

Accountability in International Investment Arbitration

Charles N. Brower Lecture
American Society of International Law
31 March 2016

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This lecture¹ in honor of Judge Brower addresses the reasons and nature of the changes that investment arbitration is currently undergoing or about to undergo. I will focus on structural changes to the dispute resolution system – not on changes to substantive treaty protection – on the background of current projects and prospects for the introduction of an investment court found in particular in the CETA, the EU proposal for an investment court under TTIP, the EU Commission’s proposal to establish a multilateral court on investment, references to a multilateral court in a number of recent treaties and in UNCITRAL’s possible topics for future work. The UNCITRAL discussions are significant because they show that, contrary to the impression one could gain from the other projects just named, the drive towards reform is not an EU-syncretic fantasy. Indeed, the UNCITRAL session addressing a possible ISDS reform displayed a rare alignment – with some notable exceptions – of developed and developing states and transitional economies which all wanted the same thing. They had different reasons, but they all wanted a reform of investor-state arbitration.

I will approach these changes through the prism of accountability – it is often said that investment arbitration is not accountable. What does it mean not to be accountable? And would accountability change with the structural modifications of the dispute settlement system that are being contemplated?

I will not teach this audience that accountability is closely linked to legitimacy and often related to transparency, matters on which investment arbitration is also alleged to suffer deficiencies. There is a wealth of scholarly writings on these topics in international law, in national law, in relation to international courts and to national judiciaries. Beyond the area of the law, there is extensive literature in political sciences and sociology dealing with these concepts. I will not be able to do justice to the richness of the intellectual debate. In an arbitral award, I would write that all the arguments are subsumed in the analysis. Here I will just say that I hope that I did not miss anything major in the swirl of ideas and writings.

¹ The oral style is maintained and, while the analysis set out in the lecture is based on extensive research, it is reproduced here without references to supporting materials. For more valuable research assistance, I am indebted to Clément Bachmann, assistant at the University of Geneva. It is noted that the analysis in this lecture provided the basis for the CIDS Report, co-authored with Michele Potestà, entitled “Can the Mauritius Convention serve as a model for the reform of Investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism” and available at www.cids.ch.



I will structure this lecture in three parts. First, I will briefly address the related concepts of legitimacy and transparency; second, I will review accountability. Specifically, I will discuss the notion of accountability, ask for what investment tribunals are accountable, speak of the clash between accountability and judicial independence and proceed to compare investment arbitration to international tribunals and national courts. As a third and final step, I will attempt a look forward towards possible reforms taking account of my previous findings.

1. Legitimacy and transparency

Let me start with transparency, because it is the easier concept. Transparency requires no definition. It is a means amongst others to obtain accountability. While it is often said that investment arbitration is not transparent, the instruments to achieve transparency do exist with the UNCITRAL Transparency Rules and the Mauritius Convention, and references to such rules in practically all the recent treaties. What is missing now is the implementation in practice, by States ratifying the Mauritius Convention and disputing parties opting into the Transparency Rules for specific proceedings. While efforts are still needed to make transparency a routine, which efforts should not be underestimated, the lack of transparency in investment arbitration is largely a past issue.

Legitimacy is a more difficult concept. In international law, legitimacy is generally considered given by State consent. But legitimacy can also be viewed in non-legal terms, in particular under the still dominant theory of Max Weber. Legitimacy thus designates the acceptance that an exercise of authority is justified, which acceptance leads those affected by it to voluntarily obey an order emanating from such authority. They do so irrespectively of the content of the order. They do so not because they are coerced, but because the authority is perceived as substantiated. How is legitimacy linked to accountability? Accountability appears to be a means to achieve legitimacy.

2. Accountability and how it clashes with judicial independence

That leads us to my second part focusing more closely on the notion of accountability. Dictionaries define “accountability” and “accountable” as “required or expected to justify an action or decision; responsible; answerable; when one party must report its activities and take responsibility for them”.

In politics and policy discourse accountability is easily used as a synonym for loosely defined values, such as good governance, responsibility, integrity, transparency. Yet, there is no consensus about the concept of accountability as a value or virtue. Therefore, I propose to view it as a mechanism or process to achieve democratic aims. My focus will indeed be on democratic societies. With this focus, in our legal context dispute of resolution, the main aim of the process would be the prevalence of the rule of law.

