A Matrix Analysis on ISDS Reform: Preliminary Considerations

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Contents

I. De-politicisation and Re-politicisation: The Turning Tides on ISDS
II. Redefining and Rebalancing: The Reform Efforts on ISDS
III. Political and Social Dimensions: A Matrix Analysis on ISDS
IV. Conclusions
I. De-politicisation and Re-politicisation: The Turning Tides on ISDS

1. FCN
   - Resolution of investment disputes by
     • (1) negotiating with the sovereign (Negotiation);
     • (2) suing the sovereign in the sovereign’s own courts where defenses of sovereign immunity may be readily available (Local Remedy);
     • (3) lobbying their home government to negotiate diplomatically, and possibly to espouse a claim on their behalf before the International Court of Justice (Diplomatic Protection).
I. De-politicisation and Re-politicisation: The Turning Tides on ISDS

2. Earlier BITs
   - The first BIT was concluded in 1959 between Federal Republic of Germany and Pakistan
   - Dispute Settlement Mechanisms (DS): No direct investor-state dispute settlement procedures; submission of disputes to the International Court of Justice or ad hoc State-to-State arbitration.

3. ICSID and Later BITs
   - ICSID: 1965
   - Later BITs: ISDS became the norm.
ISDS: A SMART DS Mechanism for Investment

Why SMART: Depoliticising investment dispute settlement by allowing investors to directly resort to investor-state arbitration mechanism to resolve their disputes with the host state. Therefore:

– DS becomes SMALLER and more HANDY (because it is no longer state-state business), and
– More INVESTOR(USER)-FRIENDLY (because investors can directly sue and appoint arbitrators)
3. Proliferation of IIAs

Source: UNCTAD. Data for 2012 are preliminary.
Proportion of bilateral treaties concluded in a given year that explicitly provide for access to international arbitration and domestic judicial review in dedicated sections on ISDS and to domestic judicial review in expropriation clauses; the grey shaded sections indicate the proportion of treaties that contain no explicit reference to an ISDS mechanism.

I. De-politicisation and Re-politicisation: The Turning Tides on ISDS

3. The Turning Tide: The “Re-politicisation” Practices:

- Limiting the scope of ISDS
- Imposing controls over ISDS processes at different stages
- Abandoning ISDS altogether and reverting to the state-state diplomatic protection practices

4. Reasons:

- The surge of (increasingly complex) investment arbitration cases; and
- The legitimacy crisis of the ISDS system.
Known ISDS cases, 1987–2012

Source: UNCTAD.
Total Number of ICSID Cases Registered by Calendar Year:

Cases Registered under the ICSID Convention and Additional Facility Rules
Average number of issues regulated in ISDS provisions in bilateral treaties concluded in a given year. Distribution (bars, left scale) and calculated average (dots, right scale).

Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules by Economic Sector:

- Oil, Gas & Mining: 25%
- Other Industry: 13%
- Construction: 7%
- Tourism: 4%
- Water, Sanitation & Flood Protection: 6%
- Electric Power & Other Energy: 12%
- Transportation: 11%
- Services & Trade: 4%
- Finance: 7%
- Information & Communication: 6%
- Agriculture, Fishing & Forestry: 5%


Source:
ICSID
Caseload Statistics
2013-2
I. De-politicisation and Re-politicisation: The Turning Tides on ISDS

*Legitimacy Crisis of ISDS*--- ISDS no longer SMART as the *essentially commercial* DS mechanism is increasingly called upon to deal with issues of *public policy* and wide *social concern*:

1. Policy space:
   - increasing review of domestic public policy

2. Inconsistent awards:
   - Inconsistent interpretation; lack of predictability

3. Procedural maxim of arbitration:
   - Confidentiality; public access to arbitral hearing and awards; participation of non-disputing state
Awards Rendered and Outcomes in Annulment Proceedings under the ICSID Convention, by Decade:

Source: ICSID Caseload Statistics 2013-2
II. Redefining and Rebalancing: The Reform Efforts on ISDS

• Revolution: Some Latin American States, Australia, South Africa

• Reform: Most other countries
  – Redefining the ambit of ISDS:
    • Carving-out and fine-tuning
  – Refine the ISDS procedures:
    • Joint determination (JD);
    • Joint interpretation (JI)
    • Appeal mechanism
## Redefining the Scope of ISDS

