

*Journal of*  
WORLD TRADE

---

---

*Published by:*

Kluwer Law International  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
Website: [www.kluwerlaw.com](http://www.kluwerlaw.com)

*Sold and distributed in North, Central and South America by:*

Aspen Publishers,  
Inc. 7201 McKinney Circle  
Frederick, MD 21704  
United States of America  
Email: [customer.service@aspublishers.com](mailto:customer.service@aspublishers.com)

*Sold and distributed in all other countries by:*

Turpin Distribution Services Ltd.  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom  
Email: [kluwerlaw@turpin-distribution.com](mailto:kluwerlaw@turpin-distribution.com)

*Journal of World Trade is published six times per year.*

Print subscription prices, including postage (2015): EUR 1119/USD 1492/GBP 822.

Online subscription prices (2015): EUR 1036/USD 1382/GBP 762.

*Journal of World Trade is indexed/abstracted in the European Legal Journals Index.*

*Printed on acid-free paper.*

ISSN 1011-6702

©2015 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to:

Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011- 5201, USA. Email: [permissions@kluwerlaw.com](mailto:permissions@kluwerlaw.com)

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

---

---

*Editor*

Edwin Vermulst  
VVGB Advocaten / Avocats Brussels, Belgium

Associate Editors **Petros C. Mavroidis** Edwin B. Parker Professor of Law at Columbia Law School, New York, Professor of Law at the University of Neuchatel & CEPR  
**Thomas Cottier** Professor of European and International Economic Law, Managing Director World Trade Institute, University of Berne, Switzerland  
**Simon Evenett** University of St.Gallen  
**Bernard Hoekman** Development Research Group, The World Bank  
**Junji Nakagawa** Professor, University of Tokyo, Tokyo, Japan  
**Yong-Shik Lee** Director and Professorial Fellow, The Law and Development Institute  
**Faizel Ismail** Head of the South African Delegation to the WTO, Geneva  
**Gary N. Horlick** Law Offices of Gary N. Horlick  
**Henrik Horn** Senior Research Fellow, Research Institute of Industrial Economics (IFN), Stockholm  
**Pierre Sauvé** World Trade Institute, University of Berne  
**Lorand Bartels** Faculty of Law, University of Cambridge  
**Thomas J. Prusa** Department of Economics, Rutgers University, New Brunswick, NJ, USA  
**Chad P. Bown** Senior Economist, Development Research Group, The World Bank  
**Guohua Yang** Professor at Tsinghua University Law School, Beijing China

All correspondence should be addressed to the Editor  
under reference of:  
Journal of World Trade  
Email: [edwin.vermulst@vvgb-law.com](mailto:edwin.vermulst@vvgb-law.com)

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner.  
Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 1001-5201, USA. Email: [permissions@kluwerlaw.com](mailto:permissions@kluwerlaw.com)

© 2015 Kluwer Law International BV, The Netherlands

ISSN 1011-6702

Mode of citation: 49:2 J.W.T.

# Rethinking the International Investment Law System

Simon LESTER<sup>\*</sup>

*The debate over investor-state dispute settlement (ISDS) has been increasingly contentious, while at the same time becoming less focused on the substantive issues involved. This article seeks to provide a balanced critique of ISDS, emphasizing three main points: (1) foreign investment today is often courted by host governments, rather than treated badly; (2) in today's globalized world, the distinction between 'foreign' and 'domestic' investment is less clear; and (3) international judicial review is a controversial idea that should be pursued with some caution. It also suggests alternative approaches to dealing with any negative treatment that foreign investors face.*

## 1 INTRODUCTION

In its formative years, during the 1960s, 1970s, and 1980s, the international investment law system was relatively uncontroversial. Taking widely accepted domestic law principles, and using them as the basis for an international law framework to protect certain rights, seemed like a useful and productive way to expand the rule of law and promote economic development and growth. Who could object to principles such as fair and equitable treatment or the protection of property rights? Supporters of the system can be forgiven for becoming complacent and not anticipating the current heated debate over the very existence of the system.

As it turns out, however, the system was uncontroversial only because it was obscure and mostly unutilized. For the most part, people were simply unaware of its implications. An investment treaty between the United States and Senegal did not have much practical impact and did not raise many concerns.

