"PRO-ARBITRATION" Revisited

A Tribute to Professor George Bermann from his students over the years

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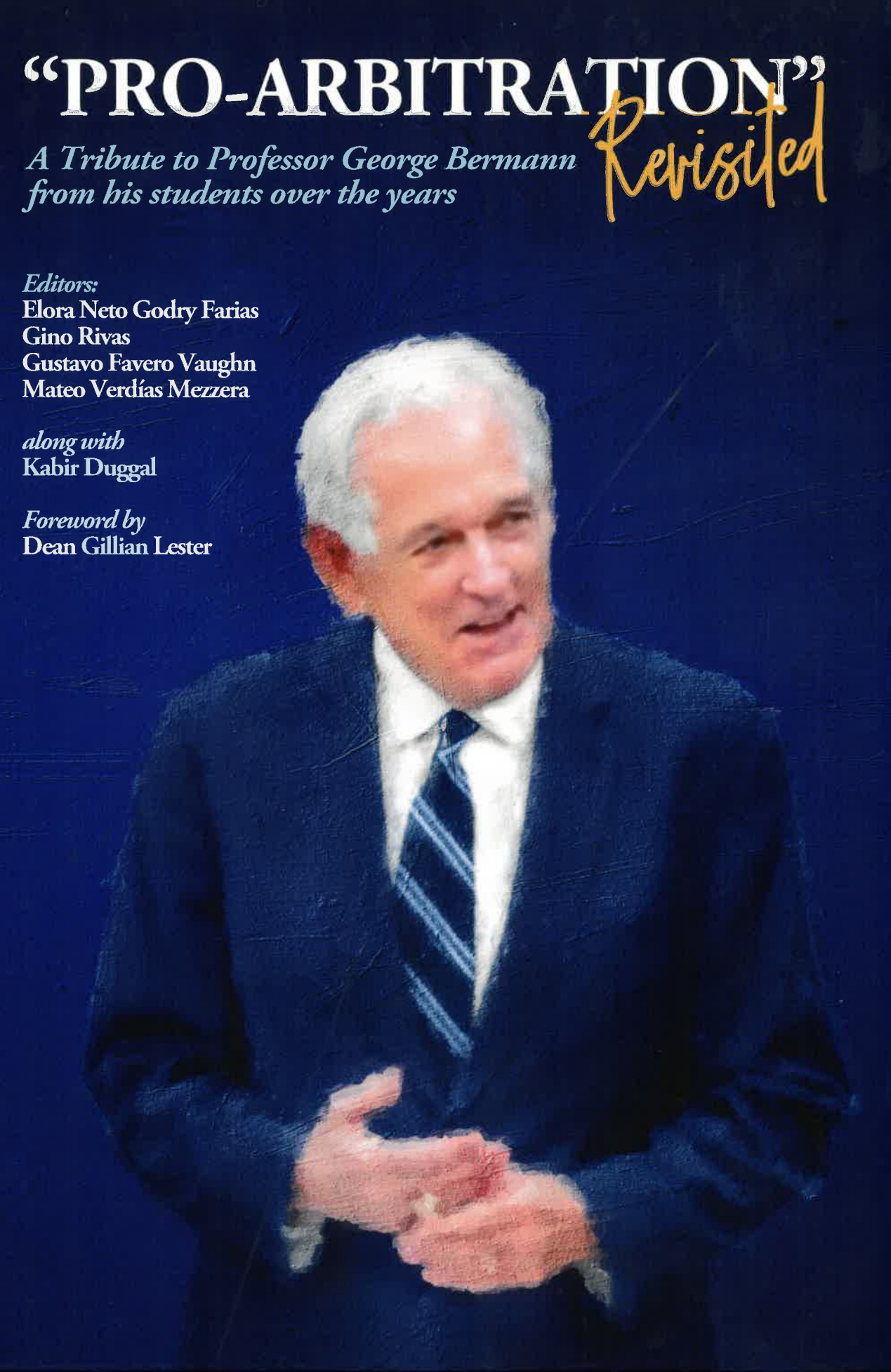

Chapter 83

WHAT DOES IT MEAN TO BE "PRO-ISDS"?

