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European Yearbook of International Economic Law ; Special Issue: Investor-State Dispute Settlement and National Courts

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| REF | TEXT | Context (Code) |
| R1C | materials.3 Discussing the criticism of investment arbitration vis-à-vis domestic courts requires providing an overview of the main reasons why States created the investment treaty system in the first place and examining today’s justifications for keeping or putting in place an international system of investment dispute resolution, whether in the form of arbitration or standing adjudicatory bodies | INTRO |
| R2C | In recent years, a number of States, academics, and members of civil society have increasingly questioned the justification for maintaining in place a dispute resolution system which allows foreign investors to bring direct claims against sovereign States before international arbitral tribunals rather than before the courts of the host State. | INTRO |
| R3S | Looking at the big picture, there are essentially two inter-related **criticisms** against investment treaty arbitration vis-à-vis domestic courts. **First**, it is argued that there is no need to put or maintain in place an international system for the resolution of investment disputes because investors in any event “retain rights under domestic systems” and those systems “are often assumed, but not established, to be inadequate”. : 4 In other words, the current IIA investment arbitration regime does not account for situations in which domestic courts do offer adequate access to justice to a foreign investor | **criticisms** |
| R4S | In a similar vein, critics contend that the IIA framework allows investors to bring claims against sovereigns without having to exhaust local remeedies in the host State, regardless of whether those remedies are capable of delivering justice.6 In fact, IIAs generally remove the duty to exhaust local remedies even for countries that have mature and advanced legal systems. | **criticisms** |
| R5S | **Secondly**, critics underscore that the procedural right to resort to arbitration against the host State under an IIA is not available to domestic investors (and foreign investors of nationalities not covered by IIAs). If domestic remedies are assumed to be unreliable, why allow only (certain) foreign investors to benefit from an international adjudicative process? In the eyes of those making this criticism, such differential treatment is seen as unfair and illustrative of “the privileges accorded by less developed countries to multilateral corporations at the expense of local investors who are competitively disadvantaged” | **criticisms** |
| R6 | 9Whether IIAs grant greater *substantive* rights than those provided under the relevant domestic systems of States entering into those IIAs is controversial and it likely depends on the laws of the relevant State. | Discriminative? |
| R7s | With regard to U.S. IIAs, Parvanov and Kantor conclude that U.S. IIAs generally do not confer greater substantive rights on foreign investors than the protection afforded to domestic investors under comparable U.S. domestic law (Parvanov and Kantor [2012](#_bookmark156), pp. 741–836) | Discriminative- US |
| R8s | Johnson and Volkov come to an opposite conclusion and argue that fair and equitable treatment provisions in BITs are more favorable to foreign investors than U.S. law (Johnson and Volkov [2013](#_bookmark145), pp. 361–415) | Discriminative- US |
| R9s | With respect to EU law, Kleinheisterkamp also finds that investment treaties provide more generous rights than EU law (Kleinheisterkamp [2012](#_bookmark147), pp. 85–109). | Discriminative- EU |
| R10s | Bonnitcha, Poulsen, and Waibel note that these debates are particularly controversial because both the U.S. Congress and the European Parliament have issued directives to their countries’ treaty negotiators stating that investment treaties should not provide greater substantive rights than are available under their respective national laws (see *infra* in the text, para. 14). However, they are of the view that “because relatively little research has been done comparing the substantive rights in investment treaties with those available under domestic law, it is unclear whether the directives are being followed in practice.” See Bonnitcha et al. ([2017](#_bookmark130)), p. 153. | Discriminative- EU/US |
