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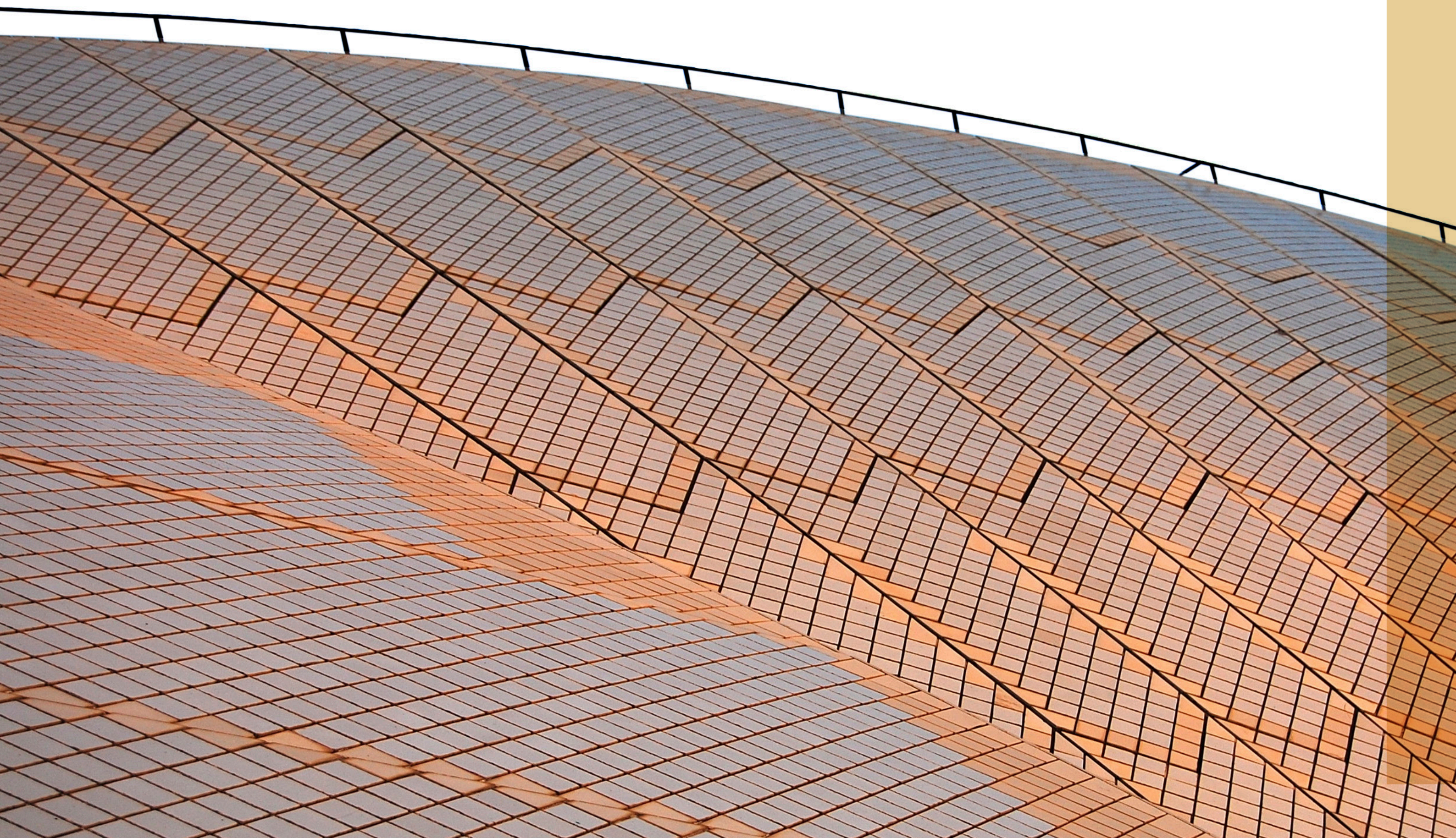
FINDING THE RIGHT BALANCE IN INVESTOR-STATE DISPUTES



FINDING THE RIGHT BALANCE IN INVESTOR-STATE DISPUTES

The growth in international Free Trade Agreements (FTAs) is making headline news around the world. In most of these agreements the inclusion of investor-state Dispute Settlement (ISDS) mechanisms, designed to protect companies from host-state interference, has been hotly negotiated by the governments concerned and increasingly subject to debate in the wider public sphere. Essentially, a system that has been around since the 1960s is only now getting attention from the general public as the system is being used more and more by international businesses, large and small, to respond to a broadening range of government action. The United Nations Conference on Trade and Development reveals that in 2013, 56 known new cases were filed by investors against states pursuant to international investment treaties and we are likely to see an increase in this trend.

