

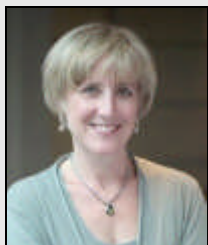


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## Making impossible investor-state reform possible by L. González García

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# MAKING IMPOSSIBLE INVESTOR-STATE REFORM POSSIBLE

By Luis González García, Matrix Chambers

The purpose of this paper is to set forth the considerations which I believe must be taken into account in framing any workable reform to the investor-state dispute settlement system and offer my comments to UNCTAD's five main reform paths. In this paper it is suggested that most of UNCTAD's reform paths involve treaty changes which are neither practicable nor will improve the present situation. However, an attempt will be made to show that it is nevertheless possible to reform the investor-state arbitration system without making changes to current treaties.

## I. Why is it almost impossible to reform investment arbitration?

The answer to this is an irony. Every attempt to reform the investment protection mechanism has failed precisely at the time when consensus was being reached that such reform is of utmost importance. History shows us that the more a specific proposal is being discussed or the more steps are being taken to put it in practice, the more likely it is to fail. An example: Everybody agrees that it is important to have a coherent development of the law and that contradictions and confusions affecting the law should be avoided. An immediate and logical proposal would therefore be to have an appellate body.<sup>1</sup> However, the more this topic has been discussed (i.e. appellate body in U.S. treaty practice) the more unwanted it has become. In other words, a reform to the system is important but unwanted. I would argue there are at least four reasons why this is the case.

First, there is widespread consensus among international lawyers, academics, economists, environmentalists, politicians and civil society at large who have been involved in an investment dispute that something is not quite right with the investor-state arbitration mechanism, however, we cannot agree on what the real problem is. And if we cannot agree on the diagnosis, much less will we agree on the remedy.

Second, most of the current proposals will require treaty making or changes to current treaties.<sup>2</sup> Experience shows us that states are unwilling to modify a system of international law unless it is clear to them that (i) such reform is essential in the interest of the rule of law, (ii) the benefit is such that it will override any possible adverse effect (iii) without much affecting the *status quo*.

Third, the timing for investment treaty reform could not be worse. Investment claims (not necessarily the outcomes) are having a massive impact on some states. States now hold strong views with respect to some critical issues of the system as a result of their own

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<sup>1</sup> See for example the OECD Working papers on international investment number 2006/1, available at: <http://www.oecd.org/china/36052284.pdf> and "Suggested changes to the ICSID Rules and Regulation" Working Paper of the ICSID Secretariat May 2005 available at [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnounc ePDF&AnnouncementType=archive&AnnounceNo=25\\_1.pdf](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnounc ePDF&AnnouncementType=archive&AnnounceNo=25_1.pdf)

<sup>2</sup> The ICSID Convention and IIA's.

experiences in investment arbitration (normally bad ones). Political and diplomatic efforts to reach international consensus is unlikely to occur at a time when states are pulling into different directions.

Fourth, for a particular reform to succeed international lawyers need to embrace it. There seems to be a lack of interest among practitioners towards the criticisms of the investor-state arbitration system made by some stakeholders. The criticism is depended upon the view that investment treaty arbitration is not “a fair, independent and balanced method for the resolution of investment disputes” as it affects, some say, the state’s right to regulate in the public interest and the “right to self-determination of peoples”.<sup>3</sup> It is true that in some cases the criticism is purely ideological, in others it is exaggerated and in a few others it is quite legitimate. Whether the criticism is valid or not, it is affecting the credibility and legitimacy of the system and for this reason it is vital that international lawyers listen to and take seriously the concerns expressed by such stakeholders. Because the development of international law cannot occur without the involvement of international lawyers (as they are the ones who supply and guide politicians, diplomats and government officials in the making of international law and international investment policy) more action is needed from investment treaty practitioners by pushing for an international agenda on the investment regime that takes into account the interest of all parties concerned. As long as we do not change this attitude of indifference by practitioners no sensible reform will be achieved.

