Kluwer Arbitration Blog

Juries for Foreign Investment Disputes

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Paraphrasing Churchill, investment arbitration is the worst form of foreign investment dispute resolution, except for all the others. Post-Suez, governments are more civilised than to employ gunboat diplomacy for their own investors, and local courts are inherently partial. Achieving neutrality is the objective, and the only means: investment arbitration. This is the conventional wisdom for rationalising the use of arbitration for foreign investment disputes.

Investment arbitration is imperfect. An oft-cited cause of this imperfection is doctrinal inconsistency, with an ICSID appellate body being trumpeted as the antidote. Partiality of arbitrators, propensity to annul decisions, and lack of transparency have also been identified.

Although these reasons might appeal to legal academics and practitioners, they fail to explain the substantial popular dissatisfaction with investment arbitration. The popular discontent is grounded in something more fundamental: investment arbitration suffers from a legitimacy deficit. This legitimacy deficit has two sources being neocolonialism and legal formalism.

The genesis of foreign investment law is neocolonial justice. Investors expect Western standards of justice, and the assumption is that local courts do not offer it. Operatively, foreign investment law imports Western standards of justice for foreign investment disputes, by way of investment arbitration, to satisfy this expectation. Even with the jurisdictional condition precedent to first use local courts for disputes, foreign investment law reserves ultimate jurisdiction on foreign investment disputes for investment arbitration.

Neocolonialism manifests itself in many ways in investment arbitration.

Foremost is the use of arbitration itself for resolving foreign investment disputes. Modern arbitration is a by-product of colonialism. In its formative years, modern arbitration developed as British traders began to exploit commercial opportunities created by the British Empire – land law occupied British courts were ill-suited to resolve foreign trade disputes.

Additionally, there are other factors that make neocolonialism apparent, from the usual identity of the parties and the arbitrators, to the educational backgrounds of the arbitrators, and the dominance of Anglo-American law firms as legal counsels. The consequence is that investment arbitration is perceived as being far from neutral, but more ‘Western’.

Subconsciously aware of their perceived partiality, arbitrators instinctively adopt legal formalism in an attempt to dispel this perception. They are well intentioned, but it is ultimately a flawed

strategy.

First, the nature of foreign investment disputes means that there is a myriad of pertinent factors in question, not only legal factors. All the other factors, most particularly the economic factors, are discarded when arbitrators subscribe to *pacta sunt servanda*.

Second, and most importantly, the vagueness of foreign investment law requires arbitrators to construe it. In this respect, the distinction between construction and interpretation must be appreciated. Construction is the process of giving meaning to vague terms, while interpretation is the process of selecting the correct meaning of ambiguous terms.

Construction necessarily involves creating law. Take, for example, the vague standard of protection 'fair and equitable treatment'. To address its vagueness, arbitrators have developed 'sub-rules' which define 'fair and equitable treatment', such as the 'dominant element' of the legitimate expectations of the investor.

When arbitrators create these sub-rules, they engage in law making. It could be countered that the nature of foreign investment law means that this is the task of arbitrators. This is not dispute. What is in dispute is the appropriateness of that task for arbitrators, particularly considering the perception of neocolonial justice. In summary, arbitrators do not have the mandate or authority to legislate for developing states.

If the reasons above are accepted, the conclusion is that the legitimacy deficient means that investment arbitration is not merely imperfect, but flawed.

Juries are the mechanism to overcome these problems.

It is submitted that a group of twelve randomly selected jurors should make the decision, by a qualified majority of eight, on the merits question: has the host state failed to protect the investment? In theory, a dispute resolution process for foreign investment disputes, which includes juries, could take place at any arbitral institution, although the administrative facilities of ICSID make it the most appropriate forum.

It might be nauseating to some, but when vague rules have to be applied to complex and multilayered fact scenarios, value based decisions pervade. All the relevant factors may be taken into account, not merely the legal factors. This should be celebrated. Value based decisions should be made in foreign investment disputes, and the proposed jury has the credibility to make these kinds of decisions, as opposed to a three member arbitral panel.

On questions of procedural law, creating the perception of justice is paramount. In this regard, it should be considered: would a decision of a 'global jury' on the natural resources of a state offer a greater perception of justice than the current system? Following this logic, the credibility of the jury would be solidified by constituting it with jurors of various nationalities: a global decision-making body for a global area of law.

Juries are not without their difficulties and disadvantages.

The principal problem would concern logistics. Who could serve on a jury? How would the jury pool be created? Would the jury selection process intolerably delay proceedings?

These problems could be overcome. The potential jurors could be drawn from the diplomatic service in Washington and New York. Jury selection process could be limited by restricting the grounds for challenge. Moreover, challenges against jurors would be limited by virtue of the limited information legal counsel would have on the jurors, compared to the wealth of information available on arbitrators.

Another problem lies in the legal framework. Foreign investment law does not provide for juries. There are two options to overcome this problem: amendment or augmentation.

Amendment involves rewriting the Washington Convention to provide for juries. As the proponents of an ICSID appellate body have fatalistically recognised, however, amending the Washington Convention is not realistic.

Augmentation would involve creating an optional protocol to the Washington Convention. By signing this optional protocol, signatories would stipulate that if they are sued at ICSID, a jury would be used during the merits phase. This is a viable option for creating a workable legal framework for juries.

There will be considerable psychological aversion to juries in foreign investment dispute resolution, much of it borne out of unfamiliarity with juries and the complexities they entail.

The current system is attractive because of its simplicity, but this creates a striking disparity between the substantive nature of the disputes, and the procedure for their resolution. In some disputes, the future of the natural resources of developing states is in question. How should the average citizen of such a state react when informed that the wealth, upon which this state hopes to develop, is decided by such a simple process?

A global jury might not completely satisfy this hypothetical citizen, however, it would certainly be more satisfactory than informing him or her that three Western educated arbitrators will decide.

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