PART IV

INVESTMENT ARBITRATION AND ITS DISCONTENTS

Chapter 14

Backlash to Investment Arbitration: Three Causes

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I. INTRODUCTION

There are at least three reasons for the current backlash against the regime that governs most serious disputes between foreign investors and host governments. First is the inconsistency of the decisions rendered by arbitration panels. Second, and perhaps most important, is the very rigid view of contracts that panels have tended to take, even when a host country is in economic crisis. A third cause of backlash is closely related to the second: the seeming insensitivity of arbitration panels to signals that corruption or incompetency might have been involved in the original negotiations or subsequent renegotiations of agreements that gave rise to disputes.

The inconsistency of decisions affects attitudes of both investors and host governments toward the investment regime. On the other hand, rigid interpretation of contracts is of concern primarily to governments, who see it as favoring investors, because bilateral investment treaties usually authorize only investors to bring claims on their contracts in international forums; host governments rarely have parallel

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Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, and Claire Balchin,
The Backlash against Investment Arbitration: Perceptions and Reality, pp. 341–352.

rights and thus do not suffer from the typically rigid attitudes toward contract. Similarly, incompetency and corruption are primarily issues for host governments.

Of course, there are other concerns on the part of both sides: arbitration's expense, the length of time required to resolve a case, and particularly the degree of bitterness that the dispute settlement process generates between investor and the host country. None of these issues, however, threatens the system as do the first three concerns.

II. FIRST CAUSE: INCONSISTENT DECISIONS

Other chapters in this volume have dealt extensively with the inconsistency of awards.[1] Decisions differ from one panel to the next on similar cases, and the standards applied for calculating monetary awards, when they are made, appear to an outsider to be especially varied. There is no point in repeating the evidence here.

Inconsistency should not be a surprise. The current regime is based on "legislation" that is mainly contained in bilateral investment treaties (BITs) and the investment provisions of regional trade agreements (RTAs). These agreements and "international law" provide only the most general guidance to arbitration panels. The lack of detailed legislation stands in contrast to the basic agreements and the national commitments of the World Trade Organization (WTO), which govern trade. In the absence of deep legislation and a review process, each panel is free to interpret the vague legislation as it sees fit. The arbitration decisions lead claimants or respondents to lose trust in a system when other claimants or respondents in similar situations appear to receive quite different treatment.

III. SECOND CAUSE: A RIGID VIEW OF CONTRACT

Western lawyers typically promote a very strong view of sanctity of contract. Yet, in practice, all lawyers know what the public knows: contracts and property rights are not rigid. They bend to broad economic and social goals, financial crises, acts of God, and other objectives and events. Similar flexibility has not so far characterized decisions of arbitrators in disputes over foreign direct investment.

Most American school children learn in high school literature classes that contracts are subject to reason. The plot in William Shakespeare's "Merchant of Venice" turns on how to avoid enforcing the letter of a contract when adherence would result in socially unacceptable cruelty. Some say that Shakespeare knew little about the law; in the Europe of his time, critics contend, no court would have rigidly enforced Shylock's contract that called for a pound of flesh from

1. *See* the contributions in this volume by August Reinisch, The Issues Raised by Parallel Proceedings and Possible Solutions 113; Christina Knahr, Annulment and Its Role in the Context of Conflicting Awards 151; and Richard Kreindler, Parallel Proceedings: A Practitioner's Perspective 127.

an errant debtor. Accordingly, the complex plot was not necessary. Whatever a real court might have done, Shakespeare assures the "right" ending: the contract calling for such a severe outcome in the event the debt was not paid was never honored.

Probably more to the point of foreign investment disputes, I learned in an earlier, but brief, career that contracts bend to changed circumstances, especially when societal interests are at stake. Before going to graduate school, I repossessed cars for a Georgia bank. The training of a new "repo man" included a lecture warning that not all of the provisions in the conditional sales contracts the new employee was charged with enforcing were valid in every circumstance. Among other cases, I remember being warned not to repossess a car belonging to someone who had joined the military after signing the contract. What was then called the Soldiers and Sailors Relief Act protected the borrower, regardless of the letter of a contract that had been duly concluded. The borrower would likely face lower wages in the military than what she or he had been earning when the deal was struck. Legislators had concluded that societal goals of having a cheap military outweighed the interests of the bank lender. The new soldier was not assured of a free car; the bank could renegotiate the deal, but it could have no confidence that it could enforce the original contract.