As soon as investors started filing lawsuits, however, a backlash occurred, and has only intensified in recent years. Now that people see what the obligations mean, many have risen up in protest. In the United States, the NAFTA was the first agreement that led to cases filed against the US Government, which made clear that the impact of these treaties would not just be on developing countries. Over

---

<sup>\*</sup> Trade Policy Analyst, Cato Institute. Thanks to David Gartner and Jason Yackee for helpful comments.

in Europe, it has only been recently that cases against European governments have led to a negative reaction, but when it came, that reaction was quite strong.<sup>1</sup>

As the debate has heated up, it has deteriorated a bit. Many critics think of the system's defenders as corporate shells; and the defenders see the critics as uninformed loudmouths.

The truth is that there are good faith arguments to be made on both sides, even if some of those with the most passion are not very well informed on the substance. Hopefully this exchange can help to elevate the debate somewhat.

One problem with the debate is that, often, the emphasis of each side is on different aspects of the issue. As a result, the debate is like two ships passing in the night. But perhaps that cannot be helped, as perspectives on what is important are sometimes very different. The question for the reader is, even though they are talking past each other, which side is emphasizing the more important issues? With that in mind, all I can do is put forward the considerations that I believe are most relevant.

In this article, I offer a critique of the existing system, in three parts. First, I question whether there is much of a problem with bad treatment of foreign investment that needs to be addressed. Second, I argue that the nature of capital flows today means that referring to investment as 'foreign' overlooks the reality of today's interdependent economic world. And third, I explore the nature of the international judicial review that the international investment law system has made available to foreign investors, and ask whether we have gone too far in creating international 'constitutional' courts.

Finally, I explore alternative approaches to addressing any problems that do arise in relation to the treatment of investment. I conclude that the real issues that exist here can be dealt with in more productive ways.

## 2 HOW IS FOREIGN INVESTMENT TREATED TODAY?

The international investment law system as it exists today is based on the circumstances of a past era. The system looks out of date, as it deals with problems that existed a long time ago, and ignores the current reality of international investment flows.

If you look back at the situation of 100 years ago, or even sixty years ago, foreign investors were often treated badly. The world that existed at that time was

---

<sup>1</sup> See, e.g., Robin Emmott & Philip Blenkinsop, 'Exclusive: Online Protest Delays EU Plan to Resolve US Trade Row', Reuters, 26 Nov. 2014, [www.reuters.com/article/2014/11/26/us-eu-usa-trade-idUSKCN0JA0YA20141126](http://www.reuters.com/article/2014/11/26/us-eu-usa-trade-idUSKCN0JA0YA20141126) ('Investor protection is among the most contentious issues in the proposed EU-US trade pact because Europeans fear US multinationals would use the investor-to-state dispute settlement (ISDS) mechanism to challenge food and environmental laws in the EU on the grounds that these were restricting free commerce').

much less democratic, with many authoritarian governments shifting their views about foreign investment, alternately encouraging it and then expropriating it. In the post-colonial world of the 1950s, 1960s, and 1970s, economic nationalism was on the rise, and newly empowered developing nations began to take back what they believed was theirs. In many cases, this was accomplished through expropriation of physical assets. This era was a challenging one for Western multinationals who had invested in the developing world.

To deal with this situation, these companies lobbied their governments for international treaties that would give them recourse to neutral international courts, which could handle any disputes that arose. This approach appealed to the governments themselves, who did not like having to engage in the diplomacy of defending their companies' rights. In the 1960s and 1970s, templates for such treaties were developed and applied, and soon proliferated. By 2012, there were nearly 3,200 agreements on foreign investment,<sup>2</sup> either as free-standing treaties or chapters of trade agreements.

