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Beware the discretionary choices of arbitrators

by
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Investment treaty arbitration has unfolded rapidly in recent years. Some observations arising from analyses of arbitrator awards are highlighted below.[1] They support broad conclusions that:

- arbitrators reviewed a wide range of legislative, executive and judicial decisions but typically did not exercise judicial restraint in various ways associated with domestic and international courts;

- arbitrators typically adopted expansive approaches to their authority and to investor entitlements to compensation, especially where the claimant had the nationality of a major Western capital-exporting state; and

- decision-making power was highly concentrated among arbitrators, suggesting a need for closer scrutiny of how the most active individual arbitrators have expanded the meaning of investment treaties and corresponding principles of state liability.

First, in virtually all of the 162 cases coded on the issue, arbitrators reviewed an executive measure and, in 37% and 44% of cases respectively, the dispute involved a domestic legislative or judicial decision. In at least half of the cases, arbitrators reviewed measures that appeared general in application – i.e. they affected actors other than the claimant – as opposed to measures that targeted the claimant specifically.

Yet there was little evidence that arbitrators demonstrated restraint in ways commonly adopted by domestic and international courts.[2] For example, there was little or no evidence of restraint due to the relative capacity of an executive agency, the role of a contractually agreed forum, or a treaty-based waiting period or fork-in-the-road.[3] Likewise, tribunals often reviewed domestic laws but there was no evidence of restraint at a general level due to the relative accountability of a legislature. Indeed, arbitrators were found to have invoked concepts associated with judicial restraint,

such as balancing and proportionality, more often when expanding than when limiting their authority.

Second, the field has apparently offered arbitrators a fertile environment for creative lawyering alongside expansive approaches to their authority. This was evident in the coding of jurisdictional and substantive issues that involved, for example, the multiplication of corporate nationality as a possible gaming strategy by claimants, the definition of what qualifies as a protected investment, the risk of parallel proceedings, and the meaning of substantive standards, including, most notably, indirect expropriation and fair and equitable treatment.[4] The tendency toward claimant-friendly expansive interpretations increased significantly where the claimant was from the US, UK, France, or Germany.[5]

Third, power was highly concentrated among arbitrators. For example, from a review of arbitrator resolutions of contested legal issues, it emerged that – of 247 individuals appointed as arbitrators – the 24 most active individuals executed about half of the issue resolutions and tended much more heavily toward approaches that expanded their authority. Other researchers have reported findings that 12 arbitrators were present on 60% of 263 ICSID tribunals and that 15 arbitrators were present on 55% of 247 investment treaty tribunals.[6]

These observations are descriptive, approximate, and subject to important limitations outlined elsewhere.[7] They are presented here to give a sense of how investment treaty arbitration appears to have evolved due to the discretionary choices of arbitrators.

In policy terms, the observations indicate a need for closer scrutiny by a range of actors – such as national associations of legislators or judges – of how arbitrators exercise their power and about whether their performance accords with considerations of public accountability, judicial restraint and basic even-handedness. In the meantime, states facing a reasonable prospect of investor claims, or seeking protection for non-Western investors, should systematically assess their anticipated exposure or protection and consider their options to avoid downside risks.

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[1] The observations arise from keyword-based searches and analyses of publicly available awards and other materials in known investment treaty cases. An outline of the methodology is provided in the author's forthcoming book, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford: OUP, 2013).

[2] The exceptions were a minority of cases, especially under NAFTA, in which the arbitrators signaled general restraint due to the residual role of domestic courts or in the specific interpretation of some substantive standards.

[3] For example, it was found that tribunals allowed investor claims to proceed in 14 of 19 cases where the claimant had not waited the required period before bringing the treaty claim and in 15 of 17 cases where the claim was subject to a fork-in-the-road clause that appeared not to have been satisfied by the claimant.

[4] Gus Van Harten, "Arbitrator behaviour in asymmetrical adjudication: An empirical study of investment treaty arbitration," 50 *Osgoode Hall Law Journal* 211 (2012).

[5] *Ibid.*

[6] Jose A.F. Costa, "Comparing WTO panelists and ICSID arbitrators: The creation of international legal fields," 1(4) *Oñati Socio-Legal Series* 11 (2011); Pia Eberhardt and Cecilia Olivet, *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom* (Brussels/Amsterdam: Corporate Europe Observatory and the Transnational Institute, 2012), p. 38, *available at* http://www.tni.org/sites/www.tni.org/files/download/profitingfrominjustice.pdf.
[7] *Supra* notes 1 and 4.

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