Substantially changed circumstances can invalidate a contract or a clause in a contract without special legal provisions such as the Soldiers and Sailors Relief Act, of course. Say I have a contract with a workman to paint my house, but before the work starts the house burns down. Common sense—or economics, Posner might say—not contract, must prevail.[2] The painter does not have to waste productive resources by painting the ashes, nor am I likely to have to pay the painter the full amount of the contract. I will have to negotiate with the painter, or even go to court; in the end, I may well have to pay something, perhaps the cost of the special paint that has been purchased and mixed and even some part of wages for workers who cannot be quickly put to work on alternative projects. But the contract is unlikely to be rigidly enforced without due consideration to intervening events, even if the contract contains no force majeure clause. On top of that, the painter will have an obligation to minimize losses by, for example, finding other tasks for his workers.

Governments of host countries in financial crises, such as Indonesia in 1997/1998 and Argentina in the early 2000s, see themselves as being much like the soldier or the devastated house owner. To be sure, there is no international equivalent of the old Soldiers and Sailors Relief Act (perhaps there should be), but no special law is required for a court to conclude that the painter does not have to paint the ruins and to relieve the homeowner from an obligation for the whole payment. Yet, governments facing a collapsing economic house have not generally been relieved of any of their contractual obligations to foreign direct investors when cases have gone to arbitration. For example, following the Asian currency crisis, two US investors in Indonesia were given awards by arbitrators that showed

2. Richard A. Posner, Economic Analysis of Law (3d ed. 1986).

little sympathy for the need for relief.[3] With the collapse of the Indonesian currency, the government—and its state-owned power company—had tried to renegotiate contracts for unfinished power plants that would have produced electricity thought not to be needed in the subsequent deep recession and which required its purchase at prices that were up to six times in local currency what had been originally negotiated.[4] Many investors renegotiated their arrangements. Some, however, refused and turned to arbitration. Arbitrators, with little attention to the collapsing Indonesian economy, awarded investors not only what they had invested in the projects to date—a sensible base award, like the painter who had bought paint—but also a substantial portion of the net present value of 30 years of future earnings.[5]

Different attitudes could emerge. Following the Argentine crisis, one tribunal accepted a "necessity" argument and did not hold the Argentine government responsible for strict adherence to contract,[6] but in an almost identical case in the same country another tribunal had, only 18 months earlier, rejected the argument.[7] The conflicting decisions established no precedent that could comfort countries that face catastrophic crises.

Inside industrialized countries, companies in crises have options that can excuse them from honoring a wide range of contracts. A US company that goes through bankruptcy under Chapter 11 can end up with rescheduled or even discharged debt, renegotiated union contracts, and relief from contractual pension obligations. Surely it is not surprising that a backlash occurs when a host country fails to receive similar relief from obligations to direct investors when it faces severe economic problems.

In fact, the regimes that handle sovereign obligations of developing countries generate oddly perverse outcomes. With arbitrators' rigid interpretation of contract, foreign direct investors are likely to come out better in crisis-stricken countries than are holders of sovereign debt. Governments sometimes reduce the value of debt unilaterally—by 70% or so in the Argentine case—or negotiations in the London Club or the Paris Club result in rescheduling or partial discharge—while foreign direct investors stand to be made whole by arbitrators. This creates a topsy-turvy world where foreign direct investors stand ahead of debt holders in the queue for claims in crises. Direct investors hold equity in their projects and contend

