Procedural Innovations in Investment Arbitration in Consideration of Public Interests

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Introduction

1. The Crux of the Matter
2. Varying Approaches
3. Solutions
4. Future Developments
5. Conclusion

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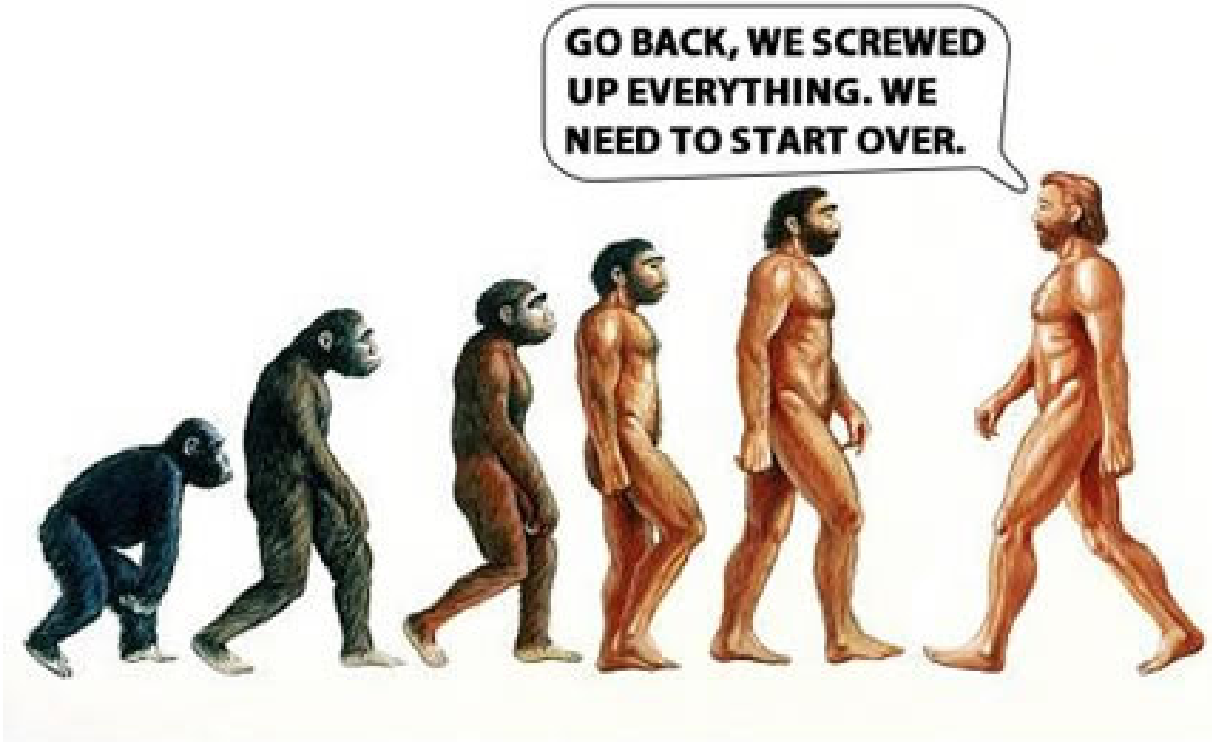
I. The Crux of the Matter

1. Commercial Arbitration as Dispute Resolution Process between Two Private Parties (procedural focus)
   - Confidentiality
   - Two-party centric
   - Awards generally not public
2. Involvement of State in Arbitral Proceedings Brings Particular Procedural Challenges (administrative law perspective?)
   - Transparency ("it's the tax payers' money")
   - States accountability affects more than just two parties to dispute
   - Precedential nature of public awards (body of case law)

II. Varying Approaches

1. "Devolution"

   Abolishing investor-state dispute settlement (ISDS) altogether



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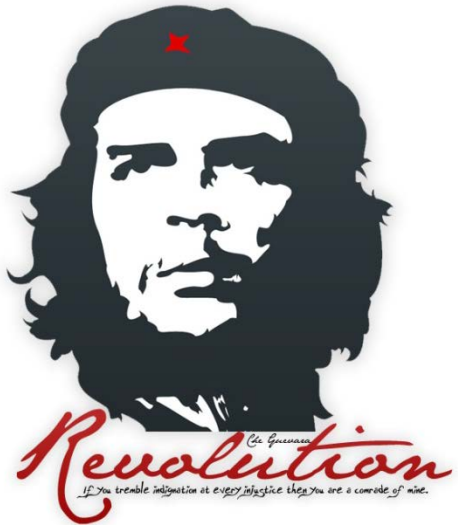
II. Varying Approaches

2. "Revolution"
   - Permanent investment court, appeals mechanism, change ICSIS
   - Latin American arbitration centre (UNASUR)
   - Return to Calvo Doctrine (exhaustion of local remedies)