Bearing this aim in mind, accountability as a process can be described quite simply: *someone* reports/is responsible to *someone else* for *something*. Let us apply this description to investment arbitration. Who reports/ is responsible? The assumption here is that it is the tribunal. For what is the tribunal responsible? If we draw an analogy with judges, we can say that arbitrators like judges are accountable for applying the law fairly and impartially; they are accountable for independence, integrity, and competence. And to whom do investment tribunals report? Who controls them? The contracting states? The disputing parties? The population which may be affected by the decision?

Here, we sense the clash with judicial independence, which – as we all know – is the bedrock of the rule of law. There is a delicate balance between accountability and judicial independence. National legal systems or the framework for international courts strike that balance in more or less felicitous terms. Scholars identify three main pressure points between judicial independence and accountability: election/appointment, compensation, and discipline.

Let us analyze these three pressure points in relation to investment arbitration. We will compare investment arbitration with national judiciaries rather than international adjudicatory bodies, because the mission of an investment tribunals resembles more that of highest national constitutional or administrative courts resolving dispute between a private party and a state rather than international courts that are primarily designed to rule over controversies between two sovereigns. Hence, a comparison with international courts appears less topical although certainly not useless, the more so as certain international courts resolve disputes with private parties, so the human rights courts and, closer to our topic, the Iran-US Claims Tribunal.

Starting with the first pressure point, accountability in democracies is generally secured by popular elections. Comparative law shows that judges are very rarely elected directly, because the nature of elections and electoral campaigns are hardly compatible with judicial office. Judges are nominated by the executive power or the legislative power or a combination of both. This ensures indirect accountability. It is indeed generally accepted that accountability can operate by way of accountability chains. Interestingly, to ensure judicial independence, it is also generally considered that security of tenure is essential.

The picture is very different in investment arbitration. Security of tenure is replaced by market forces driven by reputation. Certainly not a bad thing in terms of quality, but one easily discerns the criticism in terms of accountability. And indirect elections are replaced by direct appointment by the disputing parties (or an arbitral institution by delegation of the parties). Since the respondent state, which may be affected by the decision, will appoint one of three arbitrators and may contribute to the choice of the president, the system would seem appropriate in terms of accountability. Yet, accountability is not achieved to the same degree than in many well developed democracies by the involvement of the parliament. This

deficiency might be alleviated by the use of closed arbitrator lists, but those presently in existence are open.

Compensation is the second pressure point in the clash between judicial independence and accountability. Financial security is regarded as an important guarantee of judicial independence. Obviously, financial security does not exist for *ad hoc* arbitrators. Yet, this aspect does not seem to raise major concerns. Indeed, the CETA or the EU TTIP proposal seem satisfied with judges who receive no salary and are paid at ICSID rates.

The third pressure point is discipline. In a permanent court system, either the president of the court or a judicial committee of some sort have disciplinary power over judges. Who has disciplinary power over investment arbitrators? A biased arbitrator can be disqualified. Some institutions can revoke an arbitrator who fails to perform his or her duties, or not reappoint him or her. Major procedural errors can give rise to the annulment of the award. Among these remedies, revocation comes closest to the disciplinary power exercised over court members. This said, the institution effecting the revocation may itself be seen as lacking accountability, and it is certainly more difficult to discipline an undefined, moving corps of arbitrators than permanent members of a standing body.

Laudable attempts are made in recent treaties at incorporating codes of conduct for arbitrators. Yet, more than rules what is needed is someone with accountability having the power to enforce them. Even if rarely used, such power would have a symbolic value that cannot be neglected.

Let us pause for a moment: what did we observe so far? There are some issues of accountability in respect of the selection of arbitrators and the disciplinary power over members of investment tribunals. Yet, these do not appear so troublesome that they would justify the radical changes in structure that are being contemplated. At this juncture, it therefore seems necessary to pursue the inquiry about the reasons why radical changes are sought. A comparison with other adjudicatory bodies, international tribunals and national courts, may yield other explanations. I am of course not ignoring that both international and national courts are subject to critique as well, but that does not mean that we cannot learn from them if we analyze them properly.