## II. The problem

Despite the success of investment treaty arbitration in providing an effective and neutral forum for the resolution of international legal disputes between foreign investors and host states, there is a sense of frustration. In my view the deficiency in the system arises from conflicting decisions by different tribunals on identical facts or law, topped up with a tendency by some arbitrators to adopt aggressive and expansive interpretations based on their personal views of what, for example, “investment protection” must mean rather than grounding their approach on a balance of arguments and provide proper legal reasoning in its decisions. We are now experiencing a clash of what Napoleon called “*ideologues*” where many eminent international lawyers clash on the meaning and content of jurisdictional and substantive treaty provisions. Because so much rests on the ideology of some arbitrators, it is no surprise that any reasonable lawyer advising a client on the chances of success in an investment treaty case will advise that such chances will likely increase or become slimmer depending –in great proportion– on which arbitrator is on the case. And it is no surprise that selecting (and challenging) an arbitrator has become a rather complex, expensive and frustrating procedural phase. This particular deficiency is by no means exclusive to investment arbitration. The dissatisfaction is also found in State-to-State arbitration and organs like the International Court of Justice. However, the problem reaches a higher level in investment arbitration because of the public policy dimension of the investment regime and

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<sup>3</sup> Public Statement on the international investment regime” dated 31 August 2010, available at: <http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20%28June%202011%29.pdf>

the fact that it is the only public international law dispute resolution mechanism (i) where states do not have absolute control over the composition of the adjudicators, (ii) where virtually any government policy can be challenged by a “foreigner” in a forum which is not the national court, and (iii) which involves the payment of monetary compensation (from public funds) to the foreigner.

### **III. What are the options?**

I would like to put on the table the different routes states can take to address the deficiencies of the investor-state regime. There are not many:

- To go back to the old days of diplomatic protection (tantamount to killing the system);
- To continue with the system as it is with just minor procedural reforms here and there and think that better times will come; or
- To make significant reforms to the system.

Whatever path we decide is best, we must in all circumstances ask ourselves two basic questions: (i) in what way would the new system improve the present position? and (ii) is it realistic to achieve? It is of little use to spend much ink on a proposal that is not practicable. I will now discuss each of the options and take a position on each.

I believe that the first option (to kill the system) is not desirable because it will worsen the present position of foreign investors. One of the main objectives of the investor-state dispute settlement mechanism is to provide investors with an effective dispute settlement mechanism for the resolution of investment disputes. The possibility for claimants to bring claims against a state in a neutral forum is a major development in international law that needs to be preserved if states are firmly committed to the promotion of the international rule of law.

The second option is perhaps the most comfortable one for us international lawyers. We can continue with an attitude of indifference to the concerns raised by other stakeholders.<sup>4</sup> And what is worse, we can continue to be indifferent to the problems or abuses of the system that we face ourselves in our daily arbitration practice, some of which, it must be said, are self-inflicted. Yes, we can always counter-argue that all cases are to be resolved on a case-by-case basis, that there is no doctrine of precedents and that whatever is decided is only based on the particular facts of the case and the arguments raised by the disputing parties. But this is not a desirable way forward because the perceived abuses and inconsistent decisions are affecting the legitimacy of the system and therefore diminishing the present position of the system as many states have decided to terminate investment treaties (South Africa, Ecuador), denounce the ICSID Convention (Venezuela, Bolivia, Ecuador), not to be part of it (like Brazil, Mexico, India, and Russia) or no longer provide for investor-state arbitration in future agreements (Australia).

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<sup>4</sup> I have attempted to identify some of the criticism by stakeholders in p. 2 of this paper

The third option (to make significant reforms to what is already in place) is the one I prefer. The question is what should be reformed? And is it possible to achieve? In this paper I would make the point that half of UNCTAD's paths for reform such as the promotion of non-binding ADR methods and some procedural innovations will do little to tackle the systemic problems of investment treaty arbitration, and the fundamental reforms proposed such as an appellate body or an international investment court would be neither a desirable nor a practicable development. I will now address the question of what would be desirable to reform and whether it is realistic to achieve. It is impossible to treat these two questions separately which is why I will address them in one heading.

