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Judges, Arbitrators, and the Secondary Functions of Adjudication

Charles H. Brower II (Wayne State University) · Wednesday, September 16th, 2009 · Institute for Transnational Arbitration (ITA), Academic Council

While litigation and arbitration both entail binding adjudication, the traditional functions of judges and arbitrators diverge in fundamental respects. While judges resolve individual disputes, they also serve a number of secondary functions. For example, in the process of deciding cases, they also supply guidance to parties in future disputes, uphold the public interest, and contribute to progressive development of the law. By contrast, the functions of arbitrators traditionally occupy a narrower range. Deriving their jurisdiction from private agreements, functioning outside an integrated system of precedent, and operating under a strong presumption of confidentiality, arbitrators generally lack a mandate (or even a meaningful opportunity) to guide future parties, to defend the public interest, or to participate in the systematic development of jurisprudence. As explained below, however, the dynamics of investment treaty arbitration create pressures for tribunals to assume the secondary functions of judges.

Developed in the 1960s and 1970s as a means of neutralizing the calls of developing states for a "New International Economic Order," bilateral investment treaties (BITs) and other international investment agreements (IIAs) serve two principal functions. First, they establish standards for the treatment of foreign investment. For example, they regulate the taking of investment property, prohibit discrimination against or among foreigner investors, and entitle foreign investors to "fair and equitable" treatment. Second, BITs and other IIAs supply a remedial framework whereby foreign investors can bring claims for treaty violations directly before international arbitral tribunals constituted for the particular dispute.

Despite a slow start, investment treaties have matured to the point where the number of signed BITs and IIAs approaches the magical threshold of 3,000 instruments. The trajectory of investor-state arbitration has followed a similar course with foreign investors filing more than 250 claims against their host states, and some three-quarters of those cases falling in the past seven years. Many of those disputes raise issues of signal importance to host states. In financial terms, some claims place hundreds of millions of dollars in controversy. Others essentially threaten to bankrupt states following periods of political, social and economic turmoil. Furthermore, many

of the proceedings raise particularly sensitive issues for host states, including the transportation or disposal of hazardous wastes, the safety of public water supplies, the distribution of vital resources such as water and energy, and the integrity of judicial systems.

For example, one claim involved a Canadian investor who sought over $750 million from the United States as a result of damages inflicted by Mississippi judicial proceedings in which the trial judge (now a state supreme court justice) allegedly violated international minimum standards of fair process and tolerated appeals to local prejudice. See Loewen Group Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award (June 25, 2003). Although the claim failed on technical grounds, the tribunal declared that the trial court failed to provide due process, and that the judicial proceedings qualified as a "disgrace" by "any standard of measurement." Thus, investment treaty arbitration has become a form of international governance that brings external discipline to bear on matters of national and even local concern.

While investment treaties represent a form of external discipline, however, one can hardly describe it as a centralized system of governance. To the contrary, three factors mark investment treaties and investor-state arbitration as the components of an exceedingly decentralized framework. First, the emphasis on bilateral treaties reflects several decades of attempts and failures to agree on a truly global regime for the protection of foreign investment. Second, the articulation of many treaty obligations at a high degree of generality provides tribunals a wide measure of discretion to allocate risks among foreign investors and host states. Third, the constitution of a new tribunal for every case and the absence of appellate review reflect a lack of commitment to centralized adjudication and, thus, to continuity in the development of jurisprudence. In other words, decentralization prevails in investment treaties, as it does throughout much of international law.

Although decentralization conforms to the traditional, case-specific orientation of arbitration, it conflicts with the certainty, regularity, and public orientation often demanded by key constituencies of investment treaty arbitration. For example, consider the perspectives of foreign investors. While courts have long recognized the need for legal certainty and predictability in international business transactions, that requirement becomes most pronounced for investments involving the commitment of vast resources by aliens and their suppliers over the course of decades.
Next, consider the perspectives of host states. Modern governments increasingly have become large bureaucracies possessing a mandate to operate within the rule of law. Just to function, they require standard procedures and stable environments. And, to serve the rule of law, they must function according to regular patterns designed to guard against the arbitrary conduct of public affairs.

Finally, consider the perspectives of the people represented by host states. In modern societies, citizens increasingly expect systems of governance to avoid capture by narrow interests and to serve a broader range of concerns commonly described as the "public interest." Thus, whether one describes them as certainty, regularity, or a public orientation, all relevant constituencies expect investment treaties to pursue values that transcend a case-specific orientation and entail a corresponding movement towards the provision of public goods.

Perhaps for the reasons just mentioned, one often hears calls for investment treaty tribunals to draft awards that will supply guidance in future disputes, to defend the public interest, and to promote the harmonious development of international investment law; in other words, to perform the secondary functions of adjudication. Furthermore, certain awards suggest an appetite for that undertaking. See Saipem SpA v. Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation of Provisional Measures at para. 67 (Mar. 21, 2007). But see Glamis Gold Ltd. v. United States, Award at paras. 3-9 (June 8, 2009) (expressing a more case-specific orientation). Assuming that it becomes a popular movement, however, the question (to be addressed in another installment) is whether the performance of secondary functions would save or destroy investment treaty arbitration.

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