| R11 | With regard to *procedural* rights, it is undisputed that the investor-State arbitration mechanism is not offered as a remedy under domestic law. | Discriminative- Procedural |
| R12s | The idea that foreign investors should enjoy no greater rights than domestic investors, includ- ing procedural rights,[9](#_bookmark23) has been put forward by a range of actors, such as the Australian Government, the European Parliament, and the U.S. Administration under President Trump, among others.[10](#_bookmark24)  10See also South African Department of Trade and Industry, Government Position Paper on *Bilateral Investment Treaty Policy Framework Review* (Pretoria, June 2009), p. 45 (noting that “[t]here is no compelling reason why review of an investor’s claims against a state cannot be undertaken by the institutions of the state in question—provided these are independent of the public authority that is in dispute and they discharge their duties in accordance with basic principles of good governance, including an independent judiciary. Unfortunately, there is little indication in the texts of BITs that negotiators have acted with prudence to promote better domestic dispute settlement in the host state”). | Discriminative- EU/US/AUS |
| R13s | In 2011, for instance, the Australian Government headed by Prime Minister Gillard openly indicated that it would no longer agree to investment arbitration in its treaties based, *inter alia*, on reasons of equal treatment between foreign and domestic investors.[**11**](#_bookmark25)  11See Australian Government (Department of Foreign Affairs and Trade), *Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity* (April 2011), p. 14 (stating that “[t]he Gillard Government supports the principle of national treatment – that foreign and domestic businesses are treated equally under the law. However, the Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. [.. .] In the past, Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries”). Following changes in government, the policy appears to have changed, as now Australia considers inclusion of investor-State arbitration clauses “on a case-by-case basis”. See Australian Government (Department of Foreign Affairs and Trade), “Investor-State-Dispute-Set- tlement (ISDS)”, available at [https://dfat.gov.au/trade/investment/Pages/investor-state-dispute-set](https://dfat.gov.au/trade/investment/Pages/investor-state-dispute-settlement.aspx) [tlement.aspx](https://dfat.gov.au/trade/investment/Pages/investor-state-dispute-settlement.aspx). See also Amokura Kawharu and Luke Nottage (2018), *Renouncing Investor-State Dispute Settlement in Australia, then New Zealand: Déjà vu*, The University of Sydney Law School Legal Studies Research Paper Series No. 18/03 (February 2018), p. 5. | Discriminative- AUS |
| R14s | In its 2015 recommen- dations to the European Commission on the negotiations of the Transatlantic Trade and Investment Partnership (TTIP), the European Parliament called on the Commis- sion “to ensure that foreign investors are treated in a non-discriminatory fashion and have a fair opportunity to seek and achieve redress of grievances, while benefiting from no greater rights than domestic investors, and to oppose the inclusion of ISDS in the TTIP, as other options to enforce investment protection are available, such as domestic remedies”. 12  12European Parliament (2015) Opinion of the Committee on Legal Affairs for the Committee on International Trade on recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (2014/2228INI), 4 May 2015, Rapporteur Dietmar Köster, p. 4. See also Opinion of the European Committee of the Regions (2015), 110th Plenary Session, 11–13 February 2015, (2015/C 140/02), 28 April 2015, paras. 33–35. | Discriminative- EU |
| R15s | 13See U.S. Trade Representative Robert Lighthizer at hearing before the U.S. Congress Ways and Means Committee, 21 March 2018 (transcript available on the International Economic Law and Policy Blog at [https://worldtradelaw.typepad.com/ielpblog/2018/03/brady-lighthizer-isds-](https://worldtradelaw.typepad.com/ielpblog/2018/03/brady-lighthizer-isds-exchange.html) [exchange.html](https://worldtradelaw.typepad.com/ielpblog/2018/03/brady-lighthizer-isds-exchange.html) and video available at [https://www.c-span.org/video/?c4719932/brady-lighthizer-](https://www.c-span.org/video/?c4719932/brady-lighthizer-isds-discussion) [isds-discussion](https://www.c-span.org/video/?c4719932/brady-lighthizer-isds-discussion) (where U.S. Trade Representative Robert Lighthizer noted that “[w]e are skeptical about ISDS for a variety of reasons [.. .]