Restoring Faith in Globalization through a Multilateral Investment Regime

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The flow of investment between states and nationals of other states makes up a major component of globalization, an economic process of interaction and integration between states, corporations and individuals that has gradually become the predominant norm. Concerns about the legitimacy of international investment law are considered part of a broader backlash against global economic governance that includes international trade law, financial law, and other similar areas.[1] In response, the International Center for the Settlement of Investment Disputes (ICSID) has put forth a proposal to address some of the major concerns regarding the multilateral investment regime.

Under international investment law, Bilateral Investment Treaties (BITs) are established between the home state of the investor and the state hosting the investment. The majority of the claims arising from these treaties are brought before ICSID. Critics have accused ICSID of engaging in public governance by rendering decisions that affect host states' regulatory autonomy. Such arguments have been made against the backdrop of core constitutional principles, namely the rule of law, democracy and fundamental human rights.[2]

The use of party-appointed arbitrators has led to questions about the impartiality and independence of the ICSID arbitral process. Moreover, the narrowness of the pool of arbitrators sometimes gives rise to a conflict of interest. In some cases, an arbitrator who oversees a dispute between certain parties later acts as counsel to one of them.[3] To address these issues, ICSID has called for an amendment of its rules with a proposal that explores,[4] among other measures, the incorporation of a review procedure for the appointment and disqualification of arbitrators and the development of a code of conduct.

Similarly, critics have noted a lack of transparency inherent to the arbitral process. 2006 amendments to the ICSID rules made it possible for non-disputing parties to file amicus submissions, and this has had far-reaching effects on the practice of investment arbitration.[5] However, ICSID arbitration is still not fully satisfactory in terms of transparency, as evidenced by the inclusion of additional provisions for enhancing transparency in the latest ICSID rules amendment proposal. Another aspect considered ripe for reform is the broad discretion exercised by the arbitral tribunals in interpreting the vaguely worded BIT provisions, which leads to unpredictable and inconsistent outcomes.[6] The absence of a formal rule of precedent,[7] coupled with the lack of an appeals mechanism for correcting decisions on legal grounds and thus

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[1] Ratner. 'International Investment Law through the Lens of Global Justice', 20 *Oxford Journal of International Economic Law* (2017) 747-775, at 750.

[2] Schill. 'Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward', (E5Initiative), Geneva: International Centre for Trade and Sustainable Development/World Economic Forum (2015), at 1 and 3.

[3] Butler and Subedi. 'The Future of International Investment Regulation: Towards a World Investment Organisation?', 64 *Netherlands International Law Review* (2017) 43-72, at 47.

[4] https://icsid.worldbank.org/en/Pages/News.aspx?CID=286 (last visited on 25 Aug. 2018).

[5] https://icsid.worldbank.org/en/documents/about/icsid%20rules%20amendment%20process-eng.pdf (last visited on 25 Aug. 2018), at 1.

[6] *Supra* note 2, at 2.

[7] Kaufmann-Kohler and Potesta. 'Can the Mauritius Convention serve as a model for the reform of investor-state arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?', Analysis and Roadmap, Geneva Center for International Dispute Settlement (2016).

establishing binding precedents, has intensified the crisis and strengthened the claims that ICSID is vested with law-making powers.

The aforementioned amendment proposal addresses some of the causes of the crisis and aims to modernize the ICSID rules, yet it is insufficient in endowing the regime with the legitimacy expected of it. The crisis international investment law is facing stems from the failure to strike a fair balance between competing public and private interests. The fact that the current investment regime is built upon BITs renders it highly fragmented, and it leaves the states that are in urgent need of investment to generate economic growth with no choice but to accept treaty provisions that are otherwise against their interests.

Bearing in mind the similar crisis that eventually led to the establishment of the World Trade Organization and its Appellate Body,[8] it is through multilateralization and institutionalization that the asymmetric nature of the international investment regime can be eliminated. The establishment of a World Investment Organization with a standing mechanism for the settlement of investment disputes can create a level playing field in favor of capital-importing states. The creation of a World Investment Court[9] through a Multilateral Investment Treaty would, in turn, enable states to collectively negotiate for favorable terms and strengthen their bargaining positions to a considerable extent. In order for the new dispute settlement mechanism to remedy the deficiencies of ICSID in a comprehensive manner, it is important that an Appellate Body is set up as part of the World Investment Court.

Although progress towards overcoming the investment crisis can be made if these reforms materialize, a host state's autonomy to regulate in the public interest can only be respected with a dualistic approach. Some investment treaties, including the COMESA Investment Agreement, oblige the investors to comply with all applicable domestic measures of the Host State. However, given the insurmountable challenge of having uniform legislations enacted in all state parties to the World Investment Treaty, this issue should not be resolved at the domestic level. Accordingly, besides the treatment standards regulating the host state measures, the Multilateral Investment Treaty should incorporate the United Nations Guiding Principles on Business and Human Rights.[10] Not only would doing so render this soft-law instrument binding, but it would also hinder the ability of the investors to challenge the actions taken by the host states to protect fundamental human rights.

Lastly, instead of the term "fostering development" as it exists in the current BITs, the "fostering of sustainable development" should be explicitly provided as a treaty objective in the Multilateral Investment Treaty's preamble. Defined by the Brundtland Commission as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs,"[11] the principle of sustainable development should guide the reforms for international investment law. Viewed through the lens of the principle of sustainable development, international investment law should strive to clear the blurry line between the economic pillar of sustainable development, including the interests of investors in the protection of their reasonable expectations of return, and the environmental and social pillars, which includes the state's autonomy to regulate in the public interest on a wide variety of environmental and social issues. In order for the envisioned reforms to successfully respond to the backlash against globalization and restore faith in the multilateral investment regime, the Multilateral Investment Treaty should be interpreted in light of its objective to foster sustainable development. With

[8] Garcia, Ciko, Gaurav and Hough. 'Reforming the International Investment Regime: Lessons from International Trade Law', 18 *Oxford Journal of International Economic Law* (2015) 861-892, at 872.
[9] *Supra* note 3, at 62.
[10] United Nations Conference on Trade and Development. *Investment Policy Framework for Sustainable Development* (2015), at 78.
[11] World Commission on Environment and Development. *Our Common Future* (1987), at 43.

multilateralization and the incorporation of fundamental human rights and sustainable development considerations, the international investment regime can better respond to the need to balance private and public interests.