BOOK REVIEW

Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century

Jean E. Kalicki and Anna Joubin-Bret, editors
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1003 pages with index

No issue is of greater consequence to the rapidly expanding field of international investment law than the issue of whether sovereign states should continue to utilize existing mechanisms for the arbitration of investment disputes with investors. Jean Kalicki and Anna Joubin-Bret have made a magnificent contribution to the discussion of that issue with their collection of papers. This book is neither an assault upon, nor an apology for, investor-state arbitration. Rather, the contributors to this volume have sought a middle ground by endeavouring to propose very concrete ways in which to reform investor-state arbitration in response to many of the most common criticisms of that form of investment dispute resolution.

The contributors are a diverse mix of experts drawn from Europe, Asia and North and South America. They comprise arbitrators, attorneys, academics and current or former officials of both national governments and international organizations. Some contributors offer personal observations from a position at the centre of events, while others have mined empirical data or the existing arbitral awards for insights into the process. Though varying widely in length, the papers in the collection are thoughtful, well researched, and avowedly practical.

The book traces its origins to a 2013 proposal by Mark Kantor that the online journal, *Transnational Dispute Management*, publish a special issue titled, “The Reform of Investor-State Dispute Settlement: In Search of a Roadmap”. He asked Jean Kalicki and Anna Joubin-Bret, both deeply experienced, to edit the issue, which appeared in January 2014 as a collection of 65 papers by 85 authors. For this printed volume with its physical constraints on space, the editors pared the collection down to 38 papers by 48 authors.

Although this review cannot begin to do justice to the scope and depth of analysis in these papers, the reader may find illuminating a brief survey of the collection as a whole.

Christoph Schreuer's contribution reviews the deficiencies of diplomatic protection and adjudication in local courts and concludes that investor-state arbitration remains "the only functioning system for the orderly settlement of the numerous disputes arising from foreign investments" (p. 889). Schreuer's conclusion captures the premise of many of the papers in this collection, *viz*., that the investor-state arbitral process exists because of the lack of suitable alternatives and thus reform should be directed at improving the process while preserving the advantages that the process has brought to the resolution of international investment disputes.

Several of the papers propose ways to divert certain disputes from investor-state arbitral tribunals to a different mechanism, suggesting that the authors of these papers do believe that a better alternative exists for at least some disputes. Daniel Kalderimis proposes to divert some disputes to local courts by reintroducing, under certain conditions, the requirement that local remedies be exhausted prior to submitting a claim to arbitration. Mark Feldman proposes criteria for distinguishing between companies acting as exporters and those acting as investors, thus providing a jurisdictional basis for excluding claims by the former from investor-state arbitration. Anne Van Aaken proposes that the resolution of certain disputes be delegated to a joint commission representing the treaty parties. Theodore R. Posner and Marguerite C. Walter also call for greater use of state-state processes, including state-state arbitration, as an alternative to investor-state arbitration in certain types of cases. Locknie Hsu offers proposals for the development of new forms of alternative dispute resolution for some cases, drawing on insights from trade and commercial law.

By contrast, some contributors resist proposals to reduce the remit of investor-state arbitral tribunals. Liang-Ying Tan and Amal Bouchenaki caution against reform proposals that would limit investor access to investor-state arbitration and suggest instead revisions to investment treaties and to the arbitral process. Similarly, Nicolette Butler considers the possibility of diverting claims to existing international dispute settlement mechanisms, but concludes that none of them is

suitable, although she suggests incorporating specific features of these mechanisms into existing international arbitral processes.

One contributor would actually *increase* the scope of disputes resolved through investor-state arbitration, in at least one respect. José Antonio Rivas suggests expanding the use of investor-state arbitral tribunals to resolve counterclaims.

The most common approach to reform in this collection is to impose greater control over investor-state arbitral tribunals so that mistaken interpretations of the relevant treaties can be avoided or corrected and greater consistency achieved. Proposals of this type take several forms.

