CLI Lecture Series

"The Prospects for Reform of Investor – State Dispute Settlement"

Thursday 17 October 2019

Comments on Professor Chester Brown's Lecture by Professor Anthony Cassimatis

1. Thank you Justice Fraser: I would like to begin by also thanking the organisers for the invitation to participate in this lecture series; the Chief Justice for making this impressive courtroom available; Professor Brown for his fascinating and important speech; and my public international law students. I am an international law generalist who lacks ISDS expertise. In order to compensate for my lack of expertise I asked almost 200 students to write a research essay on concerns raised by Chief Justice French in 2015 in relation to ISDS and the relevance of such concerns to a recent decision of European Court of Justice on the ISDS provisions of the comprehensive economic and trade treaty between Canada and the EU. I thank my students for my insights (such as they are) that their essays have helped me to develop.

2. More directly, I would like thank Professor Brown for sharing with us his expertise and for offering an insightful review of ISDS, the criticisms that have been levelled at it and the current reform process and the various groupings into which States have formed.

3. In my comments, I would like to offer some brief observations regarding another constituency involved in current reform efforts: ISDS arbitrators

and practitioners. Professor Brown has identified important criticisms of past ISDS decisions and practices. The EU and Canada effectively memorialised such criticisms in the terms of their *Comprehensive Economic and Trade Agreement* (CETA) which includes, as Professor Brown has noted, an ISDS mechanism that rejects investor appointment of arbitrators, expressly recognises the "right" to regulate of the Canadian Government, of the EU and of EU member State governments, and creates an appellate structure for investment disputes. To illustrate the potential sharpness of the criticisms of ISDS felt by arbitrators consider the "Joint Interpretative Instrument" agreed to by Canada, the EU and EU member States, which is an "integral part" of CETA. Point 6(f) of the Joint Interpretative Instrument includes the following observation:

> "CETA moves decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial and permanent investment Tribunals, inspired by the principles of public judicial systems in the European Union and its Member States and Canada … Accordingly, the Members of these Tribunals will be individuals qualified for judicial office in their respective countries, and these will be appointed by the European Union and Canada for a fixed term. Cases will be heard by three randomly selected Members. Strict ethical rules for these individuals have been set to ensure their independence and impartiality, the absence of conflict of interest, bias or appearance of bias. …"

It is possible to read these references to "independence", "impartiality", "strict ethical rules" and absences of conflicts of interests and "bias" basically as <u>reasons</u> why the parties to the treaty have moved "decisively" away from what traditional ISDS arbitration has been offering up until now. How have arbitrators responded to these claims that could be construed, at least in part, as comprehensive attacks upon their work?

4. A distinguished international arbitrator and international judge, Charles N Brower, has offered forthright responses. In addition to his extensive arbitral experience (he is a regular appointee of investor claimants in ISDS cases), Judge Brower was the choice of the Trump administration to serve as an ad hoc Judge of the International Court of Justice in the cases brought by Iran against the US following the US withdrawal from the Iran nuclear deal. Judge Brower has also been serving since 1983 as a judge of the Iran US Claims Tribunal and was a former ad hoc Judge of Inter-American Court of Human Rights. Incidentally, in 2018 Judge Brower voted with the other members of the International Court of Justice in its provisional measures judgment which granted some of the interlocutory relief requested by Iran (the votes of ad hoc judges normally correlate more closely with the submissions of the States that appointed them).

5. In an academic article published last year in the *Fordham International Law Journal*, Judge Brower and his co-author attacked the proposals for an international investment court, referring to "many follies" raised by the proposals. In their view the reform proposals were driven by fear and overreaction. "Fear [was] … a poor advisor" they counselled. Judge Brower specifically criticised the UNCITRAL negotiation processes, questioning why Working Group II, which includes participants with significant arbitral experience, was not used for the negotiations, and Working Group III, which has less arbitral experience, was chosen instead. The article notes that it was based on a speech given by Judge Brower in 2017. If a news report produced by Fordham University, that was the host of the speech, is an accurate report of that speech then Judge Brower did not mince his words when criticising UNCITRAL:

> "Why do these acknowledged leaders of investment dispute arbitration as we know it bring termites into our wooden house of investor state dispute resolution?"
>
> "Why are they putting themselves out there to tear down what made them what they are?"

6. In Australia there have been fears expressed that commercial arbitration more generally may be collateral damage in the controversies surrounding ISDS. Last year Chief Justice Allsop in a conference opening address in Sydney stressed the importance of recognising the differences between ISDS and more common forms of commercial arbitration. There are indeed important *practical* differences (for example there is often no contract between the investor and the State engaged in an ISDS dispute – there was no contract between *Philip Morris Asia Ltd* and the Australian government in the tobacco litigation; the jurisdictional basis for the Tobacco arbitration was the bilateral investment treaty between Australia and Hong Kong); but there appears to be no *analytical* boundary that can separate ISDS from general commercial arbitration. This point has been made forcefully by another experienced international arbitrator, Jan Paulsson, former global head of the international arbitral practice of Freshfields Bruckhaus Deringer:

> "Broadly drafted [contractual] arbitration clauses already mandated arbitrators to consider public laws, imperative rules, even *jus cogens*. There was nothing new in this respect. In other words, if the presence of public interest is the test of a type of arbitration that must be segregated from private commercial arbitration, we must go back at least a century, and redraw all of our maps. There is no analytical line to be drawn around arbitration created by treaty."

7. And even though Judge Brower disagrees with Jan Paulsson in relation to the need for extensive ISDS reform, they appear to agree that no analytical divide exists between treaty-based and contractual arbitrations. Judge Brower concludes his attack on the UNCITRAL negotiations by suggesting that they may have little consequence for large investors who, if an international investment court is created, will return to the use of contracts to secure their rights:

   "… the large corporations that invest in high-risk countries abroad have considerable bargaining strength and, just as they did in the 1960s and 1970s, may opt to negotiate their own dispute-settlement provision via contract, presumably to their satisfaction."

8. As Professor Brown has noted, the current ISDS system does have serious issues to confront and his experience as a distinguished ISDS practitioner within the system demonstrates that support for reform can be found (as in the case of Jan Paulsson) within the ranks of the arbitral community. And as Professor Anthea Roberts has observed, even sceptical arbitrators (although perhaps not Judge Brower) might be expected "… to modify their hostile stance toward systemic reforms" in order to avoid more radical changes to the ISDS system being advocated by the "paradigm shifters" to which Professor Brown referred.

9. To conclude these brief comments, I agree with Professor Brown that the establishment of an appellate structure for ISDS would be a "watershed" and a "truly constitutional moment" for international governance akin to the establishment of the WTO Appellate Body and the International Criminal Court. I also think I understand Australia's reticence to show its hand in the UNCITRAL negotiations. The EU was apparently inspired by the WTO Appellate Body when it agreed with Canada to establish an

appellate tribunal under CETA. But watching the ongoing travails of the WTO dispute resolution system, which have included having both the Obama and the Trump administrations blocking appointments to the WTO Appellate Body (not to mention President Trump's invocations of national security against States such as Canada … Canada), has not been very inspiring. "Drought" rather than "watershed" may be a more appropriate metaphor for the current climate in international governance.

10. I conclude by again thanking Professor Brown for his valuable lecture. Thank you.