. Number one, on the U.S. side there are questions of sovereignty. Why should a foreign national be able to come in and not only have the rights of Americans in the American court system but have more rights than Americans have in the American court system? It strikes me as something that at least we ought to be skeptical of and analyze. So a  U.S. person goes into a court system, goes through the system and they’re stuck with what they get. If a foreign national can do that and then at the end of the day say ‘I want three guys in London to say we’re going to overrule the entire US system.’ [.. .] So this is troubling in that respect”). The renegotiations of the NAFTA resulted in the conclusion of the so-called USMCA which eliminated future investor-State arbitration as between the U.S. and Canada and curtailed its scope as between the U.S. and Mexico. See Galbraith ([2019](#_bookmark140)), pp. 150–159. | Discriminative- US |
| R16s | 14See U.S. Trade Representative Robert Lighthizer at hearing before the U.S. Congress Ways and Means Committee, 21 March 2018, *supra* Chap. [2](#_bookmark13), footnote 13 (stating that “[o]ur view was that rather than have this mandatory ISDS provision, which we think is a problem in terms of our sovereignty in the United States, encourages outsourcing and **losing jobs in** the United States, and by the way **lowering standards** in a variety of places, that we should be very careful before we put something like that into place. So you say ‘What are the risks, what are the alternatives for these companies?’ **The first alternative** I’d say is state-to-state dispute settlement, the **second** alternative is if you go to any one of these companies and ask them ‘Why do you need this; why don’t you put in place an arbitration provision in your contract?’ They’ll all say ‘Well we could do that,’ and indeed they did do it—did it before we had ISDS. In a country like Mexico they subscribe to all the conventions and they have to enforce those. If they put [an] arbitration provision in their contract, these things are then resolved in a similar manner, but without the United States ceding sovereignty in order to encourage people to **outsource jobs.** It’s just not a good trade in my opinion”)*.* |  |
| R17s | Although not always expressly articulated in these terms, these positions appear to question the very premise upon which the system was created. Indeed, it is often argued that the reasons why an international forum for the settlement of investment disputes was established included the need to provide **(i)** a neutral forum as alterna- tive to domestic courts that were perceived as inadequate, **and (ii)** a substitute to traditional State-to-State “politicized” mechanisms. | Raison d’etre of ICSID |
| R18c | This chapter starts by describing the pillars on which the existing investment treaty arbitration framework rests, namely the ICSID Convention and the complex network of IIAs, the majority of which include investor-State arbitration clauses (*infra* at Sect. [2.2.1](#_bookmark30)). It then provides a brief overview of the main reasons that are often put forward for the creation of the investment treaty system (*infra* at Sect. [2.2.2](#_bookmark40)), namely the need to attract foreign investment (*infra* at Sect. [2.2.2.1](#_bookmark41)); the desire to “depolit- icize” investment disputes (*infra* at Sect. [2.2.2.2](#_bookmark63)); and the desire to establish a neutral forum on the international plane as an alternative to domestic courts perceived to be inadequate (*infra* at Sect. [2.2.2.3](#_bookmark85)). Bearing the ongoing reform discussions in mind, it then provides an evaluation of whether today’s world still needs an international system for the resolution of investment disputes (in the form of arbitration or standing adjudicatory bodies) (*infra* at Sect. [2.3](#_bookmark102)). | origin |
| R19s | The existing investor-State arbitration framework emerged in its modern form in the 1960s, with the conclusion of the ICSID Convention and the first BITs.[15](#_bookmark31) | origin |