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3. Karaha Bodas Company v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, Final Award (Dec. 18, 2000), 16 MEALEY'S INT'L ARB. REP. C2–C17 (2001); Himpurna California Energy Ltd. (Bermuda) v. PT. (Persero) Perusahan Listrik Negara (Indonesia), 14 MEALEY'S INT'L ARB. REP. A-26 (1999); and Patuha Power Ltd. (Bermuda) v. PT. (Persero) Perusahan Listruik Negara (Indonesia), 14 MEALEY'S INT'L ARB. REP. B-14 (1999). The last two were both cases involving MidAmerican Energy in Indonesia.
4. The prices to the national power company were largely dollar indexed.
5. Louis T. Wells, *Double Dipping in Arbitration Awards? An Economist Questions Damages Awarded to Karaha Bodas Company in Indonesia*, 19 ARB. INT'L 471 (2003).
6. LG&E Energy Corp v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), http://ita.law.uvic.ca/documents/LGEArgentinaLiability.pdf.
7. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005), 44 ILM 1205 (2005). For an analysis of the two cases, *see* Michael Waibel, *Two Worlds of Necessity in ICSID Arbitration:* CMS vs. LG&E, 20 LEIDEN J. INT'L L. (2007).

that they should earn higher returns than lenders, as compensation for the risks associated with equity.[8] Yet, when it comes to dispute settlement for countries in crises, the priorities are the opposite of what a bankruptcy court would establish inside an industrialized country. While host governments react against the investment regime, it is no wonder that holders of sovereign debt have been attempting to have their claims treated the same way as the claims of foreign direct investors.[9]

A. One-Way Impact

In practice, rigidity in interpreting contracts usually generates reactions only from host governments. Many contracts between foreign direct investors and host governments or their state-owned enterprises are renegotiated when investors face problems. A World Bank study of renegotiation of infrastructure investment agreements in Latin America found that more than half of renegotiations have been initiated by investors, not by the state or state-owned enterprises.[10] Under almost all BITs, the state has no authority to go to arbitration to collect damages from an investor that does not carry out its obligations under an investment agreement.[11] Renegotiation may be its only option, if the investor insists on not following the earlier deal. Consider the *Aguas Argentinas* case, involving water for Buenos Aires, which was being heard at ICSID at the time of writing.[12] In the past, Suez and other investors in this project had initiated renegotiations to change the terms to be more favorable to them. The government had no international rights to enforce the terms of its original contract when faced with investor demands. On the other hand, when the Argentine financial crisis struck and the government was under pressure to renegotiate, the lead investor filed for arbitration to enforce the most recent version of its agreement.[13]

8. Some electric power investors have, for example, sought returns of greater than 20% on their total assets and 30% on the equity component. For estimates for one project, *see* Louis T. Wells & Rafiq Ahmed, Making Foreign Investment Safe 147 (2007). Of course a particular direct investment project might have equity as well as debt. Within the project, lenders may well have first claim on any arbitration award.
9. Three cases based on sovereign bonds are currently pending before ICSID: Beccara et al. v. Argentine Republic, ICSID Case No. ARB/07/5 (registered Feb. 7, 2007), Giovanni Alemanni et. al v. Argentine Republic, ICSID Case No. ARB/07/8 (registered Mar. 27, 2007); Giordano Alpi et al. v. Argentina Republic, ICSID Case No. ARB/08/9 (registered Jul. 28, 2008).
10. J. Luis Guasch, Granting and Renegotiating Infrastructure Concessions: Doing It Right 12–13 (2004).
11. There are some narrow exceptions to this general rule, explored in this volume by Mehmet Toral & Thomas Schulz, The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations, 577.
12. Aguas Argentinas S.A. Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19, Decision on Jurisdiction (Aug. 3, 2006), http://icsid.worldbank.org/ICSID/.
13. To be fair, investors did engage in some efforts to renegotiate when the crisis hit. With a government more concerned about the broader effects of the crisis, striking a new deal would have required a large amount of patience on the part of the investor group. Yet, in similar

Infrastructure investments, similar to that of *Aguas Argentinas*, have generated a large number of the disputes before ICSID. Disputes have been frequent due to the form that many infrastructure agreements have taken: they have either take-or-pay provisions (common, for example, for electricity) or they cover a product with inelastic demand (such as water). And they have been dollar indexed,[14] as were the Indonesian power cases and *Aguas Argentinas.* When a country's currency crashes, as in Indonesia or Argentina, the result is that the state power company or the public consumer of water has to pay a multiple in local currency of what it was paying before the crisis if the contract is to stand. In Indonesia, at one point electricity prices would have had to go up by a factor of six. It would be political suicide for a government to authorize such price increases. To survive, it must renegotiate or abrogate the deal.

