

Justice in international investment law in a post-ISDS world

Is the world without investment arbitration, a world with(out) justice?

Erasmus School of Law – Erasmus University Rotterdam

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Investor-State Dispute Settlement has been undergoing profound criticism for the past fifteen years. This has, in turn, generated a wave of initiatives and proposals for reform, either institutionally mandated (e.g., the work of the UNCITRAL Working Group III) or commenced by scholars and civil society organizations. These proposals range from minimal reforms of the current investment arbitration mechanism (e.g., introducing a code of conduct for arbitrators) to a complete eradication of the system. What these all have in common is the acknowledgement that the status quo is untenable and requires at least some degree of change.

Starting from these premises, the conference intends to push the ‘reform’ debate forward and interrogate what a ‘post ISDS’ world entails in terms of delivering ‘justice’.

The conference aims to address two key questions: (i) whether and, if so, (ii) what form(s) of ‘justice’ will feature in the post ISDS scenarios proposed thus far. The conference will be structured along the following themes:

- The institutional architecture and implications of the different reform proposals, including the (re)turn to a full ‘privatization’ of ‘justice’ in investment disputes;
What are the salient features of the different proposals advanced so far? Will an ‘institutionalization’ of dispute settlement (e.g., MIC) significantly alter the perception of ‘justice’ of the ISDS system? Will abolishing treaty-based arbitration make contract-based arbitration the default mechanism? What would be the role of mediation and (possibly) facilitation mechanisms?
- The different frameworks and notions of ‘justice’ implicitly or explicitly articulated in the various reform proposals;
Justice has been articulated in a variety of forms. Yet, investor-state arbitration has been prominently considered a ‘private’ dispute resolution mechanism. What is the relationship between the dispute resolution function and ‘justice’? What other concepts of justice (e.g., distributive) do or should ISDS reform proposals normatively endorse, considering current global (e.g., climate) challenges? What type of reforms would be needed to entertain those concepts?
- ‘Justice’ for affected stakeholders other than investors or States (e.g., local community-based mechanisms, or ‘transitional’ justice for investment);
In whose interests and benefits will justice be delivered in the scenarios proposed thus far? What is the subjective dimension of justice present in the reforms and how is it addressed? What type of mechanisms can we imagine for ‘inclusive’ justice, within and beyond what has been suggested so far?
- ‘Justice’ in the substantive provisions of investment treaties and contracts underlying investment disputes;
Procedural mechanisms might well not be able to respond sufficiently to certain ‘justice’ needs and claims in the investment context; what type of substantive reforms are needed to generate a ‘just’ investment environment, both in the relevant treaties and further contractual arrangements (including insurance and financing agreements)?

- 'Justice' beyond dispute settlement. Alternatives to the current model of investment and (economic) development:

What paradigms of 'development' does the current set-up of investment law and arbitration respond to? What other alternatives to FDI can we imagine leading to a 'just' path for prosperity? What other (possibly bottom-up) models can be identified in pursuing justice in the context of 'development'?

The conference aims at contributing to the current debate on the reform of investment arbitration, by shifting the focus from the proposals as such towards the forms and notions of justice at the core of these proposals. While a seemingly theoretical question, the issue of justice in investment arbitration has profound practical implications. International investment law traditionally offers foreign investors access to compensation through investor-State arbitration, based on a highly efficient enforcement mechanism. Yet, the right for recourse is exclusive and narrowly accessible only to foreign investors, at the costs of other affected stakeholders such as local communities.

The objective of the conference is to dissect the reform proposals and investigate whether these reforms are in fact just 'business as usual' or whether they leave any space for a different paradigm that is not merely focused on financial remedies granted to investors, especially considering the consequences generated by the climate crisis. The conference will also explore what conceptual shifts are potentially necessary in the current architecture of the investment governance to address (re)distributive concerns.

The format of the conference will give significant resonance to the discussion. Relying on the Sustainability in Arbitration and Investment Law (SAIL) research initiative at Erasmus School of Law, the conference intends to bring together a varied group of experts. The intent is to ease the epistemic, conceptual, and practical divide between practitioners, civil society organizations and academics from different geographies and disciplines.

We welcome abstracts (**max. 500 words**) addressing one or multiple aspects of the themes indicated in the call from different legal and non-legal disciplinary perspectives, including economics, political economy, and development studies.

If you are interested in contributing, kindly submit your abstract to sail@law.eur.nl by **July 16th**. The conference will take place on the **23rd and 24th November at Erasmus University Rotterdam**. Successful applicants will be informed by October 1st and will be asked to submit an extended abstract (max. 3000 words) by **November 5th**.

Select papers will be invited for a post-conference publication project. Details will be shared during the event.