*Perry S. Bechky**

Professor Bermann left investor-state dispute settlement (ISDS) out of his interesting discussion in "What Does it Mean to Be 'Pro-Arbitration'?," calling it too politicized. Perhaps lacking the prudence of my professor, I'll try to grab the hot potato and take his argument to ISDS. In fact, his conclusion that "acknowledging legitimacy—measured in terms of extrinsic values—as in itself a pro-arbitration attribute may be among the most arbitration-friendly moves one can make" applies with special force to ISDS. And, "[t]he present time ... is an especially apt moment" to make this ISDS-friendly move.

I. WHAT "PRO-ISDS" DOES NOT MEAN

Let us start by clearing out what it does not mean to be pro-ISDS. First, it does not mean being pro-dispute. To be sure, the marked growth in caseload this century has made ISDS the industry it is today. But one need not wish to see disputes to support ISDS—any more than building a commercial, constitutional, or criminal court reveals support for those kinds of cases. Disputes are a fact of life and it makes sense to build sound dispute resolution systems.

Second, being pro-ISDS does not mean being for any particular rules. Investment treaties have changed remarkably since 1959, adding both investor rights and state defenses among numerous other provisions. They continue to change. One can support ISDS while opposing, for example, indirect expropriation or damages based on expected earnings. Similarly, one may prefer the transparency of the International Centre for Settlement of Investment Disputes (ICSID) or the rule on arbitrator immunity of the London Court of International Arbitration (LCIA). Let each debate proceed on its own merits.

Finally, being pro-ISDS does not even mean being pro-arbitration. Historically, ISDS was coextensive with investor-state arbitration. But that is changing. Efforts to mediate investment disputes are growing. The EU is developing an investment court, and the United Nations Commission on International Trade Law (UNCITRAL) is considering one. All are types of ISDS. Their relative merits should be assessed on criteria other than which is more pro-ISDS. So, for example, compared with a new court, investment arbitration has both the benefits and costs of pluralistic, dialogic decision-making, which may lead to better results over time if one can tolerate greater inconsistency than a single

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court is likely to produce. (Consider the greater uniformity the World Trade Organization (WTO) Appellate Body brought to the General Agreement on Tariffs and Trade (GATT) panel system—before it collapsed, at least in part a victim of its own consistency.)

II. FOR DEVELOPMENT?

The World Bank—the International Bank for Reconstruction and *Development*—effectively started modern ISDS. Its motive was clear, textually, historically, and institutionally. The preamble to the ICSID Convention is predicated on "the need for international cooperation for economic development, and the role of private international investment therein." Ibrahim Shihata described ICSID as "an instrument ... for the promotion of investments and of economic development."

The argument that ISDS is an instrument for development is intuitively appealing. It has enough weight that promoting development should be seen as "the object and purpose" of ISDS when construing treaties. (This argument is made more fully in my article "Microinvestment Disputes" in Vanderbilt JTL 2012.) Yet, the empirical evidence does not show a strong connection in fact between ISDS and development. The evidence is not strong enough in my view to justify ISDS on this ground alone. More is needed.

III. FOR NORMALIZATION (AKA DEPOLITICIZATION)

Normally in legal disputes, the injured parties control their own cases. They decide whether to sue, which claims to bring, who will represent them, what arguments to make and evidence to present, and whether to settle. They have autonomy.

International law had a different notion. Only states were "subjects"; people and legal persons were mere "objects." International law thus treated injury to a national of another state as injury to the other state. That home state owned and controlled the claim. In *Barcelona Traction*, the ICJ said, "The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease.... [T]he State enjoys complete freedom of action."

To be for ISDS is to be for normalization of investor claims, for allowing injured investors to control their own claims. Normalization is what is meant by "depoliticization," removing the home state from the middle and treating investment disputes more like other legal cases. To me, the essence of ISDS is its "diagonal" nature, which allows an injured investor to bring a claim directly against the host state without need to ask its home state "vertically" to espouse a "horizontal" state-state case. (*See* my chapter on ICSID jurisdiction in the ICC Business Guide to Trade and Investment, vol. 2, 2018.)

