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Introduction to the Symposium

Innovative Strategies for Conflict Management: Improving Investor-State Relations to Propel Global Growth

Roberto Echandi,* Mariana H.C. Gonstead** & Maureen Lodoen***

Historical Background: Innovative Approaches for Investment Retention and Expansion

In 2010, the United Nations Conference on Trade and Development (UNCTAD) and Washington and Lee University School of Law partnered to sponsor the Joint Symposium on International Investment and Alternative Dispute Resolution (ADR).[1] During the joint symposium, a group of global experts focused on the use of ADR in the context of international investment law. Symposium participants included representatives from States involved in investor-State dispute settlement (ISDS), practitioners of international arbitration and mediation, investors, academics researching international investment law and international dispute resolution systems, and international organizations. This symposium was the catalyst for cutting-edge developments in dispute system design and conflict management—particularly developments related to foreign direct investment (FDI).

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*** Maureen Lodoen, JD, 2020, University of St. Thomas School of Law; BA, Creighton University. The views expressed are solely the author's and do not reflect her work as a law clerk or the views of the Minnesota Judicial Branch. She would like to thank Professor Mariana H.C. Gonstead for her invaluable mentorship and for making this special issue of the University of St. Thomas Law Journal possible.

1. U.N. Conference on Trade and Development, *Investor-State Disputes: Prevention and Alternatives to Arbitration II*, U.N. Doc. UNCTAD/WEB/DIAE/IA/2010/8 (Susan D. Franck & Anna Joubin-Bret eds., 2011), https://unctad.org/en/Docs/webdiaeia20108_en.pdf.

Over the last decade, it became evident that the "leaders of leaders" in both private and public sectors needed innovative approaches to effectively address the emerging challenges and unprecedented opportunities posed by the global economy. Effective dispute resolution has proven to be an essential method to maximize collective potential and minimize waste—the global economy and the well-being of countries is at stake.

To memorialize the progress of the unprecedented efforts of the last decade, the *University of St. Thomas Law Journal* collaborated with the International Dispute Resolution Research Network to host a workshop for a select group of global experts and business leaders in the field of FDI. The workshop was held on February 21, 2020, at the University of St. Thomas School of Law. It sought to (1) bring together global experts and business leaders to discuss current challenges and opportunities affecting FDI, (2) promote discussions of the latest empirical data and innovative approaches implemented by the World Bank to retain and expand foreign investment, and (3) engage foreign investors in an interactive conversation about the practical implications and impacts of the options discussed for the way forward.

BEYOND INVESTOR-STATE DISPUTE SETTLEMENT: OVERVIEW OF EFFECTIVE INVESTOR-STATE CONFLICT MANAGEMENT MECHANISMS

Risk is inherent in running a business, but when investors establish operations across borders, the level of risk increases exponentially. Still, investors leave the comfort of their own countries looking for resources or opportunities they cannot find domestically. When investing abroad, those in the private sector not only face the difficulties of doing business in an alien and unfamiliar regulatory environment but also confront risks and uncertainties regarding the actions of government and nongovernmental stakeholders.

For FDI projects to properly remain and expand in host countries, many factors must align. Common factors causing investors to discontinue their investments are macroeconomic factors and changes in investors' business models and strategies. However, recent research shows that at least one-fourth of investors in developing countries discontinue their FDI projects not because of these factors but because of grievances arising out of irregular government conduct.[2]

For many decades, international investment agreements have enabled foreign investors to invoke ISDS procedures to enforce the investment pro-

2. World Bank Group [WBG], *Retention and Expansion of Foreign Direct Investment (Vol. 2): Political Risk and Policy Responses*, at 24, 33 (Sandra Lynne Gain et al. eds., 2019), http://documents1.worldbank.org/curated/en/387801576142339003/pdf/Political-Risk-and-Policy-Responses.pdf.

tection guarantees included in those treaties. Between 1987, when the first treaty-based investor-State arbitration occurred, and 2020, nearly eight hundred disputes were filed with the World Bank Group's International Centre for Settlement of Investment Disputes (ICSID).[3] These cases have generated prolific literature on the evolution of international investment law as well as the pros and cons of the international investment regime. Such discussion, however, often ignores the fact that only a minority of the investors who discontinue their FDI projects and leave the host country ever consider invoking ISDS. Research shows that investors opting to discontinue their investments because of irregular government conduct opt to withdraw or to cancel the expansion of their operations without seeking compensation for damages through investor-State arbitration.[4]

Effective investor-State conflict management mechanisms enable investors to mitigate the political risks created by government conduct and enable host governments to prevent undesired discontinuation of FDI projects. These mechanisms make it possible for governments and investors to work together, forging and maintaining mutually beneficial business relationships. Once a strong relationship exists between the investor and the State, then the global economy can reach higher levels of growth.