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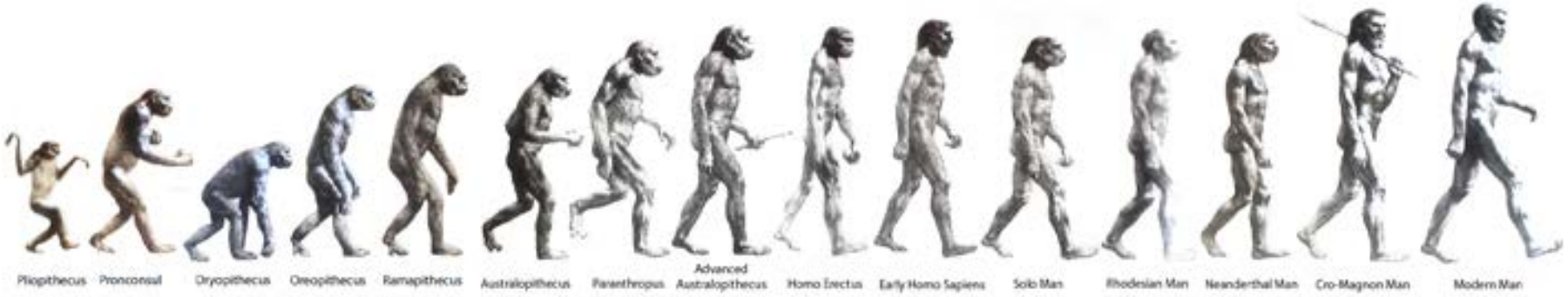
II. Varying Approaches

3. "Evolution"

   Adjustment of current regime in small, but steady steps

   - Most "workable" solution
   - Adjustment has already begun
   - Ongoing negotiations of big multilateral trade and investment agreements will shape the future



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II. Varying Approaches: Interest-Based Considerations

Which Public Interests Are Considered Relevant in Procedural Matters?

- Transparency (of procedure/overall process)
- Consideration of public interests of non-parties
- Efficiency
- Effectiveness of procedural safeguards
- Outcome control

II. Varying Approaches: Source-Based Considerations

How can Public Interests be Introduced for Procedural Matters?

- International Investment Agreements
- Arbitration Rules
- Add-on to Arbitration Regimes
- Non-binding "opt-in" provisions

III. Solutions: Transparency

1. IIAs:
   - Art. 10.21 DR-CAFTA: Publication of all case documents; arbitral hearings open to public
   - To be expected to become IIA standard (EU, Canada, Japan)
2. Arbitration Rules
   - ICSID: Public registration of cases and procedural history (C 36(3); open hearings (AR 32(2)); publication of excerpts of awards (AR 48(4))
3. Add-on to Arbitration Regimes/Opt-in
   - 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

III. Solutions: Third-Party Involvement

1. IIAs:
   - Art. 10.20(2) DR-CAFTA: Authority of arbitral tribunal to accept *amicus curiae* submissions (discretionary framework)
   - Art. 10.22(3) DR-CAFTA/1131 NAFTA: interpretation of Free Trade Commission on provisions in IIA binding on tribunals
2. Arbitration Rules
   - ICSID: *amicus curiae* allowed, within boundaries: (1) helpful to tribunal, (2) topical, (3) significant interest of *a.c.* (AR 37(2))
3. Add-on
   - NAFTA Fair Trade Commission statement on non-disputing party participation, 7 October 2003 (many limitations)

III. Solutions: Efficiency

1. IIAs:
   - Art. 10.20(4)/(5) DR-CAFTA: Early-stage dismissal of merit-less claims
2. Arbitration Rules
   - ICSID: early dismissal of cases of manifest lack of legal merit (AR 41(5))
3. Policy consideration
   - Against public interest for state to be embroiled in lengthy and costly battle that can only be won after couple of years
   - So far fully/partly successful in 6 out of 14 known cases

III. Solutions: Efficiency

4. Non-binding "opt-in" provisions

   2012 IBA Rules for Investor-State Mediation

   - Policy consideration
     - Can avoid or end lengthy arbitrations
     - Allow interest-based solution to disputes
       (might make it easier to take into account public interests)
   - Effectiveness yet to be proven

III. Solutions: Increased Effectiveness of Procedural Safeguards

1. Policy considerations:
   - IIA already contain various procedural safeguards/hurdles with respect to investment arbitrations ("waiting clauses", "fork-in-the-road provisions", "waiver clauses", "local remedies clauses")
   - Problem: vague language makes clauses often ineffective
2. IIA
   - 26(5) Canada Model BIT (2004): "conditioning" state consent to investment arbitration
   - Ensures that procedural safeguards are given full effect and enhances legal certainty (lot of "legitimacy" crisis discussion in fact centers around these provision)

IV. Future Developments

1. Further Changes to be considered:
   - Appeal's mechanism
   - Elimination of conflicts of interest (ICSID changing direction in arbitrator challenges; control of third party funding conflicts)
   - Return to stronger importance of local remedies
2. Trend
   - Public interests will significantly transform the ISDS procedure in coming years
   - ISDS provisions will become longer and more detailed – might bring its own complications

V. Conclusions

1. Private procedure yes, but with significant adjustments
2. Contracting states, treaty negotiators will be main driver of adjustments
3. Identification of public interests ("what?") and way of introduction into the procedure ("how"?) will continue (matrix)
4. Some progress (procedural innovations) has been made over the last 10 years
5. The next 10 years will likely further transform the ISDS procedure as we know it today

Thank you!

Questions? Discussion

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