H-Net Reviews
in the Humanities & Social Sciences

Armand de Mestral, ed.. *Second Thoughts: Investor-State Arbitration between Developed Democracies.* Waterloo, Ontario: CIGI Press, 2017. 552 pp. $85.00, cloth, ISBN 978-1-928096-38-2.

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The modern international investment law regime is characterized by a high degree of legalization. By "legalization" I mean that foreign investors can often unilaterally invoke a rules-based dispute-settlement process through which independent tribunals are given the power to authoritatively decide the investor's dispute with a host state through a reasoned award that justifies the tribunal's decision in the language of international law. The investor's right to arbitration is embedded in investment treaties, of which there are now more than three thousand. The result has been an explosion of investor-state arbitration (ISA), in which an aggrieved foreign investor can haul an offending host state before specialized international arbitral tribunals to award monetary damages for the state's violation of international investment law.[1] The rise of ISA has transformed international investment law from a sleepy backwater into one of the most vibrant areas of international legal practice and scholarship today.

For many years, ISA was largely noncontroversial, both because arbitrations were relatively rare, and often secret, and because they inevitably involved as defendants (or, more technically, "respondents") politically and economically underdeveloped states with problematic domestic legal systems. Allowing foreign investors to protect their property rights via international legal rules and procedures seemed quite appropriate in those cases, and perhaps even necessary if such states were to receive sufficient, and often desperately needed, private investment.

In recent years, however, ***developed*** states—the United States, Canada, South Korea, Chile, Germany, Australia, among others—have found themselves on the wrong end of ISA lawsuits. Foreign investors have used their ability to invoke ISA not just to attack (quite rare) instances of classic expropriation, but to mount aggressive challenges to popular governmental policies that have the effect of diminishing the foreign investor's profits. For example, the lawsuits have been used to challenge California's ban on environmentally hazardous gasoline additives; Germany's phase-out of nuclear power generation; and, most notoriously, Australia's tobacco-control efforts. While none of these three lawsuits has led to a monetary award in the investors' favor, the very fact that states with such high-quality legal institutions could be challenged by private actors—not domestically, but internationally—for the alleged unfairness of public-spirited laws and regulations struck many observers, particularly on the political left, as a highly problematic intrusion on policy sovereignty, as an affront to democratic values, and as unfairly giving foreigners greater rights than citi-

zens. The resulting public debate, which was especially vigorous in Europe, has led to increasing calls to restrict ISA, or even to abandon it, especially as between politically and economically developed states.

This is where the book under review enters the picture. It is the result of a 2015 conference held in Ottawa and organized by the Center for International Governance Innovation (CIGI), a Canadian think tank funded, in part, by various units of the Canadian government. The book consists of seventeen essays, most drafted by well-respected international investment law scholars and practitioners, that examine the growing "second thoughts" about ISA. The focus is not so much on analyzing the persuasiveness of arguments for and against ISA (with the exception of a useful introductory chapter by Armand de Mestral, the project's organizer, which effectively challenges ISA's critics to better support their criticisms), but rather on exploring how attitudes and approaches to ISA have evolved over time in several advanced democracies. This being a Canadian production, five chapters explore Canada's experiences with ISA, and the book closes with policy recommendations for the Canadian government; other individual chapters explore those of the United States, Germany, the European Union, Australia, and Spain, among others.

The unifying question that ties the chapters together is whether ISA between developed economies is a good idea. Since one of the main justifications for ISA is that it stands in as a confidence-inducing substitute for dysfunctional domestic legal institutions, and since no one doubts that the legal institutions of countries like Canada, the United States, Japan, the European Union, and the like are of very high quality, one might expect the authors to converge on the idea that ISA, at least as between such countries, is hardly worth the candle. In fact, the authors mostly seem to converge, at least implicitly, around the opposite position. The main exception is a chapter by David Schneiderman, a professor of law and political science at the University of Toronto and one of Canada's most thoughtful critics of ISA. The chapter on the ongoing use of ISA to challenge Spain's attempts to modify its budget-breaking solar power subsidy regime also effectively highlights the capacity of ISA to cause political and legal headaches for policymakers.

