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Should Investment Treaty Tribunals Fly in Flocks? Predictability and Consistency in Arbitral Decision Making

Andrew Newcombe (University of Victoria Faculty of Law) · Sunday, March 31st, 2013

At a conference a few years back, a well-known and respected arbitrator was speaking on the topic of predictability and consistency of arbitral decision making in investment treaty arbitration. The arbitrator asked whether arbitrators should fly solo or in flocks. He made a strong and persuasive case for the independence of the arbitrator, to fly solo—perhaps into uncharted territory. The arbitrator used the example of the condor—flying high in the sky, with clear-sighted vision taking in the expanse of the territory below it.

Using animal and bird metaphors for arbitrators and arbitral tribunals has its dangers. The condor is a member of the *Vultur* genus. According to Wikipedia, a "vulture is primarily a scavenger, feeding on carrion. It prefers large carcasses". It nests "at elevations of up to 5,000 m…. generally on inaccessible rock ledges". Particularly in light of the publication of the controversial report *Profiting from Injustice*, most arbitrators probably do not wish to characterized as inaccessible scavengers feeding on large carcasses. (The report, in any event, only uses the ignominious term "legal vultures" to refer to law firms!)

Canada is well known for its iconic animals, many of which are featured on our currency: the hard-working beaver on the five cent coin, the majestic polar bear on the two dollar coin, the migrating Canada goose on the silver dollar and the great northern loon on the dollar coin. But as animal metaphors for arbitral tribunals, there are some troubling public relations issues. We have a nocturnal, large semi-aquatic rodent, a hunter and carnivore, a bird that makes an annoying honk and, truth be told, is not very smart and, finally, the loon is now immortalized on our one dollar coin, known as the loonie—enough said.

There is no dearth of views on the question of whether arbitrators should go solo or fly in flocks. The Freshfields lectures by Professor Kaufmann-Kohler in 2006 and by Professor Reisman in 2012 are reflective of two very different approaches. In articles and a series of arbitral decisions, Professor Kaufmann-Kohler has expressed the view that arbitrators have a duty to strive for consistency and predictability, and thus to follow a consistent line of cases. This view is reflected in the oft-quoted statement by the tribunal in *Saipem v. Bangladesh*, which postulates two duties on tribunals: (i) a duty to adopt solutions established in a series of consistent cases; and (ii) a duty to seek to contribute to the harmonious development of investment law. In contrast, in his Freshfields lecture in November 2012, Professor Reisman is reported as saying that investment arbitrators "best serve the system by being case specific", while acknowledging three exceptions: (i) thoughtful consideration of previous awards, (ii) interpretation of the object and purpose of an

investment treaty and (iii) "occasional" supplementary interpretation.

Professor Kaufmann's Kohler's and Professor Reisman's lectures highlight two different approaches to the role of arbitrators and to the question of whether predictability and consistency of arbitral decision-making is important. Few would argue that predictability and consistency are not important aspects of the rule of law. If the application of legal standards is so unpredictable and inconsistent that results become arbitrary or depend on the personal views of the judge, there is little left of the rule of law. Further, few would argue that decision makers should not have at least an eye to the harmonious development of the law. Having a collection of inconsistent and contradictory rules is antithetical to the rule of law. But, in the context of investment treaty arbitration, aspirations for predictability, consistency and harmonious development of the law should not be viewed as imposing *a duty* on arbitrators to adopt *the solution* in a consistent line of cases. Rather, the overriding duty of arbitrators is one of providing clear reasons for their decisions. Where there is a *jurisprudence constante* (the development of doctrine through the accretion of a consistent line of cases), arbitrators do not have a *decisional duty* to adopt the solution in the doctrine, rather, I agree with other commentators who argue that arbitrators have a duty to provide cogent and detailed reasons for not following *jurisprudence constant*e (see Irene Ten Cate, "The Costs of Consistency: Precedent in Investment Treaty Arbitration" on decisional burdens). The duty is not one of result (adopting the solution) in a consistent line of cases. The duty is one of means—there is a *persuasive or argumentative burden* on the arbitrator to demonstrate why *jurisprudence constante* should not be followed (see Stephen Schill, "From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom" on argumentative burdens).

In a number of decisions, Professor Stern has written that the duty of the arbitrator is to decide each case on its own merits independently of any jurisprudential trend. This approach goes too far if it is interpreted as meaning that the arbitrator has a duty to decide the case without any *reference to jurisprudential trends*. Where there is a jurisprudential trend, the arbitrator has the duty to confront that jurisprudence in his or her reasons. And certainly, this is what Professor Stern has done in practice, as exemplified by her 32 page dissenting opinion in *Impregilo v. Argentine* on the question of the application of an MFN clause to investor-state arbitration provisions. (To be clear, I not arguing that there is *jurisprudence constante* on whether a "garden variety" MFN clause applies to dispute settlement. I am simply using Prof. Stern's opinion as an example of the type of thoroughly reasoned decision that arbitrators have a duty to provide if they are going to depart from jurisprudence constante.)

In *Glamis v. The United States*, the Tribunal stated at para. 8 that: "a NAFTA tribunal, while recognizing that there is no precedential effect given to previous decisions, *should* communicate its reasons for departing from major trends present in previous decisions, if it chooses to do so." [emphasis added]. That proposition should be reframed to say that a tribunal *must* communicate its reasons for departing from major trends. From where does this duty arise? It arises from the arbitrator's duty to apply the applicable law and the duty to provide reasons, particularly in the context where the parties have made extensive submissions referring to previous cases.

