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Bringing the State Back In: Reconciling Public and Private Interests in the International Investment Regime

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The international investment regime is under attack. From Berlin to Buenos Aires, protests have erupted as citizens find out their governments can be sued by foreign corporations. To many, it appears that private interests drive the international investment arbitration regime, and large corporations have usurped powers traditionally reserved for states.

In this brief, we argue governments have a greater ability to control the arbitration regime than is usually acknowledged. We outline steps that governments can take to reassert public control over international arbitration and realign the international investment regime with the public interest. These are pragmatic steps for governments seeking greater voice within the system; they are feasible alternatives to exit.

If they seek to strengthen the place of public interest concerns in the international investment regime, governments can:

1. Issue interpretative guidance before a dispute arises
2. Use diplomatic channels to encourage settlement before formal arbitration starts
3. Continue to issue interpretative guidance and pursue diplomatic settlement during arbitration
4. Strategically choose when and how to apply diplomatic pressure in cases of non-compliance

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WHAT'S WRONG WITH THE INTERNATIONAL INVESTMENT REGIME?

To many observers, contemporary investor-state dispute resolution is an area where private actors have usurped powers traditionally reserved for states. Under the investor-state dispute settlement (ISDS) regime enshrined in modern bilateral investment treaties (BITs), private investors initiate claims against states and private arbitrators rule on those claims.

Once a treaty is in force, states act only in response to the initiative of private parties, and only as a respondent in arbitration cases—a role tightly circumscribed by legal procedure. States, in this view, have largely been squeezed out of the investment dispute settlement regime, which leaves it at risk of spiralling out of control, driven by the private interests of investors and arbitrators, both of whom may have incentives to encourage the expansion of the regime.

Frustrated with the system, several states are renegotiating or renouncing treaties. Some countries appear eager to abandon the international regime altogether. Bolivia, Ecuador, and Venezuela have withdrawn from the ICSID Convention, while South Africa and Indonesia have announced their intentions to exit their BITs or renegotiate very different treaties after their current BITs expire.

MANOEUVRING TO RESHAPE THE INTERNATIONAL INVESTMENT REGIME

Yet exit is not the only option available to governments seeking to reshape the international investment regime so it is better aligned with public interest. States have significantly more room for manoeuver within the ISDS system than is often perceived. There are several potential avenues through which states can exert influence within the bounds of the current regime, which continues to rely more on state-state politics than is often recognized. These may be politically more feasible than treaty exit, and – in light of the sunset clauses included in many treaties – may also deliver more immediate results than leaving the system altogether. [1]

Even with an investment treaty in place, states can exert their influence at four stages: before a dispute has occurred; once a dispute has occurred but before formal arbitration has begun; during the arbitration process; and following arbitration judgments when awards are enforced.

AVENUE 1: ISSUE INTERPRETATIVE GUIDANCE BEFORE A DISPUTE ARISES

Governments can act before a dispute arises by providing clearer, more extensive guidance on the meaning of investment treaty terms – such as "fair and equitable treatment" – to the international arbitration community.

Investment treaties, particularly older ones, often include broad standards that are not defined within the treaty. Imprecision creates gaps in international investment law, which makes the work of arbitrators more difficult and provides them with more interpretive power. In the absence of guidance from states, and unsure of what states intended when they signed a treaty, arbitrators are left to fill these gaps themselves. The use of precedent can compound the interpretive power of arbitrators. Although international investment law is not formally based on precedent, arbitrators often look to previous case law as a point of reference to guide interpretation.

States can issue guidance to arbitrators. Where both state parties to a treaty agree on interpretive guidelines, they can add an annex or addendum to their existing treaty or document such agreement through the exchange of official diplomatic notes. Under the Vienna Convention on the Law of Treaties investment arbitrators are compelled to consider such evidence when making interpretive decisions.[2]

Even in the absence of agreement between treaty parties, individual states can issue official statements providing guidance to arbitrators. While such statements are not binding on arbitrators, greater clarity from one of the parties may provide arbitrators with a useful point of reference. If multiple states joined in such an effort – collectively endorsing a particular definition or interpretive guideline – this may have greater influence on arbitrators.

Crucially, by acting before a dispute arises governments can avoid the impression that they are manoeuvring in an opportunistic and ad hoc way to help them win a particular case. As a result, their interpretative guidance is likely to be given greater weight by arbitrators.

AVENUE 2: ENCOURAGE SETTLEMENT BEFORE FORMAL ARBITRATION BEGINS

Home and host states can work together to encourage settlements before arbitration begins. For most investors, initiating a formal arbitration case is a last resort in an incipient investment dispute: investors would prefer to settle disagreements informally with the host state, as this process is typically faster and more conducive to ongoing commercial

1 Lavopa, Federico, Lucas Barreiros, and Victoria Bruno. 2013. How to Kill a BIT and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties. Journal of International Economic Law.

2 On this point, see Johnson, Lise, and Merim Razbaeva. 2014. "State Control over Interpretation of Investment Treaties" http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf

activities. Home and host states can use diplomatic channels to settle investment disputes outside of the formal ISDS system, thereby retaking the initiative in the international investment regime.

Home states can play a central, and often overlooked, role in pre-arbitration negotiations. The government of the home state is often in a unique position as it has some political leverage over both an investor (which it regulates and taxes) and the host state government (with which it has bilateral diplomatic relations). The home state government is in a position to act as a broker and encourage the two parties to come to a negotiated settlement rather than pursuing arbitration.

