



FOREWORD

*Andrea K. Bjorklund**

Investor-State arbitration under the auspices of investment treaties, both bilateral and multilateral, is burgeoning. The rate at which cases are filed is increasing, as is the rate at which tribunals are issuing decisions in those cases.¹ Moreover, those decisions are now usually released into the public domain, an exercise facilitated by the Internet and by governmental awareness that the public is almost

* Acting Professor of Law, University of California, Davis, School of Law. B.A., University of Nebraska; M.A., New York University; J.D., Yale Law School. I would like to thank all of the U.C. Davis students who participated in organizing and running the JILP symposium, and those who worked afterwards on the symposium edition of the journal. In particular, I would like to recognize the dedication of Johnny Vuong, Neelam Naidu, Genevieve Kramer, and Ella Gower, who gave a great deal of time and energy to making the BIT symposium a success. I am also grateful to Deans Perschbacher and Johnson for their support for JILP generally and for the symposium in particular.

¹ Claims brought before the World Bank's International Centre for Settlement of Investment Disputes (ICSID) had risen from three as of the end of 1994 to 106 as of November 2004. U.N. Conference on Trade and Dev., Pub. No. UNCTAD/WEB/ITE/IIT/2004/2, *Occasional Note: International Investment Disputes on the Rise* (Nov. 29, 2004), available at http://www.unctad.org/sections/dite/iia/docs/webiteiit20042_en.pdf (last visited Nov. 3, 2005). UNCTAD also notes at least fifty-four cases outside the auspices of the ICSID. *Id.* Thus, the total number of cases is about 160, over half of which have been filed within the past three years. *Id.* These numbers include only known cases; because some claims are kept confidential, the numbers are likely somewhat higher. *Id.* at 2 (noting that confidentiality of disputes exerts a "downward pressure" on the numbers).

inevitably affected by an international tribunal's assessment of government measures vis-à-vis international law. Other documents related to arbitrations, such as procedural orders and memorials, have also been released to the public. This amounts to an explosion of information about processes that have traditionally been viewed as confidential. Those interested in the investor-State dispute settlement process are part of an eclectic community encompassing government and private-sector lawyers, representatives of civil society, academics, international commercial arbitrators, and other students of international law. Members of this community are subjecting those decisions, as well as the wisdom and efficacy of investor-State arbitration itself, to critical and often skeptical scrutiny.

Analyzing the efficacy of investor-State arbitration necessitates identifying the goals of the States that enter into the treaties. The paradigm is a bilateral investment treaty (BIT) primarily designed to increase foreign direct investment into a developing country. BITs help to establish a stable environment for investors who want some assurances that their investments will be protected in the event of political or social upheaval. Such treaties include particular undertakings by the host state to respect foreign investment, and usually provide for arbitration before a neutral tribunal, which can be commenced by the investor without the intervention of that investor's home State. Investment treaties do not, however, always involve developing countries. Multilateral treaties, such as the North American Free Trade Agreement (NAFTA) and the Energy Charter, many of whose member states are developed countries with robust capital flows between them, also provide for arbitration of investor-State disputes. Thus, investors from developed countries now often have the right to submit to arbitration their grievances against other developed countries. U.S. and Canadian investors have already frequently exercised that right.

Whether the ratification of investment treaties has actually increased foreign investment is a matter of some debate.² Yet,

² See, e.g., Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Treaties, 1960-2000* (UC Berkeley Public Law Research Paper No. 578961, 2004), available at <http://ssrn.com/abstract=578961> (last visited Nov. 3, 2005); Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit...and they Could Bite*, 19–22 (World Bank Policy Research, Working Paper Series No. WPS 3121, 2003), available at http://econ.worldbank.org/files/29143_wps3121.pdf (last visited Nov. 4, 2005); Susan Rose-Ackerman & Jennifer Tobin, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties*, (William Davidson Institute, Working Paper No. 587, 2004), available at <http://ssrn.com/abstract=557121> (last visited Nov. 3, 2005). But see Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment To Developing Countries?* 3, 21–22 (Nov. 2004) (unpublished manuscript), available at

notwithstanding the inconclusive econometric evidence, countries are queuing up to sign BITs. The United States and Canada both have active bilateral programs. Canada is negotiating BITs with India, China, and Peru. The United States has recently signed a BIT with Uruguay. It has also entered into bilateral Free Trade Agreements with Singapore, Morocco, and Chile, as well as an analogous multilateral agreement with several Central American countries and the Dominican Republic. These Free Trade Agreements all contain chapters providing for investor-State dispute resolution. Moreover, during his recent visit to Argentina, President Bush suggested resurrecting the moribund Free Trade Area of the Americas, which is projected to contain an investor-State dispute resolution mechanism similar to that of NAFTA Chapter Eleven. These initiatives suggest that many countries continue to believe that treaties are valuable.

The continued viability of investor-State arbitration suggests that the process itself is a worthwhile subject of academic inquiry, both at the macro and micro levels. Investors emphasize that the mere possibility of investor-State dispute resolution is of potential use as a negotiating mechanism even before any dispute arises. States make a trade-off when they establish such a mechanism. Investors have access to a neutral forum and may therefore be more sanguine about investing in a State, particularly one perceived as volatile or unstable, because that State can be held accountable for its acts under international law. The presence of this scrutiny may give rise to greater transparency and accountability in the host State's governmental structure. The fact that such changes may appear to be imposed by an outside agency, however, often causes concern about a loss of sovereignty.