#### **IV. A look at UNCTAD's paths to reform**

- Promoting ADR

UNCTAD's first path for reform advocates for increasing resort to conciliation and mediation and advisory services to States. It proposes that ADR could be either incorporated in BITs or in national legislation. It is my understanding that UNCTAD's primary purpose is to tackle the following concerns: (i) an increase of investment claims; and (ii) the high costs of investment arbitration, including not only direct costs like legal services but also indirect costs such as the diversion of in-house resources (legal and non-legal), an adverse impact on the reputation of the disputing parties, lost opportunities for future investments in the host country and a negative influence on policy development.

There can be no doubt that ADR mechanisms are important in today's commercial and diplomatic world and almost all will agree –at least– as diplomats say, “in principle”, that it would be desirable that states put in place dispute management systems to avoid investment disputes. I do not, however, believe that mediation or conciliation initiatives should be incorporated at the international level, i.e. incorporating such mechanisms in investment treaties. I also believe that this path of reform should not even be considered as part of what is now called “reform” to the investor-state dispute settlement mechanism. In my opinion, dispute avoidance is and should remain a domestic affair. Moreover, avoidance of disputes should be part of the domestic policy (one of good governance) of all countries regardless of the nationality of the investor or whether or not the state has subscribed to IIAs. States should promote transparency in decision-making and offer a staged process amicable settlement in all areas of public services and natural resources where potential investment disputes are often endemic. This process could include:

- (i) Implementing regulation to provide for collaborative decision making within the ministries that grant concessions to private investors in sectors that have a high impact on local communities such as the extraction of natural resources and public services. This allows the public to be engaged in the investment project from an early stage minimizing potential future conflicts between the company and the local community and to prevent politicizing the conflict.
- (ii) Promoting social corporate responsibility.

- (iii) Enforcing anticorruption laws. Many international disputes can be avoided if investors do not engage in illicit conduct in their dealings with foreign government officials.
- (iv) Ensuring that the investment contract incorporates a process to resolve issues at the lowest technical level; a review mechanism allow for the issues to be raised to the most senior level and, if appropriate, resolution procedures involving a neutral government agency to act as mediator/conciliator.
- (v) Training government officials on ADR techniques. This is achievable but states will need international assistance from international organizations and specialised institutions to carry out such enterprise.

Dispute avoidance is not only desirable but a moral –if not legal– obligation of any government official responsible for granting or supervising investment projects. Mechanisms for the prevention of investment disputes would not only minimize the risk of arbitration but more importantly would foster collaboration and cooperation among the government institutions and its citizens, which will lead to more transparent public institutions. The result of a more transparent decision-making process and collaborative approach will translate into a better system of governance. Good governance inevitably improves the state’s investment climate which is essential for attracting foreign investment and promotes further economic cooperation between states. And one would question whether this is not the entire rationale why states sign IIA’s?

- Procedural innovations in IIA

There is little objection among international lawyers that setting time limits for bringing claims, provisions for consolidation of claims, transparency provisions, submissions by non-disputing contracting parties and mechanisms for discharge of unmeritorious claims are sensible proposals to foster the development of investment arbitration. However, none of the above will get close to alleviate the legitimacy crisis that the system faces. As the NAFTA experience shows us, even with the best drafted treaty and all of these procedural innovations in place, the number of unmeritorious claims and arbitration costs will continue to remain high. A closer look at the claims submitted in the NAFTA context reveals that the volume of investment claims has remain constant and that these are becoming more complex. Procedural innovations in treaties are welcome but much more is needed to improve the legitimacy of the system.

- Limiting investors access to arbitration

UNCTAD’s proposals to restrict the range of investors with access to arbitration, to include the exhaustion of local remedies clause and to limit the subject-matter are well within the state’s sovereign right to adopt a more restrictive foreign investment policy This is part of the cost-benefit analysis states carry out (or should carry out) and it would be inappropriate for me to make a general proposition. It might be the case that for some states such a change of

policy would be a wise thing. For others, it may be seen as a radical position contrary to their investment policies. It must be said, however, that any change is likely to occur in new IIAs rather than in old ones. Even if investment arbitration is limited to a narrow number of investors or sectors, questions will remain about the legitimacy of the system as a whole.

