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Evidence in Investor-State Arbitration – The Need for Action

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Newspapers, cable television shows, and Twitter are abuzz with claims of "fake news." Within the past two weeks alone, the U.S. President accused his predecessor of wiretapping his office building, apparently in reliance upon reporting in online news media. More traditional news outlets have responded with innuendo that the Director of the U.S. Federal Bureau of Investigation privately asked the Department of Justice to refute the claim – perhaps even threatened to resign if the Department of Justice failed to act. In this particular instance, both President Trump and his detractors are likely to condemn the other side's efforts as "fake news" and carry on developing their respective political narratives.

What the world currently experiences is not new to investor-state arbitration practitioners. The world of investor-state arbitration has long been exposed to "guerrilla tactics." Part of such guerrilla tactics may well be to make unsubstantiated factual claims, support these claims with dubiously sourced news stories, and accuse opposing counsel of relying upon conspiracy theories in seeking to rebut a particular claim or defense. From the claimant's point of view, the issue is particularly poignant in the context of assertions by the host state that the investor obtained the investment by corrupt means. From the respondent's point of view, the issue comes to the fore in the context of allegations of bad faith in governmental decision-making, relying as ever upon anonymous reports of internal government deliberations. In our world, too, we are likely to see parties accuse each other of fabrication or "fake news" while carrying on in their respective thematic narratives.

In the world of politics, we can stand to suffer spin – even spin on steroids. As Steven Colbert memorably put it, decisions in politics are often based on truthiness, or the appearance of truth due to gut instinct. The narrative-driven endeavors to campaign and convince are a natural consequence of this modality of political decision.

When the world of politics discovered investor-state arbitration, some painted the picture that arbitrators, like voters, respond to ideologically well-sounding narratives rather than facts. Arbitrators are intellectually predisposed to want to believe one version of the truth. They are thus susceptible to fake news. Thus, investor-state arbitration has been dubbed a dangerous and corruptible realm of pseudo-courts charged with making far-reaching decisions affecting policy choices in host states for years to come.

Investor-state arbitration practitioners and scholars have long sought to refute this charge of bias. Following Susan Franck's pioneering work, they have shown that decisions are not inevitable, that

no one side wins disproportionately, and that stories of arbitrator prejudice are greatly exaggerated. And yet – one might ask, if investor-state arbitration suffers from the same kind of guerrilla tactics as the exchanges between President Donald Trump and his political opponents, how can we be certain that arbitrators remain truly above the fray?

In other words, if champions of investor-state arbitration are to successfully refute the charge that decisions are made based on truthiness rather than truth, there must be a predictable and reliable means of addressing evidence. It is self-evident that binding investor-state arbitration decisions should aspire to be based in fact rather than make-believe. When parties and their counsel have become so good at making believe, however, the practice must be able to look to a nascent law of evidence. It is only if such a nascent law of evidence exists that it is possible to shelve Senator Elizabeth Warren's criticism of investor-state arbitration in the category of political narrative as opposed to factually warranted critique.

Over the past few years, Ian Laird, Kabir Duggal and I have set out to address whether there are in fact rules of evidence that could rebut recent criticism. Our starting point was that discretion of the arbitrator – the free examination of evidence by the tribunal – would not rebut the charge. Discretion does not per se banish ideological predispositions from deliberations. Discretion could well prefer "fake news" to hard fact in arbitral decision-making. The only check against that possibility is trust in the arbitrators to utilize sound discretion – but this trust would need to be merited in some demonstrable way.

Consequently, we hoped to be able to pull back the curtain of arbitrator discretion and show that tribunals in fact made predictable and reliable factual determinations in investor-state arbitrations. Our conclusion after reviewing arbitral awards, jurisdictional decisions, annulment jurisprudence, and procedural orders is that investor-state arbitration does in fact follow robust rules of evidence. Surprising though this conclusion may sound to some, it is nothing other than confirmation that arbitrators can be trusted, but not because of some intangible quality of "arbitratoriness," rendering tribunals immune to truthiness arguments. Rather, it is due to an adherence by arbitrators to a basic fact-finding rubric that yields consistent results based in fact rather than conjecture, in record rather than narrative.

Our inquiry, *Evidence in International Investment Arbitration* (Oxford University Press, forthcoming 2017), begins with an articulation of rules governing burdens and standards of proof. The use of burdens and standards of proof provides the innermost skeleton for decision making in most any form of dispute resolution. Investor-state arbitration is no exception. And the burdens and standards of proof in investor-state arbitration unsurprisingly do not differ from the burdens and standards of proof applied in other international and transnational proceedings. As recently stated in *Apotex*, the principle of *onus probandi actori incumbit* applies in investor-state arbitration – the party submitting that an event took place has the burden to prove the veracity of its own claim. Further, as recognized by a *Rompetrol* tribunal otherwise skeptical of efforts to codify evidentiary rules in investor-state arbitration, the more sensational the claim, the more evidence will typically be required before a tribunal will accept the claim, i.e., a single anonymously sourced news article without more would rarely be sufficient to support a claim of egregious misconduct.

Our inquiry continues by cataloguing how tribunals permit parties to discharge their burdens and meet the respective standards. It catalogues a reasonably consistent practice of drawing inference and using presumptions. It showcases how the use of document disclosures assists a tribunal in shoring up the use of inferences and presumptions and looked to a general practice of treating

witnesses and experts. It further finds a consistent practice even with regard to the exclusion of evidence on the basis of privilege, confidentiality, or violation of fundamental principles of international public policy.

In short, investor-state arbitration follows robust rules of evidence. It can withstand the charge that as a practice, it cannot distinguish between truth and truthiness. Our book will provide additional evidence for the integrity and earnest judgment of arbitrators in the field.

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