

ECIPE Lunch Seminar: ISDS and Schizophrenia in the EU about International Law

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Overview

1. Reason behind creation of investment law and ISDS
2. Common misunderstandings concerning ISDS
3. Possible Improvements of investment law/ISDS
4. Role of domestic courts

Reason behind the creation of investment law and ISDS

- Reaction against arbitrary expropriation and discrimination of foreign property
 - Solution: establishing universal ‘minimum rights’ for all investors (cfr human rights law)
- Reaction against diplomatic protection
 - Solution: private standing before international tribunal
- State-to-state arbitration?



Common misunderstandings concerning ISDS

- System is used by middle-sized/small investors
- Most cases are won by states
- Most investors are *from* EU (mainly Netherlands, UK and Germany) - very few claims *against* EU countries
- Claims most often concern specific administrative or executive acts affecting one particular investor
 - not general regulation or legislation
 - 'regulatory chill' not supported by evidence

Possible improvements of investment law

- Investment treaties protect investments – should also promote development of host state: more balanced treaty-drafting required, e.g.:
 - Restrictive definition of investor/investment
 - Clear definition protection standards
 - Excluding umbrella clauses and market access rights
 - Incorporating public policy protection

Possible Improvements of ISDS

- Qualifying procedural access to ISDS
 - Exhaustion of local remedies vs fork-in-the-road clause
 - Frivolous claims safeguard and 'loser pays' principle
 - Mediation as mandatory precursor/alternative to ISDS

- Building safeguards into the arbitral process
 - Transparency and active role for third parties
 - Code of conduct and roster for arbitrators
 - Appellate mechanism and/or permanent courts?



The role of domestic courts

- Do we accept international standards on investment protection?
- If so, do we accept private treaty-based claims in court?
- If so, do we trust our courts to be independent and effective?

Conclusion

- Correct and complete information for law/policy-makers and public
- Advantage of general concerted EU strategy
- Model for future treaties:
 - Negotiation leverage with other countries
 - Unique possibility to set major example = catalyst for improvement global investment law
- Rethink role of domestic courts