After infrastructure, oil and mining agreements account for a large number of disputes. Like for infrastructure, many agreements have been renegotiated in the past at the initiative of investors. In particular, when mineral prices have declined or when discoveries have not turned out to be as attractive as expected, companies have insisted on relief from high royalties or taxes. Similar to the cases of infrastructure investors who seek renegotiation, BITs and RTAs offer governments no rights to proceed to arbitration to defend their contracts with investors in minerals. On the other hand, when governments see sharply rising minerals prices—as they did recently—they may attempt to capture a larger share of the rents from the minerals that they own. Political and economic pressures almost assure that governments have to renegotiate old agreements; failure to protect national wealth could be political suicide. This is the case whatever legal rights foreign investors might hold. Although some investors yield to the pressure to renegotiate, others resist renegotiations when it is the state that initiates them and instead turn to arbitration to enforce their old agreements. A number of the largest claims before ICSID arise from this kind of dispute.

The lack of symmetry in the current dispute settlement regime, with protection for investors but not for host governments, appears unfair to host governments. It is, of course, a product of the unequal bargaining power when rich countries negotiate treaties with poor countries. If investors had to face rigid enforcement of their contracts, the odds are high that they would want some review of the system in order to make it more responsive to changed or unforeseen circumstances. After all, they want to be relieved of their obligations when events or facts are vastly different from what they foresaw.

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circumstances elsewhere, other investors have managed to renegotiate to new terms with which they could live. While two electric power investors (three projects) in Indonesia went to arbitration, others settled after long negotiations. It appears that the two that turned to arbitration had little interest in settling. Exiting the business, they preferred cash to new terms.

14. The original contract for *Aguas Argentinas* did not peg water prices to the dollar; pegging was one of the revisions that emerged from subsequent renegotiations.

IV. THIRD CAUSE: CORRUPTION AND INCOMPETENCE

Unfortunately, the terms of many deals struck by foreign investors in developing countries reflect corruption or incompetence, or both, on the part of government officials. The benefits accruing to the host country under such arrangements are often markedly out of line with those that come from agreements struck elsewhere. Differences may include lower royalties, exemptions or special rules for taxation, or the allocation of substantial risks to the host country, for example. Such agreements have become subjects of disputes when a new government takes over, the press makes an issue out of imbalanced terms, or economic crises or high minerals prices bring attention to the agreements.

Only rarely have arbitration panels been willing to conclude that an agreement was unfair to the host country because it was negotiated with corruption or by officials lacking adequate competence.[15] The standard of proof for corruption has been so high that few governments have been able (or willing) to produce convincing evidence. This has been the case even when publicly available facts indicate that corruption or substantial conflict of interest was present in the original negotiations. Consider as examples the Indonesian electric power cases cited above. In all three projects that went to arbitration, members of government officials' families or military organizations (in a country with a military-backed government at the time) had received shares (and, in one case, dividends on those shares before the project was up and running) in the projects for no obvious contributions—money, skills, or market access. To be sure, with some of the same officials still in power when disputes arose, lawyers for Indonesia were constrained from pushing hard on the corruption issue.[16] Yet, during testimony before the arbitration panel, it became clear that at least one of the investors knew little at all about its local "partner." Under the circumstances, it would not have been unreasonable to ask whether the terms of the agreements were "fair" to the country and, if not, conclude that unfair terms in the agreement might have been the result of corruption or conflict of interest.

