Is International Investment Arbitration Undertheorized?

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In the last month, two professors mused to one of the authors that "international investment arbitration is undertheorized". One of the professors is a serious scholar of international law. The other professor was a former clerk at The Hague and writes about international investment arbitration. Their comment got us thinking: Is international investment arbitration undertheorized?

The accusation that international investment arbitration is undertheorized might be taken to imply that scholarship on international investment arbitration is overly concerned with doctrinal issues. Correspondingly, insufficient attention is paid to policy, methods of judging, and even conceptions of international law, just to raise a few important theoretical questions. The charge could also be understood to imply that scholarship in this field lacks original ideas. In short, "undertheorized" is parlor speak for vocational, or, *quelle horreur*, derivative.

After the pejorative sting subsides, there are some important issues that still need addressing. What research agendas do international investment arbitration scholars pursue? What constituencies stand to benefit from each agenda? How well are these constituencies served by the scholarship?

These questions cannot be fully answered here. The authors nonetheless wish to venture abbreviated thoughts. We hope to encourage conversations among readers of this website.

Writing for practitioners serves useful purposes. It helps counsel zealously promote their clients' legal interests. This is one of the key responsibilities of the legal profession. Practitioner-focused writing also assists arbitrators in resolving disputes. *See* ICJ Statute, Art. 38(1)(d). Dispute resolution is one important function of law that promotes world order if done correctly and wisely. There is also exemplary practitioner focused scholarship. In 2009, THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW won an honorable mention in a specialized field of international law from the American Society of International Law. It is a splendid book for what it is. From this perspective, writings on international investment arbitration can serve practitioners well.

But there may also be too much doctrinal writing about substantive and procedural rules and standards that confront counsel and feature in arbitral awards. By rough estimates, there are on Westlaw about 50 articles discussing fair and equitable treatment, and 150 articles on creeping expropriation. There are more books and conference proceedings on these subjects that are not on Westlaw. *Mea culpa*, one of the authors has also written about these topics. Could it be that every one of these works makes an original contribution?

Even useful practitioner-focused writing may elide key structural and theoretical issues. What are the competing policies at stake? How well does international investment arbitration harmonize the competing policies? What recommendations can scholars make to better promote the competing policies? Do the methods of reasoning and decision in international arbitrations shed light on what international law actually is and how it functions? Can we understand better the incentives, costs and benefits that motivate actors so we can align them to optimal outcomes? Ontological, epistemological, normative, empirical, methodological and policy questions are important to the Academy, policy-makers, and arbitrators. Collectively, international investment arbitration scholarship should also address these questions. If it does not, there may be truth to the charge that this body of scholarship is undertheorized.

Defenders of the existing scholarship have at least two answers. The authors agree with one. We will present both and let the reader decide for herself.

There are writings that address important structural questions. They do this task well. Steven Ratner recently took a good and careful look in the AMERICAN JOURNAL OF INTERNATIONAL LAW at whether we need to harmonize international investment arbitration with other international regimes. Ruti Teitel and Robert Howse wrote an important article examining the effect of arbitral tribunalization on international economic law against the backdrop of globalization and the human rights revolution.

Other observers may contend that practitioner-focused writing on international arbitration is not undertheorized because theoretical writing is impractical anyway. Over a decade ago, Judge Harry Edwards made this criticism of legal scholarship generally. Recently, Judge Roger Miner sharpened the barb. He groused in the NEW YORK LAW SCHOOL LAW REVIEW:

> Many articles in many law reviews seem to be written by academics for academics. . . . [T]he writing is unintelligible and what is not unintelligible is boring to the point of stupefaction. I was going to say that if I saw the word “normative” in one more law review article, I would scream.

Law is a cognate academic discipline, along with history, philosophy, and literature. The Academy of Arts and Sciences recognizes law as a social science. Seven law professors are members. Some writings on international arbitration should be written in the pursuit of abstract knowledge, as one enterprise of the Academy. The claim that scholarship should only be written to help practitioners, arbitrators and judges do their job better is as curious as suggesting that an art critic should only help draughtsmen draw better.

As for the law scholar’s vernacular that irritates some judges and practitioners, that which is unintelligible to a lay person may signal important meaning to a member of an expert community. We assume no judge would think their awards and decisions should strain to avoid terms of art such as “consideration,” and “tort,” even though the average reader of the New York Times might not understand those words in a legal context. Why then should law scholars not use terms of their expert culture when their audience is the Academy? In any event, it is often the case that a jurist in the field of international arbitration, such as Brigitte Stern and David Caron, is both a scholar and arbitrator. It would be rather strange to think they might not understand scholarly writing.

One purpose of this post is to celebrate doctrinal writing about international investment arbitration. Another purpose is to encourage more theoretical projects in this field. The two endeavors should occur in concert, not conflict. A body of scholarship, and even a work of scholarship, can achieve both purposes. Many already do. We are reminded of Kurt Lewin’s insight: “There is nothing so practical as

good theory."

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The views of the authors do not necessarily reflect the views of their institutions.