

# A Question of Independence: Examining the Case for Replacing Investor-State Arbitration with an Investment Court



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# Why Investor-State Arbitration?

- ▣ Independence

- ▣ UN Secretary General Report 1961:

“Consultations ... tend towards the conclusion that apprehension of non-business risks constitutes an impediment to foreign private investment which may be substantially lessened by the assurance of an **effective machinery** for the adjustment of investor’s claims arising from disputes with the government of the country of investment. In order to be effective, such machinery should be **international in character, so as to assure complete independence in interest** from both parties to the dispute.”

## ICSID's Anationality

- ▣ Not sited in any country
- ▣ Not subject to judicial supervision in any country
- ▣ No outside appeals or other remedies
- ▣ Obligation to recognize awards as binding and enforce pecuniary obligations as final domestic judgments

*Limited to ICSID – not to other investor-state arbitration*

# Why an Investment Court?

## Gus Van Harten's 4 arguments:

- ▣ Independence – most important
- ▣ Accountability
- ▣ Openness
- ▣ Coherence – least important

*Independence is really the whole game. Should disaggregate other issues.*

# Does ITA Lack Independence?

## Gus Van Harten's 2 arguments:

- ▣ Arbitrators lack “security of tenure”
  - ▣ Only investors may initiate treaty-based claims
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- ▣ Combine to make arbitrators dependent in ways that “tenured judges are not,” giving “financial incentives” to arbitrators that constitute the “most important” objection to investment treaty arbitration

# A Fissian Perspective

## Owen Fiss:

- ▣ Grounds courts' legitimacy to adherence to proper judicial process: “dialogue and independence”
  
- ▣ Independence:
  - ▣ Party detachment – independence from parties
  - ▣ Political insularity – independence from government
  - ▣ Individual autonomy – independence from other judges

*What follows is my Fiss-inspired argument, not Fiss' own*

# EU's Proposals

## Vietnam FTA, CETA legal scrub, TTIP proposal

- ▣ Joint committee of the governments to appoint Tribunal members: one third proposed by each government (deemed nationals), one third nationals of neither
- ▣ Small monthly retainer, plus pay for work done
- ▣ 4, 5, and 6 years terms respectively. Renewable once.
- ▣ Independence required, but footnotes allow income from government (all), former employment with government (V), family relationship with someone with government income (V), and government officials (TTIP)
- ▣ Bar on serving as counsel or party-appointed expert

# Independent?

**Gus Van Harten**: Not enough, because

- ▣ CETA judges may continue to work as arbitrators in other investor-state cases
- ▣ “CETA continues to rely on the for-profit non-judicial model of ISDS adjudication”



## Contrast ECHR

### **9 year term. Not renewable.**

- ▣ Had been 9 years renewable, then 6 years renewable. Protocol 14 changed “to reinforce [judges’] independence and impartiality.”
- ▣ William Schabas: “As a general proposition, the longer the term, the better the protection of the independence and impartiality of the judge. The restriction to a single term is also a valuable feature that contributes to independence and impartiality. If judges can be re-elected, there is a concern that their views may be influenced by inappropriate concerns, especially as the renewal date approaches.”
- ▣ Also, “balance and division of powers” between States and Parliamentary Assembly. Each State nominates three choices for PA’s consideration with help of Advisory Panel of Experts.

# Compare WTO Appellate Body

## **4 year term. Renewable once.**

- ▣ Last month, US blocked reappointment of Seung Wha Chang of Korea, citing AB rulings in cases in which he participated
- ▣ EU: “a very serious threat to the independence and impartiality of current and future [AB] members”
- ▣ Letter by all 13 living former AB Members:
  - ▣ “Undermining the impartial independence of the [AB]”
  - ▣ Suggests replacing reappointment with “a single, longer term”

Federalist 78: “Periodical appointments [of judges], however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence.”

# Independent?

No.

- ▣ Appointment by governments only, unchecked.
- ▣ Short, renewable terms.
- ▣ Potential for appointment to multiple rosters, increasing monthly retainer.
- ▣ Footnotes allowing some connections with governments.

## Worth doing?

- ▣ The Scottish Verdict: Not proven.
- ▣ If worth doing:
  - ▣ Should be done well.
  - ▣ Focus on what it preserves → Next.
  - ▣ May be justified on grounds not that arbitrators have too little independence, but too much.
- ▣ Fiss:
  - ▣ “Judges are independent, but not too independent, as is indeed appropriate in a democracy.”
  - ▣ Judges are “public officials situated within a profession, bounded at every turn by the norms and conventions that define and constitute that profession.”