This is not merely another issue of the *Law Journal* but instead a historic compendium of a decade of knowledge and experience that can advance FDI toward higher levels of innovation and growth. The articles in this issue synthesize the ideas and latest developments of global experts and business leaders who participated in the February 21, 2020, workshop in Minneapolis, Minnesota. The workshop provided a rare opportunity to discuss different pilot projects the World Bank Group has undertaken to promote and expand investment in various parts of the world, and also to learn about the experiences of business leaders. This issue represents the integrated body of knowledge that is now recognized globally as dispute system design and conflict management mechanisms in the field of FDI. We are

3. Int'l Ctr. for Settlement of Inv. Disputes [ICSID], *The ICSID Caseload—Statistics (Issue 2020-2)*, at 7 (2020), https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf.

4. Roberto Echandi, *Straightening the Purpose of International Investment Law from Litigation to Consolidating Relationships: The Role of Investor-State Conflict Management Mechanisms*, 17 U. ST. THOMAS L.J. 240–41 (2021) ("[D]ata also shows that only a very minor share of investors withdrawing or canceling FDI expansion plans opt to invoke ISDS. The rate of frequency of investors divesting from developing countries in all surveys consistently was around 25 percent of the total interviewed. Considering that today there are more than one hundred thousand foreign affiliates undertaking multiple investment projects worldwide [UNCTAD 2018], and even assuming that only half of them invested in developing countries [UNCTAD 2018], a 25 percent rate of FDI divestments would represent more than ten thousand potential ISDS claims against developing countries. Even cutting such rough estimate by half would lead to a figure that would still be significantly higher than the actual number of ISDS submitted against developing countries over the last thirty years."); Roberto Echandi, *The Debate on Treaty-Based Dispute Settlement: Empirical Evidence (1987–2017) and Policy Implications*, 34 ICSID REV.—FOREIGN INV. L.J. 32 (2019).

immensely grateful for each and every contribution to this special issue of the *Law Journal*.

Investor-State Conflict Management Mechanisms: Cutting-Edge Developments, Implementation, and Perspectives from Stakeholders

Meg Kinnear: Our first keynote speaker, Ms. Kinnear, is the vice president of the World Bank Group and secretary-general of ICSID. Her article "Current Developments in Investor-State Dispute Settlement: An Overview of Substantive and Procedural Change in the Past Fifty Years" examines the progression of international law on foreign investment and tracks its evolution over the last several decades. Ms. Kinnear explains that while treaties, domestic laws, and contracts have contributed to the development of international law on foreign investment, the establishment of the ICSID in 1966 was a particularly influential event in the progression of ISDS.

ICSID is one of five organizations in the World Bank Group, but Ms. Kinnear notes that it is the only institution that provides specialized rules of procedure for resolving international investment disputes and mandates the availability of extensive administrative support for parties and tribunals. Throughout her article, Ms. Kinnear tracks the development of international investment law, including the substantive protections afforded to foreign investors and ISDS provisions.

Roberto Echandi: Our second keynote speaker, Dr. Echandi, is the investment policy global lead of the Investment Climate Unit of the Trade and Competitiveness Global Practice of the World Bank Group. In his article "Straightening the Purpose of International Investment Law from Litigation to Consolidating Relationships: The Role of Investor-State Conflict Management Mechanisms," Dr. Echandi points out that over the last two decades, the debate about international investment law has gravitated around the advantages and disadvantages of ISDS procedures, and he responds to this debate. He argues that such debate has distracted investment stakeholders from what should be the main focus of international investment law: fostering long-term certainty and predictability in investor-State relations to mitigate political risk, thereby facilitating FDI projects to be established, operated, and expanded in host countries.

Dr. Echandi goes on to summarize his recent research. This research demonstrates the lack of appropriate legal infrastructure, both at a domestic and international level, for host States and investors to manage their conflicts early, before investors discontinue their investment projects and grievances escalate into full-blown legal disputes. Such absence of legal infrastructure not only overemphasizes ISDS as the only outlet to deal with grievances between investors and States but also creates a high opportunity

cost for investors and States alike. Dr. Echandi concludes his article by proposing that investor-State conflict management mechanisms can fill the legal infrastructure vacuum, enhancing investors' confidence to undertake investment projects beyond their home States.

