Taylor St John

The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences. Oxford: Oxford University Press, 2018. Pp. 304. £60. ISBN: 9780198789918.

I have a confession to make. I love archives. Long before law, I lost myself in academic studies in history, and visiting archives to retrieve old files in search for details to understand the past was always a highlight.

This is probably why the Introduction of *The Rise of Investor-State Arbitration. Politics, Law and Unintended Consequences* immediately caught my attention. Taylor St John describes how she in her research has 'looked at all declassified files related to ICSID in the national archives of Germany, New Zealand, Switzerland, the UK and the US' and 'all files related to multilateral investment conventions, investments insurance, and investment treaties during the relevant years' (p. 17). This bodes well, I thought. Any researcher who dives into archives to find a story untold is likely to have something interesting to share. And indeed Taylor St John is no exception.

Taylor St John's book of course is also what I would call a necessary read for anyone lacking my fascination for archives but who is still involved in the investor-state arbitration field from a policy-related perspective. Not only does it tell the story of how an international system for international dispute resolution was born and gained momentum, but it also provides important insights for anyone involved in shaping policy of the future – be it international investment law or any other area of international collaboration.

As convincingly illustrated by Taylor St John in her narrative on the development of the International Center for Settlement of Investment Disputes (ICSID) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the use of investor-state arbitration, the forces at work when ideas and proposals gain momentum in a particular point in time are intrinsically connected to the milieu in which they are formed, and the personal experience of the actors involved in promulgating and

discussing these new ideas. The role played by the World Bank in the process leading up to the ICSID Convention, referred to by St John as an 'agenda-setting and brokering' role (p. 23, Chapter 4), is a thought-provoking read and of relevance well outside the immediate investor-state arbitration sphere.

Contrary to some of the narratives heard today on the influence of perceived stake-holders in investor-state arbitration, Taylor St John concludes that 'the intensity of involvement from investors and support from powerful states are not what determined the outcome …' (p. 99). Other forces determined the origination of investor-state arbitration. Taylor St John shares revealing correspondence and reports, and takes us to the decisive meetings.

The Rise of Investor-State Arbitration thus describes the birth of ICSID and the ICSID Convention. The process took its starting point against the backdrop of the post-World War II era of the late 1950s, and the specific experiences from this time of the individuals involved in the process came to heavily influence the outcome.

As this history is revealed, two thoughts spring to mind. First, it is the observation that individuals are truly the drivers of international policy. And that the objectives, experiences, and values of individuals not only matter - but make a decisive difference. Systems are not born out of nowhere. They are born because real persons take it upon themselves to act as midwives for new legal ideas and instruments.

The decisive figure in building the momentum for the ICSID Convention was Aron Broches, the main drafter of the ICSID Convention and the first Secretary General of ICSID. Taylor St John gives numerous examples of his personal involvement and passion for the ideas contained in the ICSID Convention, and how this came to influence the project (Chapter 4, for example pp. 112-113, 138, 185-86.).

The second issue that comes to mind when reading St John's description of past events is that one cannot help but wonder: if personal experiences with a bearing on

political or societal events shape international policy, what can we learn from this insight as we try to interpret recent debates on investor-state arbitration? Who will be the Aron Broches in the book written 50 years from now when investigating the drivers for investor-state arbitration 2018, and how are the personal experiences and convictions of these individuals shaping the current process of reform in investor-state arbitration? Perhaps we will just have to wait for the 2068 edition of St John's book to find out.

All in all, Taylor St John gives a very persuasive description of trends and events which led to the wide spread use of investor-state arbitration as we know it today. But there is one small detail where I would like to add some Stockholm Chamber of Commerce (SCC) insight to the narrative.

Beginning in the 1980s, additional options for investor-state arbitration were included in the bilateral investment treaties, in parallel with the frequently used ICSID Arbitration Rules. This included reference to the SCC as a venue for investor-state arbitration in bilateral investment treaties. Was this intentional on behalf of the institutions that were added? Did they market themselves towards states for this purpose?

To find out, I conferred with Ulf Franke (SCC Secretary General 1975 – 2010). And the fact is that the SCC was not at all involved in the inclusion of the SCC rules in the more than 120 bilateral investment treaties we know of today where SCC or *ad hoc* arbitration in Sweden are an option in the investor-state arbitration provisions. The description thus in this section of St John's book that organizations 'started to compete' (p. 184) for investor-state dispute settlement (ISDS) cases is a description which does not really reflect what happened, at least if using the example of the SCC.

In reality, the SCC was completely unaware of the treaty negotiations taking place. The only exception appears to have been the negotiation of the Energy Charter Treaty (ECT), where the Swedish delegation contacted the SCC following the proposal from another delegation that the SCC should be included in the investor-state dispute

resolution provision of the ECT. The purpose behind the call from the Swedish delegation was to check whether the SCC had any objections against this proposal, and, if not, the Swedish delegation would support the proposal.

But if other institutions did not in practice compete for ISDS cases, as the example of SCC suggests, how did so many of them, including the SCC, end up in the treaties? Perhaps this is another trail to follow as the history of investor-state arbitration continues to be told. I, for one, would be very interested to learn who the key figures were in this process.

The Rise of Investor-State Arbitration teaches us that in May 1966 the United States State Department, in a report to the Senate Foreign Relations Committee, predicted that the use of the ICSID procedure would 'create a significant new body of international law' (p. 177). Today, some fifty years later, this prediction certainly appears to have been correct.

The development of the use of investor-state arbitration is a global project. And we should all be grateful for the contribution by Taylor St John in the understanding of the origins of this project which so many of us are part of in different capacities. But we also share a responsibility to contribute to continue building the capacity of investor-state arbitration, through active participation in the fora where the investor-state arbitration of tomorrow is being discussed and drafted, and to support what Ban Ki-moon once called 'the great power of arbitration' and its potential to contribute in the joint pursuit to 'overcome conflict and hatred and build a future of dignity for all on a healthy planet'.[1]

Perhaps the most important lesson from the invaluable research and fascinating account by Taylor St John is that we should all be careful to accept arguments or opinions at face value. In short, we all need to do our homework. Tracing the steps of events in the past might lead not only to new revelations, but also hold important keys to unlocking

1 Ban Ki-moon, 'Keynote Address to International Council for Commercial Arbitration Congress' in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity* (Kluwer 2017) 20.

conversations for the future. Conversation which need to take place, and which we all need to be part of.

So thank you Taylor St John for opening the doors to the archives, and for making us better equipped to join the conversation for the future.

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