## Worth Preserving: Individual Access

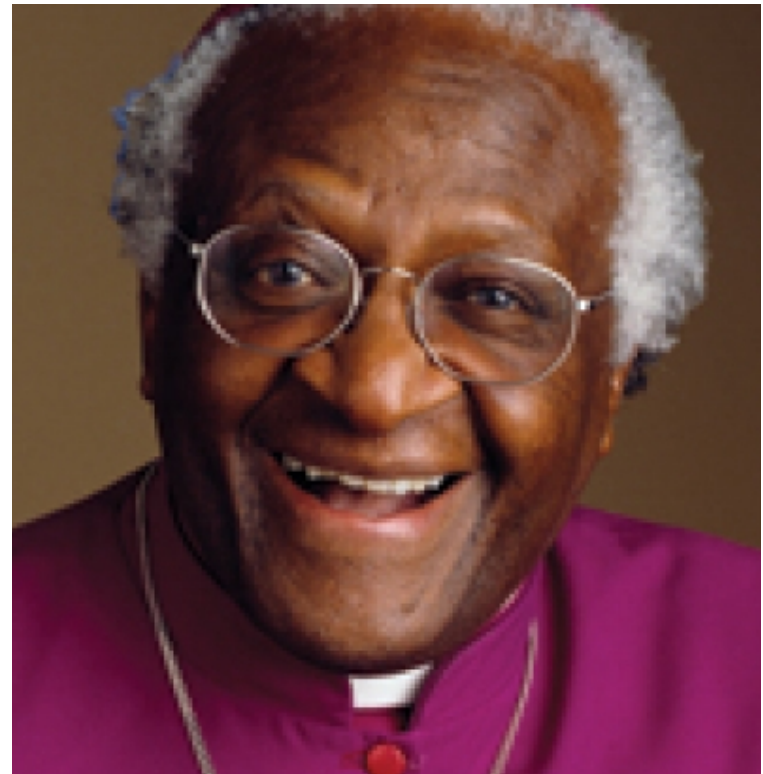
- ▣ Investors control their own claims
- ▣ Aron Broches: “The most striking feature of the [ICSID] Convention.”
- ▣ Together with human rights law, part of a fundamental shift in conceptions of sovereignty and the role of “nonstate actors”
- ▣ *International law* → Transnational law

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Important step from politics toward law: access to a neutral, effective tribunal

# Desmond Tutu

- ▣ [S]outhern Africa was building a house of justice, a place where ... victims of injustice could turn with confidence. That house is now in grave danger...
- ▣ [I]ndividual access to the SADC court constitutes a key legal instrument that has brought hope to victims of the abuse of power in SADC countries....
- ▣ Without it, the region will lose a vital ally of its citizens, its investors and its future.



## Traditional Approach to International Claims

- ▣ Only states could bring claims
- ▣ If a state chose to “espouse” the claim of its nationals, the state became the “sole claimant.” *Mavrommatis* (PCIJ 1924)
- ▣ “The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease.... [T]he State enjoys complete freedom of action.” *Barcelona Traction* (ICJ)
- ▣ Many “lump-sum settlements”
  - ▣ “[I]nfluenced and distorted by the relative political and economic power of the parties, and their desire to regularize disrupted relationships, factors which are not relevant in attempting to set forth neutral principles of international law.” *Banco Nacional de Cuba* (SDNY 1980)

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Heavily political process

## Jan Paulsson, Enclaves of Justice

- ▣ Explicitly rejects the view that increasing FDI is needed to make the case for ISD
- ▣ Recounts a litany of problems with courts of the world
  - ▣ Not limited to poor countries
- ▣ Advocates “build[ing] **enclaves of justice** where we can”
- ▣ “The error is to think that injustice is abnormal. It may be more realistic to think that ... justice is a surprising anomaly.”



## Worth Expanding

- ▣ Let's build more enclaves of justice:
  - ▣ Small businesses (SMEs)
  - ▣ Domestic investors
  - ▣ Claimants other than investors
  - ▣ Other creative uses of arbitration
  
- ▣ Let's equalize up, not equalize down

Thank you!

For more information, please see Perry Bechky, “Microinvestment Disputes” in *Vanderbilt Journal of Transnational Law* (2012) and “International Adjudication of Land Disputes: For Development and Transnationalism” in *Law & Development Review* (2014). Please do not hesitate to contact me:



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