In the United States, courts have not hesitated to invalidate or revise contracts that appear to have been negotiated under corruption or under conditions where one party was not advised by counsel. In the obvious case, contracts signed by minors, without the capacity to conclude contracts, are not enforceable. In less obvious cases, judges invalidate premarital agreements that were signed just before a wedding or when one of the parties did not have independent legal advice. Premarital contracts are especially likely to be held invalid or to be modified when the judge considers the terms of the contract to be unfair. Absolute proof of coercion or incompetence is not required; unconscionable terms can be sufficient grounds for departing from such contracts.

15. For a summary of cases, *see* Jason N. Summerfield, *The Corruption Defense in Investment Disputes: A Discussion of the Imbalance between International Discourse and Arbitral Decisions*, 6 TRANSNAT'L DISP. MANAGEMENT (2009), www.transnational-dispute-management.com.

16. Wells & Ahmed, *supra* note 8, Ch. 14.

Yet, arbitrators of investment disputes have very rarely made similar calls. As a result, contracts that are unfair to host governments are enforced, regardless of the fact that terms dramatically out of line with terms elsewhere may have been the result of incompetent officials, poor or no outside counsel, or corruption. The resulting terms may not be in the public interest, whatever the causes. When a panel sees returns to equity holders of 35% or more after taxes in an industry where typical returns are 7–10% and most risks (exchange rate, market demand) are shifted from the investor to the government, there is at least circumstantial evidence that the terms are unconscionable. With a less rigid view of sanctity of contract and an eye toward the public interest that a government is supposed to represent, a panel might not worry about more substantial proof of corruption or even incompetence before it refuses to enforce the contract rigidly.

In the case of sovereign debt, as opposed to direct investment, there have been proposals for applying the concept of ‘‘odious debt’’ to relieve countries of obligations that were incurred by unrepresentative or corrupt regimes and not for the public good.[17] Nevertheless, the concept has made little progress. One reason might be the lack of a regime for hearing a range of types of cases. The Paris Club and the London Club handle sovereign debt held by governments and commercial banks, but widely dispersed holders have no forum other than national courts to hear their cases. But for direct investment, something closer to a single regime exists. Still, the concept has not gained a foothold in investment cases. Since poor countries are forced to pay up even on what they reasonably view to be ‘‘odious’’ agreements, it can be little surprise that there is some backlash.

V. REMEDYING THE CAUSES OF BACKLASH

A. Ideal: Multilateral Agreement

In an ideal world, the backlash from developing countries would be ameliorated through the conclusion of a multilateral agreement on foreign direct investment. Home and host countries would find mutually acceptable terms that they could sign on to. A model for such an approach would be the World Trade Organization. But, even in the medium term, a multilateral agreement on foreign direct investment seems not to be in the cards. So far, all efforts to build global agreements on investment have failed, including the proposals to cover investment matters in the 1947/1948 Havana Charter, efforts of the United Nations to negotiate a code, OECD negotiations, and attempts to build a comprehensive investment regime into the World Trade Organization.[18] New efforts are unlikely to fare better.

17. *See* Seema Jayachandran & Michael Kremer, *Odious Debt*, 96 Am. Econ. Rev. 82 (2006). Although various authors trace the concept back at least to the Spanish American War, its formalization is usually attributed to Alexander N. Sack, Les Effets des Transformations des États sur leurs Dettes Publiques et Autres Obligations Financières (1927).

18. The WTO does contain some trade-related investment measures (TRIMS), which limit host country policies toward incoming investment such as requiring exports or domestic content.

Unlike for trade, negotiations on investment issues countries tend to divide easily into two camps with different interests: exporters of foreign direct investment and importers. Furthermore, unlike for trade, proponents have not put forward broadly accepted principles that can guide negotiations. Even the most-favored-nation principle that has been accepted for the trade would not pass a political test for investment even in the industrialized countries. The uproar about Dubai Ports World's 2006 acquisition that would have put it in charge of certain US port facilities that were already British-operated made it clear that investors from Arab countries are viewed differently from investors from other countries. In many countries, it does matter where investment originates. The principle of national treatment has also proved inadequate. Foreign investors—with home government backing—seek better treatment for their subsidiaries than domestic firms receive. Moreover, at least to date no one has proposed satisfactory ''escape clauses'' for a global investment agreement. Their importance in trade arrangements suggests that without parallel provisions no investment agreement is feasible. With little prospect of success in building a multilateral accord in the near future, one is left with more modest approaches, mainly in improving the current regime.