To be sure, without political control, some investors will bring claims a state would not, seek more damages, advocate more aggressive legal theories, etc. I may not support some of these claims, theories, positions, arguments, etc. As with domestic court, I can live with that as the price of a legal system based on autonomy.

IV. FOR ACCOUNTABILITY

Sovereigntists oppose international legal review of state actions. For example, as a candidate in 2016, Donald Trump complained that the Trans Pacific Partnership (TPP) "will undermine our independence" by "creat[ing] a new international commission that makes decisions the American people can't veto." In office, his Trade Representative Robert Lighthizer said to Congress:

> I am always troubled by the fact that nonelected, non-Americans can make a decision that a United States law is invalid. Just as a matter of principle, I find that offensive.... [P]ersonally, myself, the most troubling part of all this is that it attacks our sovereignty.

The rhetoric of Democratic opponents of ISDS is different, but still aimed at insulating state actions from international review. As a candidate in 2020, Joe Biden wrote, "I oppose the ability of private corporations to attack labor, health, and environmental policies through the [ISDS] process, and I oppose the inclusion of such provisions in future trade agreements." His Trade Representative Katherine Tai added, "President Biden himself has articulated his opposition to ISDS on the basis of the chilling effects that it has on other countries' policy making."

ISDS stands for accountability. It provides a mechanism for independent legal review of state actions. Such review is crucial to building the rule of law. To quote Bob Dylan, "[T]he ladder of law has no top and no bottom." Accountability to the rule of law must reach the top.

Of course, one may achieve such accountability through domestic courts. Both Democratic and Republican critics of ISDS have pointed to the availability of first-rate judicial review in U.S. courts. In my view, this position ignores the sad realities of courts in many countries. There are dysfunctional and nonfunctional states, impoverished states with inadequately funded courts, states lacking commitment to judicial independence and due process, states with backlogged courts, states with corrupt courts, states with rules that discriminate against foreigners, and states with courts that themselves commit denials of justice. Jan Paulsson has catalogued a litany of failings of the courts of many countries, calling for the development of "enclaves of justice" like ISDS where possible.

Courts shouldn't be romanticized, and their failings shouldn't be ignored. The ladder of law must really have "no top and no bottom." Courts must really be "on the level." When a court fails, "[N]ow's the time for your tears."

(I'm quoting *The Lonesome Death of Hattie Carroll*, where a court invoked high-minded principles while sentencing a rich (and, unstated, white) man to only six months for killing a poor (black) woman. Dylan also addresses failings, real or fictional, of judges and juries in *Hurricane* and some more obscure songs like *Drifter's Escape*, *Seven Curses*, *Percy's Song*, and *The Death of Emmett Till*. The pattern of fallibility is clear. How many times must a man look up before he can see the sky?)

Investors should not pull up the ladder of law behind them, building an enclave of justice only for themselves. That exclusivity might perhaps be acceptable if investors could show that ISDS makes a unique contribution to development, but such evidence is lacking. ISDS should instead be seen as a precedent to build more enclaves, such as more effective human rights tribunals or tribunals that hear claims against businesses. Indeed, the business community's support for ISDS stands in tension with its simultaneous effort to immunize corporations from allegations of grave abuses under the Alien Tort Statute. Those who would get justice should give justice too. The ladder of law has no top and no bottom.

Some critics object that ISDS works mainly for the benefit of wealthy claimants able to afford its costs. Never mind that the same point may be made of domestic courts. This critique seems to argue not for ending ISDS, but for expanding and reforming it to make it more accessible to a wider array of claimants. The ladder of law has no bottom.

ISDS may be the best accountability mechanism yet created in international law. It should not be the last.