On the issue of incorporating the classical rule of exhaustion of local remedies I believe this would, in practical terms, kill the system. The NAFTA's waiver rule might be a good alternative to look at.

- Appeals facility

Much ink has been spilt and brighter minds than mine have given their opinion on the rather mature proposal to establish an appeals facility. The reason for this, as I understand, is the constant threat of inconsistent and contradictory decisions that undermine the predictability of the system and the confidence of stakeholders. It has been suggested that an appellate body would create a body of decisions to provide helpful precedents and consistency. That may be so, however, in my opinion, an appellate facility would not be a desirable development for the following reasons:

- (i) It might work if we had a single body of substantive law and under the auspices of an international organisation, like the WTO or the UN, which we do not have.
- (ii) An appellate mechanism would gravely undermine the importance of arbitral tribunals as all cases would end up in the docket of the appellate body as is the case with the dispute settlement mechanism in the WTO.
- (iii) It would worsen the present position of both investors and states because the process would become less attractive and ineffective as it would inevitably become more expensive, lengthier and more time-consuming.
- (iv) An influential body of case law will come from the NAFTA and other free trade agreements that have borrowed the NAFTA model. These treaties stipulate that the institution responsible for the correct interpretation of the investment chapter is the free trade commission. The FTC in these treaties is the highest authoritative interpreter and guardian of the treaty. It is difficult to see countries like the United States ceding the authority to have the final word about the interpretation of a treaty it signed to an appellate body. At least not in the near future.

- Is it time for an international investment court?

The rationale behind the proposal for an international court of some kind appears to be the idea that it would afford a better method than the ad-hoc arbitration structure. In other words, it is predicated on the assumption that arbitration is ill-suited for investment disputes. Experience seems to show that the practical application of investment disputes through ad-

hoc arbitration appears to have convinced some that is not the most effective mechanism for developing international investment law.

This reminds me of what the founder and president of the American Society of International Law, Dr. James Brown Scott, said in 1913 about arbitration: “is a thing shadowy and uncertain, fleeting and evanescent,” and contrasted with judicial adjudication which he said was a “substantial and certain, continuous, and productive precedent.”<sup>5</sup>

Then there is also the issue of apparent bias of arbitrators who often wear two or three hats simultaneously: as counsels, experts and arbitrators. Another issue of concern is that three individuals who do not need to have special qualifications (or a degree of expertise in public international law) are vested with such immense power (in the sense that they are often asked to decide the legality of certain actions of the state that often have wider public policy implications).

Anyone who advocates for an international court based on these concerns has a point. Yet we would have to ask ourselves whether we would be in a better position with a permanent international court. I submit that an international investment court would not improve the present condition for the following reasons:

- An international investment court would be best suited if there was a single body of law, such as ITLOS and the ECHR. With more than 3,000 IIAs in place and more than 514 treaty-based cases<sup>6</sup> doubts remain as to how an investment court which would have jurisdiction over a considerable number of legal texts with different wording would be able to remove the ambiguity, confusions and contradictions in investment treaty arbitration. Without a clear pyramidal structure the existence of an investment court carrying out its duties in parallel with ad-hoc tribunals (assuming it is practically impossible to remove the possibility of ad hoc tribunals in all existing IIAs) might create tensions which may have a disruptive effect on the unity and coherence of international investment law.
- Even with an investment court the problem of ambiguity of the substantive protection provisions of the law would likely continue to great extent because some parts of international investment law are not well settled and it is highly unlikely that an investment court would even attempt to codify the un-settled law. I submit that the problem of ambiguity (or gaps in the body of IIAs) or the lack of legal certainty should not be blamed – in most cases – on treaty negotiators or the *ad-hoc* structure. Investment arbitration is a product of public international law and as such it suffers from the inadequacy and realities of international law, including the gaps in the content of customary rules of international law, the fragmentation of international law and the non-binding precedent approach. I believe that the legal complexities arbitral tribunals struggle with are not very different from those the International Court of

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<sup>5</sup> Proceedings of American Society for the judicial Settlement of International Disputes, 1913, p. 239.