The predictability and consistency challenge faced in a number of areas of investment law is, of course, that there is no *jurisprudence constante* and that there may be conflicting jurisprudential trends. This can been seen most obviously on the question of the interpretation of MFN and observance of undertakings clauses. I am not optimistic that predictability and consistency is attainable in light of the varied approaches tribunals have taken to the interpretation of specific

MFN and observance of undertakings clauses. We do not have an investment treaty system with a vertical hierarchy. We have a fragmented, horizontal network of treaties, institutions, rules and actors. Further, just like there are pathological arbitration agreements, there are pathological treaty provisions that point in multiple directions at the same time. In this disorder, arbitrators are the guardians of a process—not the gatekeepers of consistency.

By making this comment, I do not want to be understood as suggesting that there is massive inconsistency and unpredictability in international investment law. My view is quite the opposite. In Stephen Schill's recent article on the literature and sociology of international investment law he writes that following:

> The monographs on international investment law that had been published since 2007 all dealt with the theme of fragmentation as it emerged from these inconsistent arbitral decisions. Almost paradoxically, however, mainstream international investment law literature did not perceive inconsistent arbitral awards as a fundamental problem, nor did it view it as an obstacle to the doctrinal reconstruction of substantive and procedural investment law. Instead, convergence in arbitral jurisprudence is the main theme of the numerous textbooks dealing with international investment law, even though the substantive law is enshrined in a myriad of bilateral treaties and implemented by one-off arbitral tribunals.

What is most striking to me is not inconsistent jurisprudential trends, but that after 23 short years of investment treaty jurisprudence, there is such a remarkable level of *jurisprudence constante* in an area of international law where there has been such intense ideological divisions in the past.

I will conclude this post with a few thoughts on how to improve consistency.

- Ultimately, only States can resolve deep jurisprudential divides such as whether an MFN clause in a particular treaty applies or does not apply to dispute settlement. It is unlikely that this type of issue can be resolved jurisprudentially within the existing structure of investment treaty arbitration.
- States have to take a more active role in clarifying the meaning of existing treaty obligations. In future treaties, they must ensure that treaty provisions are clearly drafted to address the jurisprudential divides – for example by either clearly specifying that MFN applies or does not apply to dispute settlement.
- Arbitrators should welcome, rather than be hostile to, the possibility of applying Article 31(3)(a) and (b) of the Vienna Convention, which provide that (i) any subsequent agreement between the treaty parties and (ii) and subsequent practice establishing an agreement of the parties with respect to interpretation of the treaty *shall* be taken into account. The concern that States will use this mechanism abusively to provide restrictive or unreasonable interpretations is exaggerated, given the practical and political difficulties of the home state of the investor agreeing to an interpretation that seriously prejudices its own investors. Claims that the NAFTA Free Trade Commission's interpretative statement on Article 1105, Minimum Standard of Treatment were abusive, unfair, contrary to the rule of law or an unauthorized amendment of NAFTA are simply wrong and fail to recognize the mandatory rules in the Vienna Convention.
- With respect to tribunals, one proposal I would like float is that whenever there is a disputed question of treaty interpretation, that the tribunal take steps to request the investor's home state to

provide its views on contested matters of treaty interpretation. This would ensure that the tribunal has the views of both treaty parties, as well as the investor, before it. Where the tribunal cannot make the request on its own initiative under the applicable rules because of duties of confidentiality, it could seek the agreement of the parties to provide for such a process. This default procedure would ensure that both State parties to the treaty are given an opportunity to provide their views on the proper interpretation of the treaty. Any agreement between the State parties regarding interpretation or subsequent practice that establishes agreement of the State parties regarding interpretation *shall – must* be taken into account.

- More generally, state parties should take a more active role in treaty interpretation and the new generation of investment treaties should include mechanisms for the involvement of all state parties whenever there is a contested interpretation – which, of course, will likely be in every case.

Anthea Robert's thesis in her wonderful article, *Power and Persuasion in Investment Treaty Arbitration: The Dual Role of States*, is compelling. Arbitral tribunals and states share interpretative powers. There should be a greater emphasis and encouragement of *home* state practice in the interpretation of investment treaty obligations. Although this will not *necessarily* result in greater predictability and consistency, there is a greater likelihood that any tribunal interpretation will be more, rather than less, consistent with the state parties' treaty obligations.

Returning to the introduction, if I was forced to choose an animal metaphor for an arbitral tribunal it would be an owl. The owl is solitary and, of course, wise. The owl has 360 degree vision. The owl acts independently but provides wise reasons for its decisions, reasons that identify and illuminate tensions in the cases and result in a reasoned decision. One owl's decision does not create law or jurisprudence constante. But it is different with a group of owls – the literary collective noun for a group of owls is a *parliament* – and parliaments have a law making function. A parliament of owls establishes a *jurisprudence constante*. Tribunals are key actors in the creation of law—they play a constitutive role in law creation by interpreting and applying treaties. The doctrine of legitimate expectations as an element of fair and equitable treatment is a creation of tribunals—it was not mandated by the treaty term fair and equitable treatment.

The only problem with the owl metaphor for arbitrators is that owls approach small prey silently from above, eat it whole and regurgitate the indigestible parts. But, then again, no one really wants to have to read anything indigestible in a tribunal award.

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