B. Appellate Process

One step to ameliorate the backlash is to develop richer legislation that would reduce the inconsistency of decisions. In the absence of more detailed provisions on foreign direct investment from multilateral negotiations, one must rely on the development of precedents to create a common law to govern disputes. But creating precedents demands a supreme appellate ''court.'' Without an appellate body, arbitration panels are under little pressure to provide the kind of full accounts of their reasoning in individual cases that would make them useful to build precedents and, more important, there is no mechanism to resolve conflicting decisions from different arbitration panels. As long as conflicting outcomes on similar issues stand, a common law relying on precedents cannot develop.

Any greater consistency of decisions that would emerge with the development of deeper common law would also contribute to reducing the costs of dispute settlement and the accompanying bitterness that now builds up between investor and host country in the arbitration process. Arbitrations will still take place, but perhaps fewer. After all, there is no point in going to arbitration if the outcome is reasonably predictable in advance.

An appellate body structured along the lines of the appeals process of the WTO would not only lead to rich common law; it could also encourage panels to be responsive to financial crises, corruption, and incompetence.[19] Introducing

No provisions within the WTO provide security against expropriation or repudiation of contract, however. Nor do they contain any of the many safeguards that host countries have sought in negotiations for global investment agreements.

19. *See* Gabriel Bottini''s contribution to this volume, Legality of Investments under ICSID Jurisprudence, 297.

the concept of "odious" contracts is only one way of handling these issues. If host countries had a voice in the process, attention to these issues would likely increase. To assure this, the appeals "court" should be made up of "judges" who are broadly representative of capital importing and capital exporting countries, parallel to the requirement that WTO appeals panels be broadly representative of the organization's membership.

Decisions from the WTO appeals process have demonstrated that an international appellate process can—like the US Supreme Court—respond to changing public values even when legislation lags. The WTO Appellate Body used Article XX of the GATT in effect to change applicable law on protection of the environment by allowing countries to restrict imports that are produced by methods that are damaging to the environment. In a 1991 case, the GATT decided against the United States when it restricted imports of tuna captured in ways that could harm dolphins. In doing so, it explicitly rejected the application of Article XX. Then in a decision finalized in 1998, the WTO turned around and allowed the United States to restrict imports of shrimp (as long as the action was non-discriminatory) that were caught in ways that threatened sea turtles, citing Article XX as justification.[20] The later decision reflected new and widely held views of the importance of environmental issues.

With increasing concern about corruption and financial crises, a balanced appellate body for investment disputes could well conclude that severe financial crises relieve countries of some of their contractual obligations with regard to foreign direct investment and portfolio investment, that patently unconscionable agreements should not be rigidly enforced, even without clear proof of corruption or incompetency, and that changing social values should lead tribunals to revisit precedents.

C. Symmetry

Contracts, or concessions, for mining and petroleum have long included arbitration provisions to cover disputes. They have typically granted to either party—investor or host country—the right to arbitration if the other party fails to live up to its commitments under the agreement. BITs and investment provisions of RTAs have been different, with access to arbitration limited to investors. There seems to be little reason, aside from the weak bargaining power of poor countries, for BITs and RTAs to be asymmetric with respect to rights to arbitration. Symmetry of access would not only make the regime appear to be fairer, but it would likely lead to an interest on the part of investors in less rigid interpretation of contractual obligations. Given the frequency with which investors themselves see a need to change

20. For a discussion of these cases, *see* Scott C. Owen, *Might a Future Tuna Embargo Withstand a WTO Challenge in Light of the Recent Shrimp-Turtle Ruling? (World Trade Organization)*, 23 Hous. J. Int'l L. 123 (2000).

contract terms, they would find rigid enforcement of contract to be harmful to their interests.

