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Conflating Politics and Development?

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The University of Virginia's Spring 2014 symposium focused on the topic of international development. One panel focused on the role of international politics in the context of international dispute settlement. With the mandate to examine elements related to both politics and development, I was asked to explore outcomes in investment treaty arbitration (ITA) as a function of these twin variables. My recent article, published in the *Virginia Journal of International Law*, focuses on this intersection.

Recognizing that debates about ITA are reaching the mainstream in venues including *The Economist*, *Wall Street Journal*, *New York Times*, dueling editorials in the *Washington Post*, and even John Oliver, it is more important than ever to take a data-driven approach to evaluating the net costs and benefits of investment treaties and dispute settlement. While it is not a comprehensive assessment of all the relative value of specific treaties, my article, *Conflating Politics and Development?*, provides some data and offers context to the ongoing debate.

Some of the key points from the article are:

1. The available data did not support notions that the average final ITA outcome was either in favor of investors or awarded investors multi-hundred-million-dollar awards. When comparing the outcomes of cases won by either investors (i.e., some award over US$0) or by governments (i.e., an award with a finding of US$0 liability), investors won less than 50% of disputes. Rather, for every two cases investors won, governments won roughly three cases (2:3). In the small sub-set of cases where investors did win, on average, investors were awarded less than US$50 million and roughly one-third of their claimed damages.

2. Based on the available data, development status had little, if any, influence on ITA awards. In replication of earlier research, states' development status was not generally an accurate predictor of ITA outcomes. It was not possible to identify any statistically reliable difference in either: (a) raw wins-losses or (b) investors' relative success and the development status of respondent states. This finding was replicated across all analyses using three different development measures, namely measures from the Organisation for Economic Co-operation and Development (OECD), the World Bank, and the United Nations Development Programme (UNDP).

3. There was only one test, namely using amounts awarded (without adjusting for the amount in controversy), that identified a reliable link between respondent states' development status and case outcomes – but only such that Upper-Middle Income states experienced higher amounts awarded

when compared to High Income states. There were, however, no reliable differences between amounts awarded when comparing High Income states with Lower-Middle Income and Low Income states. While that one link could reflect instinctive concerns about a potential disparate impact on developing world respondents, it does not withstand stricter scrutiny. Argentina was an Upper-Middle Income state, and 10 of the top 20 largest awards in the entire dataset were awards against Argentina, which could partially explain the disparate results for Upper-Middle Income states. It also raises the question of whether cases against Argentina are representative of other ITA disputes.

4. None of the analyses described above in points 2 and 3, however, controlled for the level of internal state democracy to identify how democracy levels, which can reflect good governance infrastructure, might contribute to outcomes. After controlling for the effect of a state's internal democracy levels using Polity IV—a measure political scientists created to assess where a state falls on the political spectrum between autocratic and democratic government—twenty-one different analyses were unable to identify a reliable link with ITA outcomes and development status irrespective of: (1) whether all of the awards in the dataset or just the sub-set of investor wins was analyzed, (2) whether an "outcome" was defined as a raw win/loss, amount awarded, or relative investor success, and (3) whether "development" status was defined using OECD, World Bank, or UNDP measures.

5. Focusing on democracy levels in host states and their good governance practices potentially offers a more productive basis of research and policy discussion, rather than focusing on development status in isolation. Given that democracy levels mitigated any effect of development status, the article raises the possibility that states' internal democracy levels, aspects of domestic political infrastructure, or derivative good governance practices could influence case outcomes and whether tribunals vindicate state practice. It may be worthwhile, therefore, to focus more upon the substantive provisions in investment treaties to ensure that the scope of substantive investment protection is properly delineated to support norms of transparency, appropriate and clear levels of retained state sovereignty, and good governance practices.

As with any empirical paper, the article also delineates the dataset, the coding methodology, the statistical analyses used, and the inevitable limitations that come from conducting scientific research of international legal phenomena. These limitations are discussed at multiple places within the text. It is noteworthy that, for the null findings, the majority of potential latent effects were less than statistically small, which suggests that the results were not underpowered; but it remains a risk that the absence of an effect cannot conclusively prove there was no effect. Even if there was a power problem, given the small potential effects, it would be necessary to generate more than 600 final ITA cases to confirm, contradict, or supplement the findings.

These results do not prove that ITA is a perfect form of dispute settlement, but they do offer a context for ongoing conversations about the actual operation of ITA. Undoubtedly, anyone familiar with dispute systems design will tell you that any system of adjudication is always in need of improvement. Perhaps this is why, in the context of U.S. domestic litigation, there is an Advisory Committee on the Federal Rules of Civil Procedure that works tirelessly to implement procedural improvements into the court system. It is also why entities—such as the International Bar Association, the International Centre for the Settlement of Investment Disputes, and the United Nations Conference on Trade and Development—and legal scholars—including Nancy Welsh, Andrea Schneider, and Mariana Hernandez-Crespo—have begun exploring the strategic use of mediation in international investment disputes.

No doubt, the policy debate will continue about how best to craft the substantive provisions and derivative dispute resolution options in international economic law treaties. My primary hope is that by focusing on facts and variables that demonstrably contribute to variance in ITA outcomes, stakeholders can construct more appropriate international dispute settlement processes in a time of international economic transition. Weeding out the sensational and substituting the observable is a sensible place to start.

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