| R20s | 15For historical accounts see Newcombe and Paradell ([2009](#_bookmark151)), pp. 44–46, para. 1.31; Miles ([2013](#_bookmark149)),  pp. 86–87. As Newcombe and Paradell explain, “uniqueness of the current IIA network is a product of an historical evolution going as far back as the Middle Ages. Prior to the twentieth century, international standards of foreign investment and investor protection developed primarily through the related processes of diplomatic protection and claims commissions. In the late nineteenth and early twentieth centuries, as the world economy became increasingly internationalized, the limits of the diplomatic protection model became apparent, particularly as controversies arose between capital exporting and importing states regarding the customary international law minimum standard of treatment to be accorded to foreign investors and investments. In the aftermath of the Second World War (WWII), the process of international economic integration was rekindled, leading to the emergence of the contemporary investment treaty framework.” (citations omitted) pp. 2–3. | origin |
| R21s | The investment treaty network has grown since then to comprise more than 3000 IIAs binding a multitude of States worldwide. Switzerland is amongst the 154 Contracting States to the ICSID Convention and has concluded over 110 BITs with its trade partners.[16](#_bookmark32) | origin |
| R22s | The ICSID Convention was concluded in 1965 under the aegis of the World Bank and provides for a mechanism for the settlement of investment disputes available to foreign investors and host States in the form of both conciliation and arbitration. More specifically in relation to arbitration,[18](#_bookmark34) the ICSID Convention allows a Contracting Party and a national of *another* Contracting Party (thus, to the exclusion of domestic investors)[19](#_bookmark35) to settle their disputes arising out of an investment through arbitration, provided the parties have separately consented to it.[20](#_bookmark36) | About icsid convention |
| R23s | 20The Convention is subject to a “dual-consent” requirement, in the sense that “no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration”. See ICSID Convention, Preamble. | Dual consent in ICSID convention |
| R24s | The Convention also provides for an effective regime for the enforcement of arbitral awards rendered under the Convention, whereby Contracting Parties undertake to enforce the pecuniary obligations arising out of the award in their territory as if it were a final judgment of their courts.[21](#_bookmark37) | Arbitration enforcment |
| R25s | In the majority of cases, the basis for the jurisdiction of the Centre was an IIA incorporating an investor-State arbitration clause. Indeed, from the end of the 1960s,[23](#_bookmark39) BITs started to include a standing offer from a Contracting Party to submit disputes with the investors of the other Contracting Party to international arbitration, whether ICSID or other arbitral fora, such as UNCITRAL, Stockholm Chamber of Commerce (SCC), or International Chamber of Commerce (ICC).  23The first BIT to contain an unconditional offer of consent to submit disputes between a Contracting Party and an investor of the other Contracting Party to arbitration is considered to be the Italy-Chad BIT of 1969. See Italy-Chad BIT (1969), Article 7, referring to arbitration under the jurisdiction of the ICSID, pursuant to the Washington Convention of 18 March 1965 (the ICSID Convention). See Newcombe and Paradell ([2009](#_bookmark151)), p. 45, para. 1.31. | jurisdiction |
| R26s | According to UNCTAD, 90% of the existing IIAs contain advance consent (i.e. by way of a standing offer) to investment arbitration.[24](#_bookmark42) |  |
| R27s | In 1990, an ICSID arbitral tribunal recognized for the first time the possibility for an investor to sue a host State on the basis of the offer of consent contained in an IIA,[25](#_bookmark43) paving the way for the initiation of hundreds of investment treaty claims in the following decades.[26](#_bookmark44)  26According to UNCTAD, as of 1 January 2019, “the total number of known ISDS cases pursuant to [IIAs] had reached 942” in the various arbitral fora (see UNCTAD, *Fact Sheet on Investor-State Dispute Settlement Cases in 2018*, IIA Issues Note on International Investment Agreements No 2, May 2019, p. 1). |  |
| R28s | 25*Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, Final Award, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, paras. 18–24. See also Pauwelyn ([2014](#_bookmark157)), p. 397. A few years before, on 27 November 1985, an ICSID tribunal in its Decision on Preliminary Objections to Jurisdiction had recognized the same possibility under an offer of consent in a domestic law on foreign investment (see *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, paras. 3, 15). | Advance consent to ISA |
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