While this was going on, however, attitudes towards foreign investment changed in most of the world. Economic nationalism faded and governments around the world began to court investors. Today, a typical story about large foreign investments will note the subsidies offered by the government to attract that investment.<sup>3</sup>

To a great extent, then, bad treatment of foreign investment is a problem of a prior era. There are still some nations, scattered here and there, who threaten expropriation or actually expropriate, but the numbers are down considerably. According to a recent study of the issue, the number of expropriation acts was 136 in the 1960s and 423 in the 1970s, but has since declined to only seventeen in the 1980s, twenty-two in the 1990s, and twenty-seven instances in the 2000s through 2006.<sup>4</sup>

In the face of this empirical data, it is not completely clear what the problem is that is being addressed. If expropriation is rare today, what exactly is the problem faced by foreign investors? And where is it a problem? This issue has simply not

<sup>2</sup> United Nations Conference on Trade and Development, *Investor-state dispute settlement: A sequel – UNCTAD Series on Issues in International Investment Agreements II* (UNCTAD/DIAE/IA/2013/2), 18, available at [http://unctad.org/en/PublicationsLibrary/diaeia2013d2\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf).

<sup>3</sup> As a recent example, Alabama provided USD 158 million in financial and logistical support to attract an Airbus manufacturing plant. See Jon Ostrower, 'Alabama Puts Airbus Incentives at USD 158 Million', *Wall Street J.*, 9 Jul. 2012, <http://online.wsj.com/articles/SB10001424052702304022004577516922037292712>. Overall, US state and local government subsidies have increased from USD 26.4 billion in 1996 to USD 46.8 billion in 2005. Emerging economies such as Brazil, China, Vietnam, and India also provide significant investment subsidies. See Kenneth Thomas, *Investment Incentives and the Global Competition for Capital* 2–3, Palgrave Macmillan (2011).

<sup>4</sup> See Christopher Hajzler, *Expropriation of Foreign Direct Investment: Sectoral Patterns from 1993 to 2006*, 148 *Rev. World Econ.* 119 (2012), available at [http://otago.ourarchive.ac.nz/bitstream/handle/10523/1076/DP\\_1011.pdf?sequence%3D3](http://otago.ourarchive.ac.nz/bitstream/handle/10523/1076/DP_1011.pdf?sequence%3D3), Table 2.

been studied. With no data on the nature and extent of the problems faced by foreign investors, it is hard to craft appropriate rules to address it. To what degree do investors face treatment that is not 'fair' or 'equitable'? And what kind of treatment is this exactly? A few anecdotes aside, we have a very limited understanding. All we do know is that, other than a few outliers, expropriation without compensation has mostly disappeared as an issue faced by investors.

Staying with the world of data, despite arguments that investment obligations help 'promote' foreign investment, the evidence on this point is mixed. Examinations of the impact of such rules on investment flows are inconclusive.<sup>5</sup> And some countries, such as Brazil, which is famously resistant to investment treaties,<sup>6</sup> have had no problem attracting investment.

In reality, the biggest problem in the world of foreign investment may not be *bad* treatment, but rather treatment that is *too good*: subsidies. As noted, subsidies to attract foreign investors have proliferated.<sup>7</sup> If there is any problem with foreign investment that needs to be addressed, it is probably this one.

### 3 THE NOTION OF 'FOREIGN' INVESTMENT IN A GLOBALIZED WORLD

Supporters of ISDS point to bad treatment of 'foreign' companies in domestic political/legal systems as the problem they are trying to address. In their view, 'foreign' companies face discrimination and prejudice, and cannot always get fair treatment. But the notion of 'foreign' and 'domestic' companies looks increasingly outdated in today's globalized world. A hundred years ago, the global economy could much more easily be divided along national lines. Many companies had a clear nationality, and when they invested their money abroad, they maintained that nationality to a great extent. Foreign investment often meant big western

---

<sup>5</sup> See Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 *Law & Soc'y Rev.* 805, 827–828 (2008) ('While I find some tentative evidence that privatization programs and the World Bank's investment insurance program may promote FDI, my results suggest that BITs have little or no impact on investment decisions.');

and Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 *Va. J. Int'l L.* 397, 399 (2010). ('[S]cholars have not yet been able to provide anything close to a definitive answer of whether BITs indeed achieve their central purpose: increased flows of investment.')

<sup>6</sup> See Zachary Elkins, Andrew Guzman, and Beth Simmons, *Competing for capital: The diffusion of bilateral investment treaties, 1960–2000*, 2008 *U. Ill. L. Rev.* 265, 269, n 19 (2008) ('Brazil did not sign a BIT until 1994, and none of its ten bilateral agreements had entered into force as of the late 1990s.')

<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1432&context=facpubs>.