MARIANA HERNANDEZ-CRESPO GONSTEAD: Professor Gonstead is a professor of law at the University of St. Thomas School of Law, the executive director of the International Dispute Resolution Research Network, and a World Bank chairman-appointed conciliator to the ICSID panel. She also has served as a consultant to the Investment Climate Unit of the World Bank Group. In her article "Beyond Investor-State Disputes: Intercultural Capacity Building to Optimize Negotiation, Mediation, and Conflict Management," she suggests that to unlock the potential of investor-State business relationships, we need to move beyond a dispute-centered approach to a relationship-centered approach. She argues that up until now, the focus has been on securing investment through treaties, arbitration, mediation, and dispute prevention. While securing investment through these mechanisms is necessary, it is not sufficient to prevent divestment and promote the investment retention and expansion the global economy needs.

Professor Gonstead's article emphasizes how essential conflict management mechanisms and intercultural capacities at the domestic level are for moving forward and fostering investment retention and expansion. She suggests that optimizing problem-solving and Shared Decisions System Design can significantly contribute to maximizing the investor-State business relationship's potential and minimizing the risk of conflict by increasing the level of unity in the relationship.

Given the complexity of the investor-State relationship and the impact of cultural differences, in order to optimize problem-solving, her article reviews some of the intercultural tools developed to (1) enhance understanding at the bargaining table, (2) effectively select or design processes when conflict erupts, and (3) examine what exists and design what could be, by assessing and improving systems for conflict management and shared decision-making. Ultimately, Professor Gonstead proposes that strengthening the business relationship can lead to synergies outside the conflict zone, which in turn may create the necessary incentive to reach the higher levels of investment retention and expansion for which the world aims.

DR. DONGWOOK CHUN: Dr. Chun, senior private sector specialist in the Investment Climate Unit of the World Bank Group, explores the institutional structure and management of investor grievances in his article "Synergizing Government Services with an Investment Grievance Mechanism." Dr. Chun examines the successful operation of Korea's Foreign Investment Ombudsman system, which has been instrumental in helping investors to continue operations and expand businesses. Dr. Chun suggests that this mechanism could serve as a model for other countries to manage their own investor grievances.

REAGAN DEMAS: Mr. Demas, a partner at the law firm Baker McKenzie, attended the workshop as a representative of foreign investors. In his article "The Impact of Investigative Journalism and Social Media on Anticorruption Enforcement and Investor-State Relations in Emerging Markets," Mr. Demas highlights a new trend where investigative journalism and social media advocacy campaigns have unraveled large-scale corruption scandals in host countries. Mr. Demas argues that the risk of investor-State conflict increases when bribery and corruption in host countries are detected. He also provides practical tips for companies to participate in anticorruption initiatives in emerging markets and manage conflict resulting from the revelation of corruption in host countries.

ALTERNATIVES IN INVESTOR-STATE DISPUTE SETTLEMENT: FROM WHERE WE HAVE BEEN TO WHERE WE ARE

SUSAN FRANCK: Professor Franck is a professor of law at American University Washington College of Law and is an expert in the fields of international investment law, empirical analysis, and dispute settlement. In her article "The Past, Present, and Future of Investment Treaty Conflict Management and Dispute Systems Design," Professor Franck explores the origins and history of international investment dispute settlement and examines how to derive value from individualized dispute resolution mechanisms. She also proposes three questions for future dispute resolution designers to consider as they work to reform international investment conflicts.

DR. KARL P. SAUVANT: Dr. Sauvant is a lecturer in law at Columbia Law School; a Resident Senior Fellow at the Columbia Center on Sustainable Investment, a joint center of Columbia Law School and the Earth Institute at Columbia University; a guest professor at Nankai University, China; and a former theme leader of the International Centre for Trade and Sustainable Development/World Economic Forum Task Force on Investment Policy. In his article "An Advisory Centre on International Investment Law: Key Features," Dr. Sauvant discusses the idea of an Advisory Centre on International Investment Law, which has recently been added to the agenda of the United Nations Commission on International Trade Law. Specifically, Dr. Sauvant explains how the centre might be governed and financed. He also identifies who the potential beneficiaries of the centre might be and how the centre could assist them as they defend investor-State disputes.