<sup>6</sup> UNCTAD Report “Recent developments in investor-state dispute settlement” Issues Note No 1 May 2013



Justice or international criminal tribunals have to deal with. An international investment court will likely face the same struggle.

- The institution of an international court would not guarantee that we would have the best legal minds as judges. The appointment of permanent judges that have been appointed by states would not guarantee the quality of the decisions, reconcile divergent opinions with respect to the content of the investment treaty protections or strengthen the credibility of the system just because the appointment was made by the state. As is the case with any other international court or tribunal, the controversy will remain about the elections of judges. The selection process, the candidate's links with the government, the political pressures, the quality of the judges for the international investment court could even end up being worse than what is currently in place.
- Additional practical problems: Who would be a member? Would the court be under the UN auspices? What about budget issues? Who will pay and in what proportion?

## V. What is possible to achieve?

The objective of any reform to the regime should be to bring more legal certainty to the rules of investment protection and improve the perception of legitimacy.

On the issue of managing perceptions to improve the legitimacy of the investment arbitration mechanism, I believe attention should be drawn to the following aspects:

### **New ways of selecting arbitrators**

*Investment treaty arbitrators, like Caesar's wife, should be above suspicion*<sup>7</sup>

The effectiveness of an international tribunal depends on the quality of the individuals who sit on the bench. As Lord Denning said, "*Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking 'the Judge was biased'*".<sup>8</sup> One of the vulnerabilities of the investment arbitration mechanism is that there is no system in place which guarantees the appointment of independent, unbiased and the best legal minds. Because there is no criterion for the selection process and because two out of three arbitrators are selected by the parties and no special professional background is required to become an arbitrator, there is always the risk that a bad arbitrator could end up deciding your case.

Much worse, there is a strong perception that party-appointed arbitrators are prone to be bad arbitrators. A bad arbitrator is either: one who is competent but biased; incompetent but unbiased; or incompetent and biased. I suggest that most investment treaty arbitrators are not bad arbitrators but situations often arise where arbitrators appear to be biased. An arbitrator who is repeatedly appointed by the same party or counsel raises concerns about the

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<sup>7</sup> Paraphrasing Lord Bowen in *Leeson v. General Council of Medical Education & Registration*, (1889) 43 Ch D 366 (385), 1886-90 All ER 78 : 61 LT 849

<sup>8</sup> *Metropolitan Properties Ltd. v. Lannon*, (1969) 1 QB 577 (578), (1968) 3 All ER 304 : (1968) 3 WLR 394.

arbitrator's capacity for independence. There is also a concern that the individuals who decide a challenge are the remaining arbitrators or lawyers who may well be engaged in the same practice or fear they could be in a similar situation of repeated appointments by the same counsel or party. As has often been said, it is fundamental that justice should not only be done but should be seen to be done.

I believe it is important to reform the selection process while preserving the parties' right to have retain some control over the selection process and at the same time preventing them from selecting the same arbitrator over and over again. I propose the following risky and perhaps naive alternative selection process:

- Reverse selection process where the claimant appoints the respondent's arbitrator from the respondent's list of three individuals, and consequently the respondent appoints the claimant's arbitrator from the claimant's own list of three individuals. Each party sends to the other party a list of three names and each selects one from the list to be the other side's appointed-party arbitrator.<sup>9</sup>
- Both arbitrators then draw a list of five names which is sent simultaneously to both parties and whoever is ranked higher by both parties is then selected as chairman.

I believe this selection process may mitigate the practice of repeated appointments, will significantly reduce the challenges to arbitrators by both parties and is likely to open up the pool of arbitrators.

An additional issue that raises concern is the participation of ICJ judges as investment treaty arbitrators. ICJ judges accepting appointments (or making themselves available) not only undermine the importance and dedication they give to the ICJ, but it may also give the impression that becoming an international arbitrator is a very lucrative career path. As the ongoing debate about the "financial incentives" for arbitrators continues in investment arbitration,<sup>10</sup> the fact that ICJ judges are sitting as arbitrators is certainly an escalation of the negative perception of the investment arbitration mechanism.