<sup>7</sup> See Kenneth Thomas, *Investment Incentives and the Global Competition for Capital*, Columbia FDI Perspectives, No. 54, 30 Dec. 2011, available at [http://ccsi.columbia.edu/files/2014/01/FDI\\_54.pdf](http://ccsi.columbia.edu/files/2014/01/FDI_54.pdf). ('Investment incentives (subsidies designed to affect the location of investment) are a pervasive feature of global competition for foreign direct investment (FDI). They are used by the vast majority of countries, at multiple levels of government, in a broad range of industries.')

companies investing in developing countries (and this is where problems with bad treatment typically arose).

The modern economy looks different from this older period. Today's foreign investment flows in much more varied ways. It is not just western companies investing in the developing world. It is a wide range of companies of many nationalities, investing all over the world and creating global supply chains and operations. Companies might have their headquarters in one country, develop technology in another, and produce in several other countries. And the nationality of the owners might not match up with any of these countries.

In this context, the notions of 'foreign' and 'domestic' investment have much less meaning. Should we think about investors as having a particular nationality, as 'American' or 'Korean' or 'Mexican'? While particular companies may have a majority of shareholders who are citizens of a country, or may have their headquarters in a particular jurisdiction, transnational corporations are fundamentally 'citizens of the world'. Their owners can and do move production or other operations to wherever is the best location.

To take some examples from the auto industry, in the practice of US trade and investment policy, Ford is considered an 'American' company, and the US Government often negotiates on its behalf in trade and investment agreements. But does it make sense to think of Ford this way? Total US employment for Ford in the manufacturing sector is about 43,000, but Ford employs more than 145,000 people worldwide in fifty-five different production facilities.<sup>8</sup> In contrast, Toyota is thought of as a 'Japanese' company. While there are over 140,000 employees in Japan, Toyota has overseas employment of close to 200,000. It has major factories in the United States, Canada, the United Kingdom, France, Turkey, Thailand, China, Taiwan, India, Indonesia, South Africa, Australia, Argentina and Brazil.<sup>9</sup>

Clearly, both of these companies operate globally. Should the historical origin or shareholder nationality really play such a significant role in the legal treatment of these companies under international investment law? Why should the US Government push for protections for Ford abroad but not Toyota abroad? The nationality-based approach to the protections offered under these treaties does not reflect the way many companies operate in today's investment world.

Looking to recent headlines, Burger King is in talks to merge with the Canadian donut company Tim Horton's and, in the process, to create a parent

<sup>8</sup> Ford Co., List of Operations Worldwide (1 Dec. 2014), <http://corporate.ford.com/our-company/operations-worldwide/global-operations-list>.

<sup>9</sup> Toyota Motor Cor., Annual Report (Form 20-F), at 105 (24 Jun. 2014), [http://www.toyota-global.com/investors/ir\\_library/sec/pdf/20-F\\_201403\\_final.pdf](http://www.toyota-global.com/investors/ir_library/sec/pdf/20-F_201403_final.pdf).

company based in Canada.<sup>10</sup> If Burger King becomes a Canadian company, can it sue the US Government under the NAFTA investment rules when a future Mayor Bloomberg mandates size limits on donuts because of health concerns? The formal nationality of companies has become less important over the years, and may not serve as a good basis for imposing investment obligations on governments.

#### 4 WHAT SCOPE FOR INTERNATIONAL JUDICIAL REVIEW?

International investment obligations provide for the international judicial review of national measures. This proposition is inherently controversial, but the extent of the controversy depends on the scope of the obligations. Such obligations can be narrowly drawn to target specific kinds of actions, or they can be more wide-ranging and open-ended. I argue in this section that a focus on non-discrimination can be politically workable, but more expansive obligations such as 'fair and equitable' treatment are not appropriate.

Non-discrimination is at the core of international economic relations. It includes both national treatment, which means not discriminating *against* foreign goods, services, or capital; and most favoured nation treatment, which means not discriminating *among* goods, services, or capital of different nations. Such a rule promotes good international relations and good economics. Without it, protectionist measures can proliferate, and economic alliances can stand in the way of peaceful relations.

A non-discrimination rule is narrow and bounded. Under such an obligation, a government can regulate however it likes, and on whatever policy it chooses, as long as the measure is non-discriminatory.