Accordingly, I will look first to international courts. International courts are defined by five characteristics: they are permanent, established by law, applying international law and pre-existing procedures, and they issue binding decisions. All of these characteristics apply to investment arbitrations, but for the first one about permanence. Permanence implies institutionalization, well beyond the framework of arbitral institutions that merely facilitate the administration of proceedings. While we know of the many drawbacks of permanent institutions, they do convey an impression of solidity which contrasts with the fragile or precarious nature of *ad hoc* tribunals. I have tried to capture this contrast with pictures of a brick and mortar court house, the Peace Palace, on one hand, and of three “pedestrian” arbitrators on a side walk, on the other:



In addition to the permanent, institutional nature of international courts, another difference is striking when comparing international courts and investment arbitration: the number of decision-makers. For investment arbitration, the ICSID framework provides for an uneven number or for three by default. The history of the ICSID Convention does not show a discussion on the appropriate number of arbitrators, except that the initial “several arbitrators” was changed to an “uneven number” of arbitrators. The UNCITRAL 2010 Rules do not specify the number of arbitrators in case of agreement and provide for three by default. In any event, the practice is for three-member tribunals, very rarely for a sole arbitrator.

The position is very different for international courts and looks as follows:

- ICJ 15-17
- ECtHR 7, 17 (an asymmetric dispute settlement mechanism like investment arbitration)
- ITLOS 5, 9, 11
- CJEU 5, 15
- WTO Appellate Body 3 (exchanging views with 4 others and benefitting from a strong secretariat whose influence must be factored in when assessing the performance of the WTO dispute settlement mechanism)
- IUSCT 3 or 9 (for important issues or overruling prior a case)

One could object to this comparison, arguing that the impact of the decisions of investment tribunals does not rise to the level of that of judgments of these international courts. Well, this probably depends on the dispute. The media interest triggered by some recent investment disputes, the debates sparked in civil society, the reactions to certain awards, show that the impact of investment tribunals can be considerable.

Earlier, I had compared investment tribunals with national courts and it makes sense to repeat the exercise in connection with the number of decision makers. To cite just a few highest national courts and relying on the most usual compositions, where applicable, the picture looks as follows:

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|----------------------------|-----|
| • US Supreme Court | • 9 |
| • German Bundesgerichtshof | • 5 |
| • French Cour de cassation | • 5 |
| • Swiss Supreme Court | • 5 |

The recurrent number of five is probably not a coincidence. Although they may not be uncontroverted, studies by psychologists on group dynamics appear to show that five is a good number , if not *the* optimal number, for purposes of decision-making. In smaller groups of two or three, individuals are less efficient because they feel too exposed. In larger groups, the process is more cumbersome and individual members tend to be less engaged.

What can be drawn from this comparison with the composition of international and national courts? Essentially that the current investment arbitration system gives individual arbitrators huge leverage.



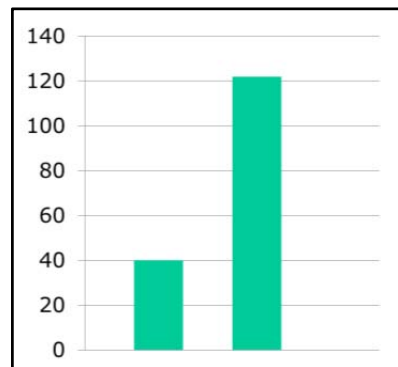
I should stress that I make this observation about huge leverage assuming a perfectly impartial and independent investment tribunal. This observation is distinct from the criticism about investment tribunals being biased or having ideological preferences. It applies to a tribunal that – as it should be – has no bias nor ideological preference. It has of course even more weight when tribunals do not meet these requirements or expectations.

Although it does not appear to be articulated in these terms, this leverage may well explain the essence of the accountability concerns triggering the proposed changes in the structure of international dispute settlement. Several factors appear to reinforce these concerns:

- The pool of investment arbitrators is relatively small. Insiders think that participation in the pool is merits-based, but what insiders think is irrelevant to our analysis. Outsiders to whom investment tribunals are accountable while being independent, associate the size of the pool with a club implying all kinds of dubious compromises and arrangements. This impression is compounded by the double-hat issue, a duplication of functions, which incidentally is prohibited for *ad hoc* judges before the ICJ, in sports arbitrations before CAS, and for appellate judges on the new CETA investment court. The ASIL – ICCA task force on issue conflicts has done most valuable work in this area, but the problem remains.
- Another relevant factor when assessing concerns about arbitrator leverage is the return of the State in the aftermath of the economic-financial crisis, after decades of State disempowerment. Linked with the return of the State is the fact that the political and economic organizations of the world are at variance. The economic system has become truly global when the political structure continues to be nation-based. And investment arbitration is one of the places where the two organizations meet, with the unavoidable difficulties that their differences bring.