In some instances, the contributors would provide clearer guidance to tribunals, thus preventing mistaken interpretations and creating a more consistent jurisprudence. Elizabeth Boomer recommends that countries revise the language of international investment agreements to provide investor-state arbitral tribunals with more specific guidance and she includes an appendix in which she offers specific treaty language and explanatory commentary on her proposed language. Baiju S. Vasani and Anastasiya Ugale call for greater use by tribunals of *travaux preparatoires* to find the intended meaning of treaty provisions. Joshua Karton suggests the creation of an Advisory Committee on International Investment Law that would provide authoritative guidance to tribunals. Roberto Castro de Figueiredo proposes that the ICSID Administrative Council adopt interpretive resolutions that contain authoritative interpretations of the ICSID Convention. Michael Ewing-Chow and Junianto James Losari recommend greater use of the mechanism pioneered in the NAFTA allowing the treaty parties to issue binding interpretations of treaty provisions. Tomoko Ishikawa similarly recommends a mechanism whereby the treaty parties issue joint interpretations of treaty language.

In other cases, the contributors would institute additional mechanisms for reviewing and potentially invalidating awards, thus correcting (and perhaps deterring) mistaken interpretations and, again, promoting a more consistent jurisprudence. Several of the contributors discuss the creation of an appellate mechanism. Gabriel Bottinini argues that such a mechanism is needed, while Luis González García and Kristina Anđelić, in separate papers, argue that it is not and they

recommend various alternative approaches. Barton Legum takes a middle position, suggesting that an appellate mechanism may perhaps be needed in the specific context of the Trans-Pacific Partnership Agreement and the Transatlantic Trade and Investment Partnership Agreement, but is unnecessary as a general matter. Two contributors, Eun Young Park and Jaemin Lee, contribute chapters with very specific recommendations regarding the ways in which an appellate mechanism should operate.

One means of reviewing awards that is already in widespread use is the procedure for annulment of ICSID awards. Nikolaos Tsolakidis describes the continuing concern that ICSID annulment committees are exceeding the scope of their authority under the ICSID Convention and are functioning as appellate bodies, in effect, exercising too much control over investor-state arbitral tribunals. Diego Brian Gosis suggests that the problem is not too much review, but too little. He would amend the ICSID Convention to permit rectification of any kind of error in an award and to authorize annulment of awards on the basis of a manifest error of law or fact.

Two of the contributors – Omar E. García-Bolívar and Eduardo Zuleta – address concerns about the legitimacy and consistency of investor-state arbitral awards that arise from the way that arbitral tribunals are constituted. In separate papers, they advocate the creation of a permanent investment tribunal that would supplant the current system of investor-state arbitration, in which a different tribunal is constituted for each dispute.

Several of the contributors focus on concerns not about the substantive results of investor state arbitration, but about the cost and delay involved in the process. Some would reduce the cost of the process by discouraging nonmeritorious claims. Jeffrey Sullivan, David Ingle and Matthew Hodgson offer a set of papers suggesting different ways to use cost awards to deter nonmeritorious claims and dilatory tactics. Mallory Silberman proposes means for reducing the number of nonmeritorious petitions for ICSID annulments. Others focus on expediting the arbitral process. Adam Raviv offers 29 specific recommendations for shortening the time needed for ICSID arbitration, while Joongi Kim reviews several sources of delay and focuses on modifying the process for closing arbitral proceedings more promptly.

A final group of papers, rather than suggesting particular reforms, examines the reform process itself in search of insights regarding how reform can or should proceed. Antonio R. Parra discusses the process that led to the 2006 amendments to the ICSID Regulations and Rules, while Julia Salasky and Corinne Montineri describe the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Karen L. Kizer and Jeremy K. Sharpe describe how reforms to the investor-state arbitral process can be achieved through the negotiation of international investment agreements, focusing on the U.S. experience. J. J. Saulino and Josh Kallmer examine some of the political realities underlying the investment treaty negotiations that shape investor-state arbitration. Jan Asmus Bischoff discusses the role of the European Union in the future development of international investment law. David Gaukrodger and Kathryn Gordon describe the work of the Freedom of Investment Roundtable hosted by the Organisation for Economic Co-operation and Development in promoting reform. Silvia Constain suggests convening an ad hoc committee of ICSID members to develop a model international investment agreement that would bring uniformity to substantive provisions and establish a standing dispute settlement mechanism with an appellate body. Steven W. Schill argues that reform must entail a reconceptualization of investor-state arbitration as a form of public law based judicial review.

As this brief survey indicates, the many proposals in this collection vary greatly. Some proposals are more novel than others. Some are more sweeping than others. The real virtue of this collection, however, is that, in each case, the contributors have focused on the practical aspects of their proposals. That is, they identify a problem that calls for solution and then they offer a solution. For one in search of a constructive guide to reform, there is no better place to start.

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