V. FOR LEGITIMACY

To be pro-ISDS is to support neutral, effective adjudication through a process that is fundamentally fair to the parties and accessible to the public. ISD tribunals must be on the level. They must serve—and at the barest minimum, must not disserve—the "extrinsic values" identified by Professor Bermann. He named three: "fundamental fairness," "the public's right to know of matters of legitimate public interest," and "accountability." We can quibble about where to draw the line between intrinsic and extrinsic. Fundamental fairness, for example, strikes me as intrinsic to any adjudicatory process. It directly affects at least half of the twelve intrinsic criteria identified by Professor Bermann: effectuating the likely expectations of parties, consistency with institutional rules, ensuring independence and impartiality of arbitrators, protecting a party's right to be heard, promoting accuracy, and enabling the resulting award to withstand challenges. (I elaborate on these ideas in my recent article, "Investor-State Arbitrators' Duties to Non-Parties," in Duke JCIL 2021.)

But this is a quibble. Professor Bermann is exactly right to "conclude that if pursuing what appears to be a pro-arbitration strategy sufficiently disserves such other values, it actually discredits arbitration and ultimately operates to

arbitration's detriment." One need only swap out "arbitration" for "ISDS" in the present context.

The ICSID tribunal in *Hrvatska Elektroprivreda v. Slovenia* nicely captured the obligation of the tribunal to serve "as guardian of the legitimacy of the arbitral process," by making "every effort to ensure that the Award is soundly based and not affected by procedural imperfection." This is right.

By contrast, very recently, the North American Free Trade Agreement (NAFTA) tribunal in *Odyssey Marine v. Mexico* disregarded this guardianship responsibility. It rejected amicus submissions by two nongovernmental organizations (NGO's) on a cramped view of the NAFTA standard. It failed to consider (as required) "the extent to which" both "there is a public interest in the subject-matter of the arbitration" and the NGO's bring "a perspective ... that is different from that of the disputing parties," seeming even to imply that NGO's can add nothing of value when the parties have experienced counsel. Philippe Sands dissented on grounds akin to Professor Bermann's thesis, "It is incumbent upon arbitrators to have regard to the need to consider the impact on the legitimacy of the final award.... Regrettably, the Majority's decision indicates no awareness of these considerations...." The majority may have thought it was serving pro-ISDS values like efficiency, but did more harm by disserving ISDS's legitimacy in the midst of a raging legitimacy crisis. How many ears must one man have before he can hear people cry?

VI. CONCLUSION

Any effort to build more room for law and justice in international relations where possible will be slow, imperfect, episodic, and opportunistic. It will not move in a straight line.

Consider the example of the Southern African Development Community (SADC), which created a regional tribunal with an individual right of access for cases spanning both investment and human rights. Claims could be brought regardless of nationality. In its first case, the SADC tribunal found that Zimbabwe violated the rights of white farmers. Zimbabwe refused a remedy and attacked the tribunal, persuading the other SADC countries to end individual access.

The late Archbishop Desmond Tutu defended the SADC tribunal. His argument sounds in human rights and investment protection, and helps to show the shared concerns between the two regimes:

> [S]outhern Africa was building a house of justice, a place where ... victims of injustice could turn with confidence. That house is now in grave danger....
>
> [I]ndividual access to the SADC court constitutes a key legal instrument that has brought hope to victims of the abuse of power in SADC countries....

> Without it, the region will lose a vital ally of its citizens, its investors and its future.

Put differently, SADC countries built a court that was on the level, then tore it down rather than face accountability. (I discuss SADC further in "International Adjudication of Land Disputes," Law & Development Review 2014.) The ladder of law had reached the top in Southern Africa, but then was pared back. I hope it will be rebuilt someday, modeling how ISDS-type adjudication can act as a precedent for building other enclaves of justice.

Meanwhile, as ISDS faces crisis, to be pro-ISDS is to work to advance its legitimacy. ISDS tribunals and institutions must do their jobs and do them well. States should review ISDS, revising procedures and substantive rules as needed to foster legitimacy. Practically speaking, given today's crisis, I think being pro-ISDS now requires commitment to the ongoing reform process. Failure to improve is not an option. Supporters must admit that the waters around ISDS have grown. It better start swimmin' or it'll sink like a stone.