Although member states are not allowed, under Article 27 of the ICSID Convention, to provide diplomatic protection during the course of a dispute there is an exception for "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute." There is some evidence that home and host governments do seek to informally settle disputes.[3]The challenge for states in weighing up whether to pursue this diplomatic route is that it is not always obvious ex ante which actions by a home state government are covered by this exception to the ICSID Convention. While previous case law is not entirely clear, in practice ICSID tribunals very rarely find home state actions to be in contravention.[4] Thus there appears to be broad scope for states to engage in diplomatic efforts to encourage settlement of a dispute without running afoul of the ICSID Convention.

AVENUE 3: ISSUE INTERPRETATIVE GUIDANCE AND PURSUE DIPLOMATIC SETTLEMENT DURING ARBITRATION

The period of formal arbitration in an investment dispute, when the legal teams for the investor and the respondent host state plead their cases to independent arbitrators, is the point at which states have the least power over the system.

Yet there is some room for manoeuvre. States have the option of issuing interpretative statements to more clearly articulate treaty provisions within the context of an actual dispute, rather than at a more generalized abstract level (Avenue 1). Indeed, many treaties explicitly allow states to provide interpretive input to arbitration decision-making.[5] In effect, states entering into investment treaties establish dual roles for themselves, as both treaty parties and as respondents in cases.[6] There is a strong case for viewing states' delegation of interpretive authority to international tribunals as "implied and partial rather than express and exclusive," as Anthea Roberts argues.[7]

States can also continue to pursue diplomatic settlement when formal arbitration is underway so long as they do not violate Article 27 of the ICSID Convention. In many instances investors formally file an arbitration dispute with a host state but then amicably resolve the dispute before the arbitration panel issues its award.

AVENUE 4: STRATEGICALLY CHOOSE WHEN AND HOW TO APPLY DIPLOMATIC PRESSURE IN CASES OF NON-COMPLIANCE

In practice the investment regime – like most aspects of international law – depends primarily on the voluntary compliance of losing states to pay awards. In cases of non-compliance, however, the ICSID Convention allows home states to use diplomatic pressure to encourage and coerce host states to pay arbitral awards.

In deciding whether to exert diplomatic pressure to enforce compliance, home states have to weigh the wider ramifications for their relationship with the host state. For this reason, states delaying payment of investment awards have not always faced swift and substantial punishment from other states. While the US famously imposed trade sanctions on Argentina when it failed to comply with a series of awards, it waited several years before taking this action. More recently Russia lost a $50 billion claim related to the Yukos expropriation and it appears unlikely to pay. The claimants will likely need substantial assistance from one (or more) states to enforce this ruling. Will states be prepared to prioritize investment protection above other aspects of their diplomatic relations with Russia?[8]

Ultimately enforcement relies on states; states choose how much importance they place on upholding the current ISDS regime and to what extent they are willing to sacrifice other policy objectives and international commitments in order to achieve this goal.

3 See Gertz, Geoffrey, "The Enduring Role of Commercial Diplomacy: American Ambassadors and the Informal Settlement of Investment Disputes", forthcoming; and Tsuchiya, Chieko and Lou Wells. 2011. "Japanese Multinationals in Foreign Disputes: Do They Behave Differently, and Does it Matter for Host Countries?" Transnational Dispute Management, Volume 5.

4 See, for example, Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela, Decision on Jurisdiction. ICSID ARB/00/5 http://italaw.com/documents/decjuris.pdf , paras 135-140; and Banro American Resources, Inc, and Societe Aurifere du Kivu et du Maniema SARL v Democratic Republic of the Congo. ICSID ARB/98/7.

5 See UNCTAD. 2011. Interpretation of IIAs: What States Can Do. http://unctad.org/en/docs/webdiaeia2011d10_en.pdf

6 Roberts, Anthea. 2010. "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States" American Journal of International Law 104.

7 Roberts, Anthea. 2013. "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System," American Journal of International Law 107.

8 See, eg, The Economist. 2014. "The Chase Is On" 14 November. http://www.economist.com/news/business/21632513-russian-oil-giants-dispossessed-owners-begin-hunt-50-billion-chase

CONCLUSIONS

States are the masters and creators of the international investment regime. There are widespread concerns that narrow private interests – of foreign investors and professional arbitrators – have trumped public interests in investment dispute settlement. Yet far from being merely respondents, states retain the ability to reorient or fundamentally reshape the regime. There is greater scope for state manoeuvre than is commonly assumed.

Even with treaties in place, states can and do act to realign the system to reflect their interests and priorities in multiple formal and informal ways. State action to reshape the investment regime is easiest to do in advance of a dispute, and likely most effective through bilateral or multilateral statements, as opposed to unilateral actions.

The four avenues identified in this brief – issuing interpretative guidance before a dispute arises, encouraging settlement before formal arbitration begins, continuing to issue interpretative guidance and pursue diplomatic settlement during arbitration and strategically choosing when and how to apply diplomatic pressure in cases of non-compliance – provide opportunities for states to strengthen the place of public interest concerns in the international investment regime. Of course, it is up to individual states to choose whether they want to pursue such channels; and even if they do act, their interventions may not necessarily bring about the changes critics of the investment regime would like to see. But if states are worried that private interests trump public interests in the current investment regime, they have the power to change it.

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