADR imposes lighter burdens. However, there would be a need to work more on the social aspects of ADR and their acceptance by groups of concerned citizens. There might be a need for more transparency in order to involve all stakeholders in the decisions. More access to information may encourage greater use of ADR, as it would contribute to broadening the acceptance of ADR's legitimacy.

I would like to end by noting that neither Stevens nor Echandi has referred to the need to establish an appeal mechanism or a Cour de Cassation in the field of investment dispute resolution. Discussion of 'finality' might extend beyond the rendering of an award. I do not have a settled view on this issue, but looking once more to other dispute settlement fora, one can note a trend towards embracing two-tiered judicial mechanisms in judicial fora in which non-state parties have access. Can the legitimacy of the investment dispute settlement system escape discussion of this issue?

\(^6\) On these principles, see B. Kingsbury, N. Krisch and R. B. Stewart, 'The emergence of global administrative law', *Law and Contemporary Problems* 68(3) (2005), 16–61.