- Another reason why individual leverage of investment arbitrators raises concerns is the progress of democracy in these last decades:

Democratic
States worldwide
(Freedom House)



From 40 in 1972, the number of democratic states has risen to 122 in 2014. We can of course argue about the classification of one or the other regime, but the trend is overwhelming. “The spread of democracy and participatory government – so writes Henry Kissinger in his latest book entitled ‘World Order’ – has become a shared aspiration; if not a universal reality”. Why does this matter? It matters because democratic political culture favors institutions and distrusts the power of (unelected) individuals. The public animosity against CEOs of large corporations is based on the same resentment.

3. Looking ahead : A system in line with democratic values and the asymmetric nature of investment disputes

Where do we go from here? This leads us to my third and last part. If you accept my analysis that the current system gives unelected individuals powers that are difficult to reconcile with democratic values, then this must somehow impact the design of the changes to the system.

Having identified the fragility of the current system, the risk is to shift to the other extreme: from the commercial arbitration paradigm to an inter-state dispute settlement model. That shift would neglect the true nature of investor-state arbitration. Investor-state arbitration is asymmetric; it is an “investor-state” and not “state-state” mechanism. The shift may also sacrifice some of the main advantages of investment arbitration as we currently know it. It is not because we have now focused on accountability deficiencies that the present system does not have its advantages as well. Looking at the big picture, I would stress three advantages:

- First, neutrality or, if you prefer, distance. Distance from politics – the depoliticization that was so much praised as a major conquest of investment arbitration, and rightly so – and distance from business interests at the same time;
- Second, finality;
- Third, manageability, mainly due to the decentralized *ad hoc* nature of the proceedings. The system is “light” compared to “heavier” permanent adjudicatory bodies requiring significant resources, so for instance the secretariat of the WTO dispute settlement and appellate bodies.

Unfortunately, the EU designed foreign investment court, implemented in CETA and considered for TTIP, does exactly what should be avoided: it shifts to an interstate model. 15 members all chosen by the states (specifically 5 for the US and 5 for the 28 or 27 EU Member States) sit in first instance in panels of 3, each panel being composed of a national of each contracting party and one third country national. With this design, the distance is gone. Moreover, that design is likely to place the entire responsibility of the decision on one person only, the third country national. One could object that this does not matter because there is an appeal. Yes, there is an appeal. However, one encounters the same composition on appeal, with the result that the outcome will ultimately depend on the chair of the appeals panel. Admittedly, he or she will be state-appointed and part of a permanent institution, which may make such influence more acceptable in terms of accountability. But in the end, what progress is really made?

I have asked myself whether it would not be possible to design a dispute settlement mechanism that fixes the present democratic deficiency and at the same time preserves the gains of the current system. A dispute settlement mechanism that takes account of the asymmetric nature of investment arbitration and that is neither shaped along the lines of commercial arbitration nor of inter-state dispute settlement. How to do it? I certainly have no ready-made recipe. Just a few tentative, isolated avenues stemming from the foregoing analysis:

- It may be worthwhile exploring whether the number of decision-makers should not be increased (at least for certain cases), to optimize the decision-making process and avoid too strong a concentration of power in individual members;
- One could also think of establishing a roster of decision-makers, from which the disputing parties could then choose. If so, one could revert to Aron Broches' very first vision of what later became the ICSID Convention. In his first note on the draft ICSID Convention, he provided for a closed list of arbitrators established by the states, which were "required to seek advice before making the designation from their highest courts, law schools, bar associations, commercial, financial and industry organizations".
- Further, one could investigate the possibility of introducing a coordination/consultation mechanism between decision-makers (or presiding decision-makers). This is done in many national courts (sitting in full court or *en banc*). It is also done in the Iran-US Claims Tribunal and in the WTO Appellate Body. It would improve the consistency of the results without necessarily having to introduce an appellate body, a step that should preferably be avoided as it would do away with the "lightness" of the system. At the same time, the consultation would spread the power of individuals over a group;

These are just a few provisional thoughts around the general idea of a dispute settlement mechanism that meets the accountability expectations of democratic societies and takes into account the asymmetric nature of investment disputes as well as the gains of investment arbitration.