ANDREA SCHNEIDER & NANCY WELSH: Professor Schneider is a professor of law at Marquette University and director of Marquette University Law School's nationally ranked dispute resolution program. She has taught dispute resolution, negotiation, ethics, and international conflict resolution for over twenty years. Nancy A. Welsh, a leading scholar and teacher of dispute resolution and procedural law, is a professor of law and director of

the dispute resolution program at Texas A&M University School of Law, and she has previously served as the chair of the ABA Dispute Resolution Section. Professors Schneider and Welsh coauthored the article "Bargaining in the Shadow of Investor-State Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management." They suggest that early conflict management and thoughtfully structured negotiations may be the answer to more effective conflict management for investment disputes. Further, they explain that such negotiations should move beyond mere discussions of legal rights and defenses to include conversations about all stakeholders' interests and relationships. Finally, Professors Schneider and Welsh contend that the *threat* of mandatory mediation, with an opt-out for negotiations that meet quality requirements, could make negotiations more prevalent.

KATIA YANNACA-SMALL: Ms. Yannaca-Small, an arbitration expert, served as former counsel at Shearman & Sterling and legal advisor on international investment with the Organisation for Economic Co-operation and Development (OECD). In her article "Corporate Social Responsibility and the International Investment Law Regime: Not Business as Usual," Ms. Yannaca-Small discusses the corporate social responsibility of foreign investors. She argues that the current international investment law regime is not sufficiently equipped to respond to calls to hold investors accountable for potentially harmful behavior related to human rights, labor risks, environmental impacts, or corruption. She therefore proposes that the mechanism established under the soft-law OECD Guidelines for Multinational Enterprises through mediation and consultation, as provided by its National Contact Points, may be the best option currently available to manage conflicts between foreign investors and the communities in which they operate.

TOWARD INVESTOR-STATE CONFLICT MANAGEMENT: WHAT ARE INTERNATIONAL ORGANIZATIONS DOING?

FRAUKE NITSCHKE: Ms. Nitschke, senior counsel at ICSID, contextualizes the mediation rules developed by the International Centre for Settlement of Investment Disputes in her article "The Proposed ICSID Mediation Rules." She not only summarizes the proposed rules but also reviews their scope, commencement of the proceedings, mediator appointment, and mediation conduct. Ms. Nitschke also touches on the future of investment mediation and ICSID's capacity-building efforts.

JUDITH KNIEPER: Dr. Knieper is a legal officer at the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) in Vienna. In her article "UNCITRAL's Working Group III Discussion on Dispute Prevention," Dr. Knieper proposes that, while certain aspects of dispute prevention need to be managed at the national level, other issues, such as capacity building and exchanging best practices, could be

coordinated internationally. Further, she argues that mechanisms such as the enforcement mechanism established by the newly adopted Singapore Convention on Mediation could help parties avoid lengthy and costly proceedings.

DR. ALEJANDRO CARBALLO-LEYDA: Dr. Carballo-Leyda is the general counsel of the International Energy Charter and head of its Conflict Resolution Centre. In the final article of this issue, "Preventing and Managing Investor-State Conflicts and Disputes in the Energy Sector," Dr. Carballo-Leyda explains that companies investing in foreign countries within the energy sector may not always be fully aware of the underlying causes of conflicts and frictions between their local project and the host state. Therefore, he argues that States and companies may benefit from developing their own internal frameworks and policies to prevent and manage the conflicts and disputes that will inevitably arise. Dr. Carballo-Leyda proposes two complementary tools that could be used for this purpose: the World Bank's Systemic Investment Response Mechanism (SIRM) and the International Energy Charter's Model Instrument for Management of Investment Disputes.

CONCLUSION

The complexity and nature of investor-State disputes make it unlikely for the average citizen to effectively participate in the resolution of these high-stake issues. Critical decisions involving these disputes are made by those with the highest levels of responsibility—government leaders to executives of multinational companies. Yet these decisions profoundly affect all stakeholders because of the systemic nature of FDI.

For this reason, this issue attempts to equip current and future decision-makers in the private and public spheres with the necessary knowledge to make informed decisions that will deeply affect not only their own constituencies but also the global economy. To this end, the articles in this issue aim to pave the way to leverage FDI as a vehicle to better the lives of all citizens. The ultimate goal is not only to explore ways to better resolve and prevent investor-State disputes but also to strengthen investor-State business relationships. Doing so can significantly contribute to expanding and retaining foreign investment, ultimately propelling global innovation and growth.