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OF INTERNATIONAL RELATIONS AND STRATEGIC STUDIES

SPOTLIGHTS

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Investor-State Dispute Settlement Mechanism with Professor Lutz-Christian Wolff

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The Lakshman Kadirgamar Institute (LKI) recently interviewed Professor Lutz-Christian Wolff, Wei Lun Professor of Law and Dean of the Graduate School, the Chinese University of Hong Kong, as part of the LKI Spotlight series. The LKI Spotlight series features interviews with thought leaders around the world, on key and emerging issues of international relations. This interview focuses on the question surrounding the investor-State dispute settlement mechanism.

The investor-State dispute settlement (ISDS) mechanism is a procedure usually set out in Free Trade Agreements (FTAs) or Investment Treaties that provide foreign investors the right to access an international tribunal to resolve any dispute, regarding such treaties, with the host State. Over the last few years there have been many contentions that the ISDS mechanism impinges upon the sovereignty of a State, and on the question of enforcing decisions of tribunals on Sovereign States.

After several years of studying, doing research and working in Shanghai, Taipei, Düsseldorf, Beijing, New York and Frankfurt, Prof. Wolff has been based in Hong Kong since 1999. Prof. Wolff specialises in Chinese and international business law, private international law, and comparative law. His most recent work includes: *The Law of Cross-border Business Transactions: Principles, Concepts, Skills,* 2nd ed. (2013*); Mergers & Acquisitions in China: Law and Practice,* 5th ed. (2015); *Offshore Holdings for Global Investments of Multinational Enterprises: Just Evil?,* 6/2015 Journal of Business Law, p. 445; *Flexible Choice-of-Law Rules: Panacea or Oxymoron?,* 10 Journal of Private International Law (2014), p. 413; and *From a 'Small Phrase with Big Ambitions' to a Powerful Driver of Contract Law Unification? China's Belt and Road Initiative and the CISG,* 34 (Part 1) Journal of Contract Law (2017), pp. 50-69.

See below for a lightly edited transcript of the interview, featuring Prof. Wolff's responses to questions posed by Nilupul Gunawardena, Research Fellow at LKI. The questions and other aspects of this interview are not the institutional views of LKI, and they do not necessarily represent nor reflect the position of any other institution or individual with which the parties are affiliated.

LKI: The international dispute settlement mechanisms for investment, trade and human rights have fundamentally different institutional and procedural schemes. *What is the raison d'être for such large differences in mechanisms for resolving disputes that involve similar or even overlapping issues?*

Prof. Wolff: The various dispute settlement mechanisms have historically been developed at different times based on different rationale driven by different stakeholders. While this explains the different institutional and procedural schemes, there are also differences in the substantive law areas which may justify the existing variety.

LKI: *Do you think the mechanism of ISDS would give corporations the right to challenge national laws, interfere with State policies, or weaken labour and environmental standards?*

Prof. Wolff: The rights of corporations in the ISDS context are first of all a matter of the underlying legal basis, i.e. bilateral or multilateral investment treaties or investor-host State contractual arrangements. Normally ISDS dispute mechanisms would not allow corporations to challenge national laws, interfere with State policies, or weaken labour and environmental standards directly. However, ISDS may indirectly have effects of this kind. As always, a comprehensive and unambiguous legal framework can avoid any negative impact.

LKI: There is an increasing difficulty in the enforcement of arbitral awards. *Do you think this poses a risk of a growing re-politicisation of ISDS and a return to diplomatic channels for resolution of investor-State disputes?*

Prof. Wolff: The increasing difficulty in the enforcement of ISDS arbitral awards correlates with the growing importance of ISDS proceedings in recent times. Host countries of foreign investments have to realise the risk of being subjected to ISDS procedures, as a result of their consent to waive State sovereignty for the benefit of ISDS. The refusal to honour ISDS arbitration awards may be legally justified as the waiver of State sovereignty in the context of ISDS arbitration proceedings does not necessarily also imply a waiver in the context of enforcement.

The ISDS framework is still in a state of development, during which the competing interests all stakeholders need to be balanced out. I am optimistic that the existing issues will be addressed in due course so that the advantages of ISDS mechanisms can be preserved. At the same time, this would counter the re-politicisation of ISDS and avoid the need to return to the rather questionable option to use diplomatic channels for the resolution of investor-State disputes.