D. Midpoint Guidance

In the United States, judges sometimes make "midpoint" statements that serve as guidelines to disputing parties. The guidelines are sometimes sufficient to lead the disputing parties to settle without continuing litigation. For example, in the US government case against Harvard for the behavior of two Harvard Institute for International Development advisors in Russia,[21] the judge, after hearing evidence, said that he was inclined not to support treble damages, as the government had sought, but that he would favor some damages. This provided sufficient guidance to induce the government and Harvard to revive negotiations and reach a settlement, without having to continue the trial to the damages stage.

Arbitrators could provide similar guidance to investors and host governments. In one of the Indonesian electric power cases, for example, an intermediate statement that the tribunal was unlikely to award the approximately US $600 million requested by the claimant but would award more than the amount of investment made thus far (about US $95 million) might just possibly have led to a settlement between the parties. (As it turned out, the final award was for US $261 million).[22] Some guidelines were more likely to lead to a settlement in the second Indonesian case (involving two projects). It turned out that the award was for more than the Overseas Private Investment Corporation (OPIC) insurance coverage on the investment, but once the award was made, the investor collected on insurance and neither the investor nor OPIC ever tried to collect the balance.[23] Perhaps the parties might have settled on their own for the value of the insurance, if some guidelines had been provided midpoint.

VI. CONCLUSION

Some of the changes that might moderate the reactions of host countries can be made within the current system. Others, however, require more fundamental revisions.

With regard to what might be the simplest change, encouraging midpoint guidance, one should not be too optimistic about the results. First, bureaucrats—whether corporate managers or government officials—frequently find it difficult to

21. For one version, *see Russia Case (and Dust) Settle*, Harv. Magazine, November–December. 2005, 59, http://harvardmagazine.com/2005/11/russia-case-and-dust-set.html. A longer and influential (at least within Harvard) article on the subject was David McClintick, *How Harvard Lost Russia*, Institutional Investor, Jan. 24, 2006.
22. For the story, *see* Wells & Ahmed, *supra* note 8, Ch. 13.
23. *See* Wells & Ahmed, *supra* note 8, Ch. 14.

agree to a specific settlement, once an outside "judge" is available to render a decision. Both kinds of bureaucrats fear that they will be criticized later by superiors or the press for settling for too little. Better to leave the decision to an outsider, is a common but unwritten rule. This is probably especially the case when the dispute has become a public and politicized issue.

Broader reform, which requires changing an international regime, is difficult if there is no crisis. Just maybe the backlash that is emerging will shake parties with interest in the investment regime sufficiently that users and practitioners will demand changes. Yet, so far many involved in arbitration remain immersed in points of law, rather than exploring the system as such.

Constructing a better system is also hindered by the fact that bilateral and regional trade negotiations have led to 2500 or more treaties, many of which have different terms and language covering investment. They refer disputes to different forums, often ICSID but sometimes other regimes or region-specific processes. Building a single appeals process for the different agreements may be difficult. Success in working through ICSID could, however, accomplish enough that pressures will grow to bring other agreements under the same framework or to lead panels under other rules to follow ICSID precedents.

Although building common law based on provisions that differ in language is a challenge, a body of interpretations around specific language may encourage some standardization, at least in future treaties. Particularly difficult might be adding symmetrical access to arbitration. This could require reopening hundreds of negotiations.

Nevertheless, threats of some Latin American countries to withdraw from the system, wholly or partially, may lead business people to question the stability of the current system. Also, some non-governmental organizations are adding pressure for change, as they raise serious questions about the current system. Even a few lawyers have called for change, especially in the form of an appeals process.[24] With business support and some pressure from others, reform may turn out to be feasible sooner than some expect.

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24. For a series of articles supporting an appeals process, *see* Federico Ortino & Audley Sheppard, INVESTMENT TREATY LAW (2006).