<table>
<thead>
<tr>
<th></th>
<th>ISDS</th>
<th>No ISDS</th>
<th>Time limits</th>
</tr>
</thead>
<tbody>
<tr>
<td>China-Canada BIT 2012</td>
<td>NT MFN MST Expr Trsf SM DB Fina Tax</td>
<td>NS review and approval of an investment (Art (34))</td>
<td>6 m cooling; within 3 years</td>
</tr>
<tr>
<td>CHN-JAP-KOR TIT 2012</td>
<td>“Any investment dispute” (art15.1); (Envn measures art23)</td>
<td>IP and prudential measures (art 15.12)</td>
<td>4 m cooling; within 3 years</td>
</tr>
<tr>
<td>US 2012 Model BIT</td>
<td>NT MFN MST Expr Trsf PR SM Publication</td>
<td>Envn and Lbr (art37) (and No G2G)</td>
<td>6m; within 3year</td>
</tr>
<tr>
<td>ECT 1994</td>
<td>Disputes relating to an investment under Part III (SM Expr Trsf Subrogation)</td>
<td>Only Expr applies to tax (art21(5)(a))</td>
<td>3m;</td>
</tr>
</tbody>
</table>
# Refining Corresponding ISDS Procedures

<table>
<thead>
<tr>
<th></th>
<th>Prerequisite procedure</th>
<th>Optional procedures</th>
<th>Appeal</th>
<th>Interpretation</th>
</tr>
</thead>
<tbody>
<tr>
<td>China-Canada BIT 2012</td>
<td>--</td>
<td>JD for prudential measures (or G2G)</td>
<td></td>
<td></td>
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<tr>
<td>CHN-JAP-KOR TIT 2012</td>
<td>JD for tax (art21.5.b)</td>
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<tr>
<td>US 2012 Model BIT</td>
<td>JD for tax (6m)(art21)</td>
<td>JD for financial services (4m)(art20)</td>
<td>Appeal (art 28(10))</td>
<td>JI (art30-31)</td>
</tr>
<tr>
<td>China 2010 Model BIT</td>
<td>JD for tax (6m)(art11)</td>
<td></td>
<td></td>
<td>JI (2m)</td>
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<tr>
<td>ECT 1994</td>
<td>JD for tax (6m)(art21(5)(b)(ii))</td>
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Is there a way to rationalize the fragmented practices in ISDS reform?
III. Political and Social Dimensions: A Matrix Analysis on ISDS

The 3-D of an investment Dispute:

*Economic* (fundamental/default), Political and Social dimensions

- Pure or primary economic disputes: smarter and easier to deal with
- But, when it is *compounded* with significant political and social interests, it is no longer smart and cannot be easily swallowed by ISDS.
### Investment Disputes and Their Settlement

<table>
<thead>
<tr>
<th>Political Disputes</th>
<th>High</th>
<th>Low</th>
</tr>
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<tbody>
<tr>
<td>Social Disputes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>High</td>
<td>Red Zone (for both politically sensitive and socially influential disputes)</td>
<td>Blue Zone (for socially influential but politically less sensitive disputes)</td>
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<tr>
<td></td>
<td>No ISDS or closely State controlled and socially monitored ISDS</td>
<td>Socially monitored ISDS</td>
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<tr>
<td>Low</td>
<td>Yellow Zone (for politically sensitive but socially less influential disputes)</td>
<td>(Green Zone, for purely or primarily economic disputes)</td>
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<td></td>
<td>State Controlled ISDS</td>
<td>ISDS</td>
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## An Application of the Matrix Analysis

<table>
<thead>
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<th>Political Disputes</th>
<th>Social Disputes</th>
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<tbody>
<tr>
<td><strong>High</strong></td>
<td><strong>No ISDS or closely state controlled and socially monitored ISDS (essential security)</strong></td>
</tr>
<tr>
<td><strong>Low</strong></td>
<td><strong>State Controlled ISDS (JD or/and JI, for e.g., taxation, prudential measures)</strong></td>
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</tbody>
</table>
More careful analyses needed

- Techniques such as JI, JM, appeal and transparency, third party participation are useful to enhance political and social legitimacy, but they may not necessary fit for all disputes.
- More careful analyses are needed on both the disputes and the DS techniques to find best matches.
# The Places and Time Dimensions

<table>
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<th>Low</th>
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<tbody>
<tr>
<td>Social</td>
<td></td>
<td></td>
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<tr>
<td><strong>High</strong></td>
<td></td>
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<tr>
<td>No ISDS</td>
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<tr>
<td>(for Non-Compensation disputes in first and second generation Chinese BITs)</td>
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<td>Admission (for EU)</td>
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<tr>
<td><strong>Low</strong></td>
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<td>Admission (JI for US)</td>
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<td>ISDS</td>
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<td>(for all investment disputes in third generation Chinese BITs)</td>
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Conclusions:

- ISDS is a SMART DS mechanism intended for settling economic/property disputes, which becomes clumsy when it started to engage in politically and socially sensitive issues.
- A political/social matrix analysis may help to rationalize the current and future ISDS reform efforts.
- The types of disputes and DS techniques need to be more carefully analysed to achieve best matches or more tailor-made DS mechanisms.
Many thanks!