By contrast, obligations relating to subjects such as direct expropriation, indirect expropriation and 'fair and equitable' treatment are much broader. They all have parallels in domestic constitutional or administrative law, and, at least in theory, offer a form of these protections as international constitutional law. That is a controversial proposition, one that needs to be debated and understood.

'Fair and equitable' treatment in particular has been the subject of much criticism in the context of the investment system. Concerns about its scope have led governments to try to put boundaries on it. However, these attempts do not show much promise. A recent effort by the EU and Canada as part of the CETA leaves us with obligations that still look quite broad and undefined. The CETA includes 'manifest arbitrariness' and 'fundamental breach of due process' as

---

<sup>10</sup> Liz Hoffman & Dana Mattioli, *Burger King in Talks to Buy Tim Hortons in Canada Tax Deal*, *The Wall St. J.*, 25 Aug. 2014, [online.wsj.com/articles/burger-king-in-talks-to-buy-tim-hortons-1408924294](http://online.wsj.com/articles/burger-king-in-talks-to-buy-tim-hortons-1408924294).

examples of such treatment.<sup>11</sup> Unfortunately, even if such terms are narrower than previous obligations, they raise more questions about the scope of the obligations than they answer. What exactly are the limits of these obligations? Which government actions might violate them? No doubt creative lawyers are already thinking about the possibilities, even before the CETA is signed.

International judicial review is not objectionable in and of itself, of course. But the nature of the obligations, who has access to them, and how enforceable they are needs to be considered carefully. Open-ended provisions that are available only to foreign investors contribute to the perception that international economic law is a corporate hand out, with ordinary people ignored.

## 5 ALTERNATIVE WAYS FORWARD

To a great extent, we have been stuck in the same debate for decades: Do investment obligations, as currently written, promote and protect foreign investment, as supporters say? Or do they give corporations special rights and undermine the right to regulate, as critics allege? It would be helpful to step outside this all or nothing dichotomy and think critically about some of the more specific issues that arise in this context.

First, it would be a great idea for investment generally, both foreign and domestic, if we could elevate property rights and discourage expropriation. Unfortunately, current efforts in the international arena are weak and isolated. In international investment law, these rights are only provided to a limited group, that is, foreign investors, and under an uncertain and unpredictable quasi-judicial framework. If we want property rights to be taken seriously, we need to promote them as a matter of domestic law.

Conversations about such issues in international fora are useful, but to really push them forward, perhaps an international treaty on expropriation could help. Such a treaty could establish global minimum standards and require their adoption in domestic law. Governments around the world may not agree completely on all the nuances of an expropriation principle, but promoting the general concept as an important element of domestic law would be of great value.

Such an approach has the benefit of helping not just foreign investors, but domestic ones as well. For example, Canada is known to have relatively weak protections against expropriation.<sup>12</sup> The solution to this problem, however, is not

<sup>11</sup> Draft Comprehensive Economic and Trade Agreement, Can.-E.U., Investment Chapter, Art. X.9, 26 Sep. 2014, available at [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf).

<sup>12</sup> See Mark Milke, *Stealth Confiscation: Property Takings via Regulation*, Fraser Forum, May/June 2012, at 22 [www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/articles/stea](http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/articles/stea)

to give protections to foreign investors through investment obligations. Rather, it is to give such protections to *all* property holders through changes in Canadian law.

Along the same lines, more general principles of due process, transparency and good governance would also be valuable to domestic legal systems. If the criticism is that some domestic courts are biased and corrupt, is not the ideal solution to find ways to make them less so? Again, allowing foreign investors to escape the corruption of a domestic court does not help the local citizen who has no other option. International cooperation to improve the functioning of domestic courts would be a better focus.

Without question, there are sensitive issues of sovereignty here, as will be the case whenever there are international talks that affect domestic policies. For those affected, though, it is arguably less of an imposition on national autonomy when a government adopts international guidelines and makes them part of its domestic law, rather than having its jurisdiction taken away and given to an international court.

Second, foreign investors need to take responsibility for their business decisions. There is risk in any investment; there is more risk when investing in some countries than in others. Companies have a responsibility to know this and plan for it, and, in fact, it is not hard to do so. Companies who make foreign investments can buy political risk insurance; and they can demand arbitration clauses in any foreign investment contracts they sign with host governments. This approach is better than running to the government to lobby on their behalf for special treaties. It addresses the problem without creating an overbroad international judicial system.