Sam Luttrell, Clifford Chance counsel in Perth and Romesh Weeramantry, foreign legal consultant in Hong Kong, wrote a public submission in response to a Bill put before the Australian parliament that sought to prevent the government from entering into trade and investment treaties that contain ISDS provisions. Sam and Romesh's submission was one of only a handful opposing the Bill and the content was quoted by a Senate committee reporting on the Bill and was drawn upon heavily by the Department of Foreign Affairs and Trade in subsequent Senate hearings on the issue. Sam and Romesh wrote an opinion piece on ISDS for the Australian Financial Review which is reprinted below.

Greater good from arbitration forum

One of the recurring themes in the current debate around investor state dispute settlement (ISDS) clauses is that they are tools of crafty multinationals looking to dictate policy to weak governments.

A private Bill currently before the Australian Parliament seeks to prevent the federal government from entering into any new trade agreements that include such clauses.

This debate lacks balance.

We hear a lot about what we supposedly lose with investor dispute clauses, but much less about what we gain.

The Chief Justice of the High Court recently warned a move towards international arbitration had the potential to not only challenge the power base of the court, but create uncertainty for litigants.

High Court Chief Justice Robert French says more attention should be given to the provisions in trade agreements, saying these could be used by global corporations as an alternative to Australian courts.

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>
> **Sam Luttrell** Counsel, Clifford Chance

This forum shopping, he says, would create uncertainty for business as a result of reagitating issues already decided by a court.

Before investor state dispute clauses, foreign investment disputes had the potential to damage international relations.

In extreme cases, the government of the aggrieved investor might resort to "gunboat diplomacy." One example dates back to 1952, when the Royal Navy enforced the blockade on oil exports imposed in retaliation for the Iranian government's nationalisation of British- controlled oil fields.

The ISDS system was designed to end this destabilising practice and to promote capital exchanges that were seen as essential to a lasting peace – particularly after the Second World War.

The World Bank was instrumental in this process. It advocated the need for post-war economic development and integration, especially for the many countries that gained independence around this time. The first dedicated body, the International Centre for Settlement of Investment Disputes (ICSID), was established in 1965 as part of a World Bank initiative.

ICSID provides only a procedure. The substantive rules – including the conditions on which foreign-owned property can be nationalised and the minimum standard of treatment owed to foreign investors – were left to individual states to agree.

At first they did so mostly in contracts and national foreign investment laws. But the early 1990s, investment treaties – particularly those of the bilateral variety – had emerged as the preferred instrument for these purposes.

Many of these treaties include ISDS provisions, under which the foreign investor can bring arbitration claims directly against its host state, in a neutral international forum.

If the investor resorts to this, it does not need to involve its home government. Indeed, it will usually forfeit its right to do so. The provisions have therefore solved the problem of inter-state escalation.

The clauses also benefit nations at every stage of development. Companies can invest safe in the knowledge that, if they end up in a dispute with the host state, they can take their case to a neutral forum that applies international standards. They do not need sovereign risk insurance – or at least not as much - and they are less reliant on a contract with the host government.

Their banks and shareholders are immediately more comfortable, and the costs of investments are lower as a result.

Today, there are more than 2500 of these treaties worldwide. They link some of the poorest countries in the world to crucial sources of capital and technology. If anything, we should be building more bridges with investment treaties, not tearing them down.

Companies need investor dispute clauses to manage sovereign risk and keep on an equal footing with their competitors – other foreign investors whose governments have negotiated protections for them.

To say that foreign investors in Australia do not need these provisions because we have the "Rolls Royce of legal systems" is to miss the point entirely.

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Romesh Weeramantry Foreign Legal Consultant, Clifford Chance

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