Finally, enforcement is not the only challenge the current investor-State dispute settlement system faces. As early as in 2012, the United Nations Conference on Trade and Development (UNCTAD) has listed other problems, such as the (i) expansive use of investment treaties, (ii) uncertainty due to varying interpretations of investment treaties, (iii) procedural inadequacies in the International Centre for Settlement of Investment Disputes (ICSID) procedures, (iv) potential conflicts of interests of limited number of individuals who are repeatedly appointed as party representatives or arbitrators, (v) appointment of arbitrators who are likely to support the appointing party, (vi) secrecy of proceedings, and (vi) excessive costs and lengths of arbitration proceedings.

LKI: *Why do you think parties prefer (or do they prefer) an ad hoc arbitral dispute settlement mechanism over an international investment court?*

Prof. Wolff: The ongoing discussion regarding the establishment of an international investment court reflects the differing interests of potential host countries of foreign investments on the one hand and investors and their home countries on the other hand. For the time being many related issues are unsettled. Furthermore, in recent years a trend away from multilateralism in trade and

investment matters towards regional or bilateral arrangements has emerged. The involved parties seem to prefer smaller scale settings which can easier reflect their interests. Having said that, I do not think that different stakeholders are generally opposed to the idea of an international investment court. In fact, the establishment of a permanent Investment Tribunal and an Appellate Tribunal under the EU-Canada Comprehensive Economic and Trade Agreement (CETA) can be seen as a step into this direction. I believe that an international investment court would be very useful for a variety of reasons including the positive effect of unified institutional structures and procedures.

LKI: China recently decided to establish two international courts to handle disputes that arise as part of their BRI project. Noting that China has not adopted the UN Commission on International Trade Law (UNCITRAL) Model Law and the UNCITRAL Arbitration Rules, *do you think these courts would be an appropriate forum for the resolution of international investment disputes?*

Prof. Wolff: The two International Commercial Tribunals recently established in Xi'an and Shenzhen, China, are not independent courts, but form part of the Supreme People's Court (SPC). Jurisdiction of the tribunals can be established in cases which meet a rather broad definition of 'international commercial matters' and fall into five special categories. The establishment of the tribunals follows an international trend to set up dispute settlement bodies which combine the advantages of the State court process on the one hand, and of arbitration proceedings on the other hand, for the benefit of a more effective dispute settlement in cross-border commercial cases (*not* investor-State disputes). For example, in January 2015, Singapore established the Singapore International Commercial Court (SICC) as a Division of the Singapore High Court. Other countries which have taken or are about to take similar steps are Dubai, Abu Dhabi, Kazakhstan (Astana), the Netherlands and Belgium.

For the time being the International Commercial Tribunals in Xi'an and Shenzhen cannot claim to offer the advantages of international commercial courts established in other countries. In particular, according to China's civil procedure law it is not possible to appoint non-Chinese judges, admit non-Chinese trial representatives, use non-Chinese court languages, conduct non-public trials, and opt for the jurisdiction of the tribunals without distinct connection to the tribunals. Moreover, it is questionable if non-Chinese parties to international commercial contracts would agree to the jurisdiction of the tribunals rather than choosing neutral dispute settlement bodies, if this is at all possible.

China's Arbitration Law of 2006 does, in fact, deviate in certain respects from the UNCITRAL Model Law. Also, the UNCITRAL Arbitration Rules are not commonly used in arbitration proceedings before Chinese arbitration bodies. However, the International Commercial Tribunals in Xi'an and Shenzhen are not arbitration bodies so the UNCITRAL Model Law and the UNCITRAL Arbitration Rules are of no direct relevance.

Further Reading

Gaukrodger, D. and Gordon, K. (2012). Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community. *OECD Working Paper*. [online] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207366 [Accessed 9 June 2018].

Wellhausen, R. (2018). Recent Trends in Investor–State Dispute Settlement. *Journal of International Dispute Settlement*. [online] pp 1–19. Available at: http://www.rwellhausen.com/uploads/6/9/0/0/6900193/j_int._disp._settlement-2016-wellhausen-jnlids_idv038.pdf [Accessed 8 August 2018].