The actors involved usually have significant resources and have a lot of experience in these matters. When governments step in to help big corporations and rich investors, and ignore those without similar wealth, it gives off the appearance of special favours for those with wealth and influence.

Third, with respect to the international system, we need to think critically about the distinctions between international law obligations. It is one thing to say

---

lth-confiscation-property-takings-via-regulations-ff.pdf ('Canada fares poorly in the protection of all sorts of property rights protection including, and especially in, the case of regulatory takings'); Bryan P. Schwartz and Melanie R. Bueckert, *Regulatory Takings in Canada*, 5 Wash. U. Global Stud. L. Rev. 477, 491 (2006) [http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1186&context=law\\_globalstudies](http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1186&context=law_globalstudies) ('The conclusion is clear: property rights are minimally protected under the Canadian Constitution. Moreover, quasi-constitutional documents such as the Canadian Bill of Rights and the Quebec Charter offer minimal protection. As a result, Canadian courts have no solid grounds to begin to develop an aggressive 'regulatory takings' doctrine.

On the contrary, constitutional legal developments have signaled that the protection of property rights is ultimately left to democratically elected legislatures. Local legislators that fail to work to protect property rights are likely to lose confidence among their constituents and to lose the business of potential foreign investors. However, judges will not find protections of property rights where none are explicitly provided for.')

that governments should promise not to discriminate against each other's foreign investments, to be enforced with the usual state-to-state dispute settlement process. The benefits are clear, and the scope is limited. It is quite another, however, to create a general 'due process' type obligation through which foreign investors can sue governments directly, that is overseen by international courts. Such a rule is exceedingly broad in terms of the power it shifts from the national to the international, and deserves more debate than it has seen so far.

When constructing international law, we need to think about the scope and boundaries of its constitutional function. The broader the legal principles used, the more power is given to international courts. In domestic legal systems, we have seen how constitutional principles have been used to shape social and economic policy. Giving such power to international courts should be done with caution, and thus the legal obligations written narrowly and carefully.

Finally, it is worth noting that a number of sensible reforms to the system have been suggested: more transparency; an appellate mechanism; ways to filter out frivolous cases; and restrictions on treaty shopping by complainants. Without a doubt, the system can be tweaked and improved. However, that will not fix the more fundamental objections.

## 6 CONCLUSION

When you look around the world today, you see many people in dire straits. People who are being oppressed on the basis of their religion, race or gender; people whose property has been stolen; and people who are being treated unjustly for no reason at all. Do any of these ordinary people have access to enforceable international law to assert their rights against governments? For the most part, a couple regional human rights treaties aside, they do not.<sup>13</sup> But foreign investors

---

<sup>13</sup> Even domestic investors do not have the protections given to their foreign counterparts. The Economist recently reported on a Chinese hotel owner whose property was taken by local Chinese government authorities:

'... Mr Qiao says he was abducted and held for 13 hours last December as the building was demolished by what he describes as a network of corrupt officials and developers. All of its contents were lost.

Mr Qiao's story is far from unique. Since the mid-1990s, tens of millions of Chinese have lost their land. In many cases, only minimal compensation has been offered. Researchers believe that, of thousands of "mass incidents" of rural unrest occurring each year, the majority are about land. In one of the worst recent cases, nine people were killed in mid-October in Yunnan province in the southwest in a dispute over evictions.

In their campaign for redress, Mr Qiao and his son have been stymied at every turn. Local police did not respond when thugs broke the Qiaos' windows. The electricity bureau did nothing when power to his building was cut. Planning officials scoffed at his request for adequate compensation for the loss of his business. The Qiaos informally approached a local court to assess their chances of suing the government successfully. They were given a brush-off.

do. As a result, the criticism of the investment law system as constituting special favors for corporations seems, on its face, to be credible.

The defence offered by supporters that this system has been around for a long time, and relies on well-accepted domestic legal principles, falls flat. There was never any public debate on the implications of creating international 'constitutional' law for foreign investors. That is not how these agreements were presented – the emphasis was instead on the 'protection' and 'promotion' of foreign investment – but that is what they are. Thus, supporters cannot simply rely on history. They need to address what these agreements actually do (i.e., create supranational courts), and make the case for them. It is not convincing to me, but the public should hear their arguments and decide.