### **The need for ethical standards**

I believe the adoption of ethical standards for arbitrators, counsel and party-appointed experts in investment arbitration is important. Not only would it bring clarity to the ethical principles and criteria to disqualify any of the above but it would also strengthen the legitimacy of the system.

Over the past couple of decades codes of conduct have been developed in domestic legal systems and by private institutions such as the IBA and the Chartered Institute of Arbitrators have been dealing with questions of standards of conduct and possible conflicts of interest for

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<sup>9</sup> See current practice of ICSID for the appointment of presiding arbitrator known as "ballot procedure", available at [http://www.biiicl.org/files/5807\\_kinnear\\_03-11-11\\_biiicl.pdf](http://www.biiicl.org/files/5807_kinnear_03-11-11_biiicl.pdf)

<sup>10</sup> Presentation by Michael Waibel at the 21<sup>st</sup> Investment Treaty Forum Public Meeting, "The Economic and Financial Aspects of Investor-State Arbitration", 24 October 2013.

arbitrators and counsel but have not fully covered the particular situations of investment arbitration.<sup>11</sup>

So far investment treaty tribunals have had to deal with these issues on a case-by-case basis. Depending on the circumstances of the case, some tribunals will look at the relevant domestic code of conduct, the arbitration rules, the IBA Guidelines and, if the answer is not found there, they will simply make use of their inherent powers. This is not ideal as many lawyers and experts from a variety of jurisdictions participating in investment arbitration are regulated by different rules of conduct or not regulated at all. This can lead to a situation where not everybody knows what they are supposed to do and how to behave. Removing uncertainty in the rules of professional conduct in investment arbitration will help safeguard the integrity of the investor-state arbitral process and improve the predictability of the entire system.

### **The creation of the International Investment Law Commission**

Lastly, to tackle the problem of inconsistent law which undermines the stability and predictability of the regime,<sup>12</sup> I propose the following path that does not require changes to current treaties, or even international consensus among states on the content of jurisdictional and substantial treaty provisions.

I would propose the creation of an expert body created by the United Nations General Assembly for international investment law, modelled on the International Law Commission. The commission's work would be carried out by eminent international lawyers from different jurisdictions. The task of the expert body would be to identify and analyse conflicting approaches to investment protections<sup>13</sup> and be responsible for reconciling divergent opinions and bringing about a general understanding concerning the rules which have been subject of controversy. For example, the meaning of "investment", the meaning of "fair and equitable treatment", whether it is an independent standard or that of customary international law, the scope of the umbrella clause, whether the most favoured nation clause permits a claimant to rely on a more favourable dispute settlement or jurisdictional provision from another IIA, or whether the term "effective means" is intended to derogate or form part of the more general protection against denial of justice. The commission would review existing rules, treaties, custom, practice and decisions of international tribunals.

The works of the commission would not be very different from what many scholars and eminent practitioners do at the moment but, as we know, the writing material is of unequal value and non-exhaustive. The proposed commission on international investment law would produce a study which could be presented to the Assembly General for the acceptance of states. It would not be binding on arbitral tribunals and it would be for each tribunal to decide what weight to give to these reports. This would create a somewhat soft-control mechanism

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<sup>11</sup> Investment treaty arbitration has a public interest dimension that points towards a differentiation from private international commercial arbitration.

<sup>12</sup> See discussion in Alvarez, J. "The Public International Law Regime Governing International Investment" Hague Academy of International Law, 2011 at p. 257

<sup>13</sup> In the same manner as the Advisory Committee of Jurists of 1920

on issues of conflicting case law and would have a considerable effect on the progressive development of international investment law. These reports would be useful as they could be used by states in their investment treaty negotiations and the adoption of foreign investment policies.

Looking at the question on which reform path is desirable and practicable the answer is not easy. How can we be ambitious and at the same time realistic? I would suggest that the answer may lie in the creation of an international commission. But is it possible? I say, it is not impossible, just not easy.