
ISDS
and
the recent role of Canada in its reform

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ISDS

- Investor-State Dispute Settlement [ISDS] is a system which gives foreign investors right to sue national governments before arbitral tribunals instead of domestic courts.
- I focus on a limited number of values

Why values

Values matter:

- ❖ Values form a foundation, or in other words “**standards**” and “**principles**” on which the legal system is based.
- ❖ They are part of the “**background**” in which judges or arbitrators operate.

Public/ Private values

Values traditionally divided to Public versus Private :

- **Public values:** accountability, transparency and access to information, participation, the right of access to an independent court, due process rights, including the right to be heard and the right to reasoned decisions and reasonableness
- **Private values:** party autonomy, finality of the awards, neutrality of the adjudicative forum, confidentiality and trust
- **Public/ Private debate also present in ISDS**
 - ❖ Species of global administrative law
 - Or
 - ❖ Private law

This public/ private debate is not essential for my research as I seek a number of **values shared** by public and private law.

Public values delivered in private law

- Private law is a technique or instrument used by public authorities
- Private law has regulatory function – in tort law, trust law, family and employment relationships and also contract law (eg externalities; duty of care, collectivity etc.)
- Protection of “non-parties”
- Acknowledged in domestic and international private law

Shared values

- Under the umbrella of the Rule of Law, there are values which are **not confined** to public law only. Some of the public values are also recognised in private law.
- There is a **spectrum** of approaches, in contexts ranging from public to private law, in which public values are recognized and implemented.

Shared values

- They can be found under the overarching Dawn Oliver's **common values**: control of the use and abuse of power and protection of vital individual and public interests:
 1. **Controlling** exercises of power
 2. **Protection** of certain vital interests of individuals and public interests in relation to public as well as private bodies.
 3. **Role of the courts and tribunals**

Shared values in my research

I focus on a **limited** number of shared values. Shared values that I seek to examine are linked to the right to a fair trial.

❖ Participation

- Provides an ability to the affected party to influence the decision which directly affects such a person and present facts which enables adjudicators to reach fair and an informed decision.
- A principle of Natural Justice - *audi alteram partem* - requiring to allow other parties to be heard.
 - Implications beyond parties to the dispute (the host state and the investor)
 - Interests of other parties are frequently adversely affected (individuals, local communities and even the entire Host State population)
 - *Chevron Corp v Republic of Ecuador* – example of issues with procedural fairness

❖ Independence and impartiality of adjudicators

- Independence refers to the freedom from an improper influence
- Impartiality refers to the freedom from bias or favouritism.
- To maintain public confidence in fair adjudication

Values versus supremacy of party autonomy

Proponents of ISDS as private law claim that **party autonomy** has supremacy over other values.

However:

- ISDS has authority conferred by Treaty not private parties
- Treaty is a Sovereign act – deals with acts or inaction of the State in its sovereign capacity
- Sovereign – rights and duties – right to change or revoke the Treaty; duty to protect own citizens etc.
- Treaties are silent on this point
- Party autonomy has its own limits – public policy, states' mandatory rules etc.
- Interpretation – ISDS Tribunals in various instances seem to have disregarded principles of party autonomy and sanctity of contract
- Right to a fair trial – participation in front of an independent adjudicator guaranteed:
 - ❖ Constitutionally
 - ❖ As Human Rights eg under the ECHR

Canada's role

- Through Investment treaties Canada and other states are subject to ISDS.
- Canada involved in the reform of the processes related to dispute settlement mechanism - in The EU-Canada Comprehensive Economic and Trade Agreement (CETA) through the Investment Court System (ICS).
- This reform is linked to the values related to independence and impartiality of the adjudicators.
- The ICS sets a new process for the selection of adjudicators and their code of conduct which both promote their independence and impartiality:
 - at least 15 tenured adjudicators nominated by the parties to the treaty – the EU and Canada
 - the three members of tribunal should be randomly-selected from the roster
 - the International Bar Association's ethical requirements for tribunal members
 - set remuneration
- However, this reform might be still insufficient as it falls short to discuss the issue of participation by all affected parties.

Values and institutional design

The role of arbitral institutions is critical to safeguard these values and maintain public confidence.

Arbitral institutions:

- Have the power to **shapes** the industry
- Prescribe procedural rules – so affect the **adherence** to the rule of law values:
 - ❖ A given right or not – to participate in the trial
 - ❖ Secure independence and impartiality of adjudication

Values in ISDS

- These shared values are subject of concern and debate.
- Out of fairness to ISDS, it is important to compare ISDS to other adjudicative systems to see what variations exist.
- Whether there is a justification.
- Whether ISDS is really unique.

Comparative study

- If the way that ISDS safeguards these shared values is really of a concern, to find out how it could be addressed we need to look to other systems.



- A comparative study follows – examines which mechanisms ISDS and other public and private adjudicative bodies employ to safeguard these values - guaranteed right to participate & adjudicative independence and impartiality.



Thank you