Another common defence of ISDS is that the outcomes of the cases have been 'neutral', in the sense that governments win cases about as often as investors do.<sup>14</sup> But this presentation of the dispute data obscures more fundamental issues. In a debate about gun rights, the percentage of successful challenges to gun control laws, based on constitutional protections for gun ownership, would not be the most important issue. If 50% of cases against gun control laws are successful, that tells you little about the overall 'neutrality' of the system. The nature of the protections, and of the particular challenges, is much more relevant in judging the system. Thus, the focus should be on the protections themselves. What is the scope of rights that should be protected? Who should have these protections?

With regard to proposed alternatives, there may be an assumption on the part of supporters of international investment law that some countries cannot improve their domestic political and legal systems, and that international judicial oversight is therefore necessary. My reading of the past several decades of history leads me to a different conclusion, as numerous countries have evolved towards good government and rule of law, even after long periods of authoritarianism.

---

The Economist, 'The Law at Work: No More rooms', 1 Nov. 2014. <http://www.economist.com/news/china/21629538-against-network-officials-and-thugs-law-no-shield-no-more-rooms>.

<sup>14</sup> See, e.g., Winand Quaadvlieg, 'Take the emotion out of the ISDS debate', Letter to the Editor, Financial Times, 27 Nov. 2014. <http://www.ft.com/intl/cms/s/0/4d6989c0-74a4-11e4-8321-00144feabdc0.html> ('ISDS has existed for 50 years, during which there have been 568 documented cases. Of these, 274 have been decided upon: 43 per cent were decided in favour of the government, 26 per cent were settled and 31 per cent, about 85 cases, were decided in favour of the company'); Colin White, *Investor State Dispute Settlement (ISDS) Benefits Both Investors and States*, Fiscal Pulse, 19 Dec. 2014, [www.gbm.scotiabank.com/English/bns\\_econ/ISDS.pdf](http://www.gbm.scotiabank.com/English/bns_econ/ISDS.pdf). ('A review of all ISDS cases suggests that the outcomes are reasonably balanced and benefit both investors and states: ... Based on all 274 settled ISDS cases, governments prevailed in 43% of cases, investors in 31%, while 26% were settled outside of arbitration before a verdict was handed down. In those instances where investors won, cash compensation has been as high as USD 935 million, but there is no pattern of investors being able to reverse public policy and/or regulatory decisions.')

In my view, these domestic systems can be improved, and there would be great benefits to doing so. It is good news if foreign investors have access to fair and neutral courts; it is even better news when the least powerful citizens can also experience fair and neutral courts in their own country. Theoretically, it is possible to do both things; realistically, though, we are currently pushing only for one (the foreign investor system) and ignoring the other (improving domestic systems).

Some might argue that there are economic welfare gains that make the system worthwhile, despite the appearance of bias towards the wealthy. In truth, such benefits have not been demonstrated. In fact, the problem it addresses has not even been defined. What exactly is the problem that needs to be addressed by an elaborate system of investment obligations and international tribunals? We are operating under assumptions from decades ago, which have not been adjusted as the world has changed.

As people start to rise up against the investment system, it seems to me the task now for the investment law community is to figure out what its purpose is. What is the problem you are trying to deal with? What is the best way to address it? In the field of trade law, much of the problem is obvious for anyone to see. For example, tariffs are written down clearly in domestic tariff schedules, which identify tariff rates for specific products; anti-dumping tariffs are imposed on the basis of transparent public hearings and result in published tariff rates; and even domestic laws such as Buy National procurement policies are usually publicized clearly. As a result, dealing with these issues in an international agreement is fairly straightforward. International obligations to address protectionist trade policies such as these are not difficult to construct.

By contrast, with foreign investment, the problem is a bit obscure. Approvals to make a foreign investment in the first place are well-known, so this aspect of the discrimination problem is clear. But when the issue is the proper treatment of foreign companies in domestic law, it becomes hard to identify the specific behaviour that is supposedly of concern. What does 'denial of justice' look like exactly? What are examples of situations where 'due process' has not been provided? How can international courts appropriately judge the behaviour of these domestic actors? These problems do exist in the real world, but they are not easy to define and construct international obligations to confront. The universe of problems experienced by foreign investors (and others) in domestic legislation, regulatory agencies, and courts remains unclear.

