Is Arbitration in International Investment Law Bad for Democracy?
Mapping the terrain and considering reforms

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Abstract

It is not often that the technicalities of international investment law become a matter of public debate and political mobilization. The dispute settlement mechanism known as ISDS (Investor-to-State Dispute Settlement), frequent in contemporary international investment agreements, is a notable case. This seemingly procedural matter was the subject of impressive public mobilization in Europe in opposition to signing the TTIP agreement³, due to concerns about negative impact on environmental protection and labor conditions. As stated in a European Commission's factsheet on Investment Protection and Investor-to-State Dispute Settlement in EU Agreements: 'some of the most recent cases brought by investors against states have given rise to strong public concerns. The main concern is that the current investment protection rules may be abused to prevent countries from making legitimate policy choices.'⁴ Interestingly, on the American side of the Atlantic objections were raised also by advocate of freer trade.⁵

The premise of this paper is that in order to understand the relationship between investment arbitration and democratic politics, we must first be much clearer about what specific aspects of democratic politics are meant. Therefore, the paper highlights three specified aspects of the relationship between investment arbitration and democratic politics: first is whether the obligations towards foreign investors wrongly restrict self-determination; the second concerns transition to democracy, asking whether the obligations harm the chances of newly founded democratic regimes to take root? Thirdly, the question pertains to quality of democracy, where a democratic system is already consolidated, but international obligations have effect on the distribution of opportunities for participation among citizens.

The focus of this paper is conceptual. To answer questions about the relationship between international investment law and democracy, we are required to make conceptual-normative assumptions, whether explicit or implicit, about what is harmful and what is fair. Indeed, much of the political dispute about international

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³ TTIP – Transnational Trade and Investment Partnership, negotiated between the European Union and the United States from 2013 until 2016, when negotiations were declared frozen.
⁵ Daniel Ikenson, 'A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement', Free Trade Bulletin 57 (2014), 1-4
investment (and trade) is between those defending the rules, due to their contribution to the production of wealth, and those critical of the rules due to their contribution to exceedingly uneven distribution of this wealth within countries and across borders. The contribution of a conceptual analysis is to clarify some of the assumptions that inform the discussion. There is another supposition to take into account, that we do not defend here, namely, that international investment law, including the arbitration mechanisms plays a relevant role in distribution of benefits and burdens among the parties.

In response to the three questions about the specified aspects of the relationship between investment law and democracy, the paper makes the following two step argument. First, negative impact depends on the extent and patterns of inequality of distribution of the benefits and burden between the parties. This is to say, where the extent of inequality is large or very large, and the patterns of re-distribution reinforce or exacerbate these extents, the three aspects of democratic politics examined here are negatively affected. This conceptual framework enables a sensitive evaluation of the arbitration rules and mechanisms. Second, if this is the case, relatively modest reform proposals have potential to mitigate the negative effects on democratic politics. 

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6 As background for the presentation and discussion at the workshop, I have enclosed the paper "Is Investor-State Arbitration Unfair? A Freedom-Based Perspective", which includes earlier thoughts on two of the main issues in the current presentation. Further discussion is in Suha Jubran-Ballan and Ayelet Banai, "Democratic Transitions and Investment Arbitration: Private Law as Politics" (paper under review, on file with author); Ayelet Banai "Freedom beyond the threshold: self-determination, sovereignty, and global justice." Ethics & Global Politics 8.1 (2015): 24-46 <https://www.tandfonline.com/doi/abs/10.3402/egp.v8.24446>