Whether the dispute resolution process functions well in any single arbitration is, of course, a fact-specific inquiry. The time that investor-State cases take from start to finish must by now have dispelled all notions that arbitration is necessarily speedier and less costly than litigation. For example, the tribunal in *Methanex v. United States* issued its decision in August 2005, nearly six years after the submission of the Notice of Arbitration.³ The *Methanex* tribunal required that the investor pay the costs of the arbitration, which amounted to over U.S. \$2 million, and required that it pay the legal fees incurred by the

<http://papers.ssrn.com/abstract=616242> (last visited Nov. 3, 2005); Deborah Swenson, *Why Do Developing Countries Sign BITs?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 131 (2005).

³ *Methanex Corp. (Can.) v. United States*, (UNCITRAL) (Aug. 3, 2005) (Final Award of the Tribunal on Jurisdiction and Merits); *Methanex Corp. (Can.) v. United States*, (UNCITRAL) (Dec. 9, 1999) (Notice of Arbitration).

Department of State, which amounted to nearly U.S. \$3 million.⁴ While proceeding in local courts might not have proved any more satisfactory with respect to result, speed, or cost, the attractiveness of international arbitration will likely diminish if the proceedings are, or are perceived to be, equally costly and time-consuming. The quality of arbitral decisions is also coming under scrutiny, as are the tactics engaged in by both investors and respondent States. Many decisions relate to matters of jurisdiction or admissibility, and States frequently raise defenses on those grounds.

Notwithstanding these procedural limitations, investors are continuing to file claims at a record rate, and for the immediate future the existence of investor-State arbitration seems assured. Concerns about the legitimacy of the process and the quality and predictability of the jurisprudence are growing alongside the number of cases and decisions.⁵ Greater public attention is likely to lead to decisions of better quality as arbitrators are required to explain clearly their reasons for coming to conclusions. The fundamental legal bases of investor protection – national treatment, most-favored-nation treatment, the minimum standard of treatment, and expropriation – will be developed through arbitral decision-making in investor-State cases. The decisions themselves do not technically have the status of precedent.⁶ They are, however, used ever more frequently as persuasive authority. Moreover, as the number of decisions grows, they are creating a jurisprudence, much of which is treated by subsequent tribunals as least quasi-precedential.⁷ Ensuring that the decisions are of high quality is thus essential to the legitimacy of investor-State dispute settlement.

The symposium convened by the UC Davis Journal of International Law and Policy was intended to contribute to the analytical scrutiny given to BITs by gathering participants from multiple disciplines and inviting them to engage in a thoughtful inquiry into a variety of topics. These included the efficacy of investment treaties, the actual functioning of investor-State arbitration, and the likely challenges and changes that investor-State dispute settlement will face in the future.

⁴ *Methanex Award*, *supra* note 2, at Part V, pp. 4-5. Methanex's counsel estimated its legal fees to be in the range of \$11-12 million. *Id.* at Part V, p. 4.

⁵ See, e.g., Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521 (2005).

⁶ NAFTA art. 1136(1) ("An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.").

⁷ Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 *V.A. J. INT'L L.* 49 & n. 194 (forthcoming 2005).

Kenneth Vandavelde, Dean of the Thomas Jefferson School of Law and formerly of the U.S. Department of State, commenced the proceedings with a wonderful overview of the history of investment treaties. He identified four stages in the development of the investment treaty regime, and suggested that we are entering into the fourth stage, which is characterized by more cases, more jurisprudence, and, concomitantly, more scrutiny.

The first panel, moderated by Professor Robert Hillman of the University of California, Davis, School of Law, brought together economists, political scientists and lawyers to discuss the fundamental rationales for investment treaties. The panelists included Professor Andrew Guzman of the University of California, Berkeley, School of Law, Jennifer Tobin, a Fellow at the Brookings Institution and Ph.D. candidate at Yale, Professor Deborah Swenson of the U.C. Davis Department of Economics, and Jason Yackee, Clerk on the U.S. Court of Appeals for the Eighth Circuit. They discussed and debated the reasons that developing countries enter into bilateral investment treaties and the conflicting empirical evidence about their wisdom in doing so.

The second panel addressed the ways treaties actually function. It comprised Professor Jeffery Atik of Loyola Law School, Los Angeles, Professor Jack Coe of Pepperdine University School of Law, Susan Durbin of the California Attorney General's Office, and James Loftis, Co-Chair of the International Dispute Resolution Group of Vinson & Elkins in Houston. Professor Anupam Chander of the U.C., Davis School of Law moderated this panel. The panelists discussed how BITs operate in practice, with particular emphasis on the dispute resolution provisions of the treaties.

The third panel, moderated by Professor Cruz Reynoso of the U.C., Davis, School of Law, addressed the future of investor-State dispute resolution. The panelists included Professor Susan Franck of the University of Minnesota Law School, Meg Kinnear, General Counsel and Director of the Trade Law Bureau of Canada's Department of Foreign Affairs and International Trade, and Andrea J. Menaker, Chief of the NAFTA Arbitration Division in the Office of the Legal Adviser, U.S. Department of State. They identified several challenges facing claimants, respondents, and the arbitrators themselves, and suggested possible responses to those challenges.

Investor-state cases bring to the fore unresolved questions about the interplay between international tribunals and international law and local regulation and local dispute resolution mechanisms. The discussion at the conference, and the papers submitted by the participants that follow, are part of what promises to be a rich and continuing dialogue about the nature of investment dispute settlement.