Thus, the task of supporters should be to study the problems, analyse them, and quantify them. The current model is based on a 1950s era, pre-globalization situation; it is time to move the system into the modern era, with an evidence-based agenda.



## **[A] Aim of the Journal**

The journal deals authoritatively with the most crucial issues affecting world trade today, with focus on multilateral, regional, and bilateral trade negotiations, on various anti-dumping and unfair trade practices issues, and on the endless succession of vital new issues that arise constantly in this turbulent field of activity. The approach is consistently multidisciplinary, aimed at trade practitioners, government officials, negotiators and scholars who seek to expose ground-breaking theses, to make important policy statements or to offer in-depth analysis and discussion of delicate trade issues.

## **[B] Contact Details**

Manuscripts should be submitted to the Editor, Edwin Vermulst.

E-mail address: edwin.vermulst@vvgb-law.com

## **[C] Submission Guidelines**

- [1] Manuscripts should be submitted electronically, in Word format, via e-mail.
- [2] Submitted manuscripts are understood to be final versions. They must not have been published or submitted for publication elsewhere.
- [3] Articles should not exceed 10,000 words.
- [4] Only articles in English will be considered for publication. Manuscripts should be written in standard English, while using 'ize' and 'ization' instead of 'ise' and 'isation'. Preferred reference source is the Oxford English Dictionary. However, in case of quotations the original spelling should be maintained. In case the complete article is written by an American author, US spelling may also be used.
- [5] The article should contain an abstract, a short summary of about 200 words. This abstract will also be added to the free search zone of the Kluwer Online database.
- [6] A brief biographical note, including both the current affiliation as well as the e-mail address of the author(s), should be provided in the first footnote of the manuscript.
- [7] An article title should be concise, with a maximum of 70 characters.
- [8] Special attention should be paid to quotations, footnotes, and references. All citations and quotations must be verified before submission of the manuscript. The accuracy of the contribution is the responsibility of the author. The journal has adopted the Association of Legal Writing Directors (ALWD) legal citation style to ensure uniformity. Citations should not appear in the text but in the footnotes. Footnotes should be numbered consecutively, using the footnote function in Word so that if any footnotes are added or deleted the others are automatically renumbered.
- [9] Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Tables should be numbered and should include concise titles.
- [10] Heading levels should be clearly indicated.

For further information on style, see the House Style Guide on the website: [www.kluwerlaw.com/ContactUs/](http://www.kluwerlaw.com/ContactUs/)

## **[D] Review Process**

- [1] Before submission to the publisher, manuscripts will be reviewed by the Editor or by an associate editor selected by the Editor and may be accepted, rejected or returned to the author for revision.
- [2] The journal's policy is to provide an initial assessment of the submission within thirty days of receiving the posted submission. In cases where the article is externally referred for review, this period may be extended.
- [3] The Editor reserves the right to make alterations as to style, punctuation, grammar etc.
- [4] The author will also receive PDF proofs of the article, and any corrections should be returned within the scheduled dates.

## **[E] Copyright**

- [1] Publication in the journal is subject to authors signing a 'Consent to Publish and Transfer of Copyright' form.
- [2] The following rights remain reserved to the author: the right to make copies and distribute copies (including via e-mail) of the contribution for own personal use, including for own classroom teaching use and to research colleagues, for personal use by such colleagues, and the right to present the contribution at meetings or conferences and to distribute copies of the contribution to the delegates attending the meeting; the right to post the contribution on the author's personal or institutional web site or server, provided acknowledgement is given to the original source of publication; for the author's employer, if the contribution is a 'work for hire', made within the scope of the author's employment, the right to use all or part of the contribution for other intra-company use (e.g. training), including by posting the contribution on secure, internal corporate intranets; and the right to use the contribution for his/her further career by including the contribution in other publications such as a dissertation and/or a collection of articles provided acknowledgement is given to the original source of publication.
- [3] The author shall receive for the rights granted a free copy of the issue of the journal in which the article is published, plus a PDF file of his/her article.