The reasons for the authors' attachments to ISA are varied. Perhaps even the best domestic political and legal systems occasionally make mistakes, and ISA, like a reluctant superhero, is needed to step in and save the day (pp. 30, 276, 488). Or perhaps critics of ISA overstate its dangers, as Armand de Mestral (ch. 1) argues. Or perhaps the ISA system is already evolving in such a way as to respond to those criticisms that do have merit, for example, by tightening formerly vague and expansive legal text (pp. 506-507), by increasing transparency, or even by creating, as the European Union has proposed, a permanent standing "investment court" (pp. 351-354). Or perhaps it would be intolerably "hypocritical" (p. 443) for the world's advanced economies to try to impose ISA on developing countries while refusing to accept it as between themselves, or perhaps developing countries would undesirably abandon ISA if developed countries rejected it too (p. 508).

In terms of production value, the volume is well done. The book feels substantial in the hand; the editing is strong, the paper heavy, the cover attractive. In terms of content and substance, the volume does pretty well too. The contributions are more cohesive and complementary than is usually the case with edited volumes, and the editor should be congratulated for keeping his contributors in line. As a snapshot of current governmental thinking on ISA, and as a recounting of how those governments arrived at their thinking, and of how their thinking seems to have been influenced by their experiences to date with ISA, the book excels. David Gantz's chapter on the United States, Luke Nottage's on Australia, and August

Reinisch's on the European Union are especially comprehensive and interesting. For readers who are approaching the ISA debate with little or no knowledge of what developed-country policy toward ISA is, or where it might go, the book provides a good starting point for further learning. Each chapter's extensive footnotes provide the reader with a more-than-adequate entrée into this formerly esoteric and inaccessible area of international law.

But if the book is primarily focused on ISA in the present, with the aim of influencing how it is in the future, is it of interest to readers of H-Diplo, who often operate in the past? I think it is, albeit in a somewhat limited way, to the extent that it suggests interesting and important research questions that the book's authors—trained as lawyers, not as social scientists or diplomatic historians—do not address on their own. Most relevant is the frequent claim made by ISA supporters that ISA is desirable in large part because it "depoliticizes" investment disputes (pp. 220-221). The basic idea starts from a deep suspicion of a world in which the foreign investor's primary protection against host state malfeasance is the willingness of the investor's home state to take actions on the international stage to protect the investor's interests, up to and including "gunboat diplomacy." The suggestion is that the legalized processes of the modern era have replaced or even stand between a return to a more violent and unprincipled past.

The problem is that we seem to know very little about how diplomatic protection, broadly construed, actually functioned in the pre-investment-treaty era. Historical examples in the pro-ISA literature are few and far between, usually starting, and stopping, with summary invocations of the hoary Venezuelan debt crisis of 1902-03. But 1903 is many years distant. Much more archival work is needed to understand how the advanced states and their investors used diplomatic, legal, and other means to resolve investment disputes in the absence of a robust system of treaty-based ISA, especially in the post-World War II years.[2] My own sense, developed in a working paper, is that the pro-ISA literature's vision of politicized dispute settlement is something of an ahistorical caricature.[3] Politicized dispute settlement could achieve reasonable outcomes in reasonable amounts of time, and it could do so entirely pacifically. Even in the absence of investment treaties, host states were not free to treat investors with impunity. Nor were investors necessarily able to drag their home states into military conflict. Politicized dispute settlement could be moderating, and it could be effective, especially where home state, host state, and investor shared a mutual interest in future cooperation. My claim, based on a microhistorical analysis of the public and private-sector reactions to Mauritania's seizure of the MIFERMA iron ore operations in the 1970s, is interesting in a purely academic sense, but it is also of significant policy importance. It suggests that we might successfully de-legalize investor-state relations without necessarily returning to an imagined era in which investor-state disputes were resolved by threat of steel and fire.

Notes

[1]. Scholarship on the subject is too vast to comprehensively cite here, but for a recent empirical overview, see Daniel Behn, "Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State of the Art," *Georgetown International Law Journal* 46, no. 2 (2015): 363-416.

[2]. For a notable exception to the lack of serious primary-source historical inquiry on this subject, see Noel Maurer, *The Empire Trap: The Rise and Fall of U.S. Intervention to Protect American Property Overseas, 1893-2013* (Princeton, NJ: Princeton University Press, 2013).

[3]. Jason W. Yackee, "Politicized Dispute Settlement in the Pre-Investment Treaty Era: A Micro-Historical Approach," University of Wisconsin Legal Studies Research Paper No. 1412 (May 16,

2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2968988. See also Jason Webb Yackee, "The First Investor-State Arbitration: *The Suez Canal Company v. Egypt* (1864)," *Journal of World Investment & Trade* 17, no. 3 (2016): 401-462 .