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Judicial Economy in Investor-State Disputes

David M. Bigge (US Department of State) · Thursday, May 25th, 2017

The recent mention of "judicial economy" in the award in *Eli Lilly and Company v. Government of Canada* provides an opportunity to consider judicial economy in investor-state arbitration more generally. In its award of March 16, 2017, the *Eli Lilly* tribunal determined that certain judicial interpretations of Canada's patent law did not violate the substantive requirements of NAFTA Chapter Eleven. The claimant acknowledged during the proceedings that it had to prove a "dramatic change" in Canadian patent law to prevail on its claims. The tribunal found in its award that the claimant had not demonstrated such "a fundamental or dramatic change" in Canadian patent law, and therefore failed to establish a violation of NAFTA Article 1105 even under the Claimant's broad interpretation of that provision (¶¶ 387, 389).

As a result of this finding, the *Eli Lilly* tribunal stated that it did not have to decide whether a decision by a state's judiciary must rise to the level of a denial of justice in order to constitute a violation of Article 1105's minimum standard of treatment provision, and that "**judicial economy dictates that it should not do so**." (¶ 220, emphasis added). This reliance on judicial economy did not, however, restrain the Tribunal from opining on the matter for six further paragraphs, concluding (contrary to Canada's argument) that "a claimed breach of the customary international law standard of treatment requirement of NAFTA Article 1105(1) may be properly a basis for a claim under NAFTA Article 1105 notwithstanding that it is not cast in denial of justice terms." (¶ 223). The tribunal further adopted the *Glamis Gold* test for Article 1105, and noted that the application of *Glamis Gold* to a state's judicial decisions could occur only "in very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct. . . ." (¶¶ 222, 224). As the *Eli Lilly* tribunal did not base its decision in the case on this analysis, the discussion of judicial acts under Article 1105 must be considered *obiter dictum*.

Application of Judicial Economy in Investor-State Cases

Although "judicial economy" could refer to many efficiencies of arbitration, including preliminary awards, bifurcation, or consolidation, the *Eli Lilly* tribunal referred to "judicial economy" as the basis for refusing to decide certain legal issues presented by the parties – particularly difficult or novel issues – where there is another basis of decision. Judicial economy as applied in *Eli Lilly* is a prominent feature of WTO dispute resolution: the Appellate Body has long held that WTO panels "need only address those claims which must be addressed in order to resolve the matter in issue in the dispute." Indeed, this rule is routinely applied in the WTO context, and is even discussed in the WTO's online training program.

Judicial economy is not widely-addressed in investor-state awards, under ICSID or otherwise, and its application in practice is inconsistent. This inconsistency may at least in part be the result of the different sets of rules used for various disputes. The UNCITRAL Rules (1976) – the governing rules for the *Eli Lilly* dispute – require in Rule 32(3) only that the tribunal state the reasons upon which the award was based; they do not promote or prohibit judicial economy in awards. The tribunal in *Spence v. Costa Rica*, a CAFTA case using the UNCITRAL Rules (1976), was therefore able to state in a 2016 interim award that, "[t]o the extent that any point has not been expressly addressed in this Award it is for reason of judicial economy and an appreciation that an assessment of the point in question was not necessary for purposes of the Tribunal's decision rendered herein." The *Chevron v. Ecuador* tribunal, also operating under the UNCITRAL Rules (1976), likewise assured the parties that "[t]he Tribunal has . . . considered the Parties' submissions and claimed relief at length; and the omission here of any reference to any part of such cases should not be taken as signifying otherwise." It should be noted, of course, that the UNCITRAL Rules permit a party to request an additional award if the tribunal fails to address an issue raised in the proceedings, but the tribunal may decline to make the additional award if it considers the request to be unjustified.

Article 48(3) of the ICSID Convention, in contrast, expressly requires that an "award shall deal with every question submitted to the Tribunal," a requirement reflected in Rule 47(1)(i) of the ICSID Rules. These provisions limit a tribunal's ability to apply judicial economy in the same manner as the WTO. This does not mean, however, that ICSID tribunals can never invoke some aspects of judicial economy to streamline their awards. As the annulment committee in *M.C.I. Power Group L.C. v. Ecuador* explained,

> [t]he obligation in Article 48(3) of the Washington Convention to deal with every question applies to every argument which is relevant and in particular to arguments which might affect the outcome of the case. On the other hand, it would be unreasonable to require a tribunal to answer each and every argument which was made in connection with the issues that the tribunal has to decide . . . . [T]he tribunal must address all the parties' "questions" . . . but is not required to comment on all arguments when they are of no relevance to the award.

The *M.C.I.* explanation of judicial economy has been applied by a number of subsequent ICSID tribunals, including in *Suez v. Argentina* and *Gremcitel S.A. v. Peru*, both holding that "[c]onsiderations of judicial economy suggest . . . that the Tribunal can dispense with dealing with arguments . . . which have no impact" on the outcome. The line between a "question" and an "argument" may be difficult to draw, but this delineation is required by the ICSID Convention as explained by the annulment committee in *M.C.I.* In any event, while some exercise of judicial economy is permitted, an ICSID tribunal is not permitted to rule on the narrowest issue and leave the rest of the presented questions unanswered.

Rejection of Judicial Economy

Some arbitrators have expressly rejected the notion of judicial economy in investor-state disputes. In a separate opinion in *S.D. Myers v. Canada*, one arbitrator wrote:

> This opinion will address those issues necessary to dispose of this first stage of this case, and in doing so will attempt to provide reasoning that is sufficiently well elaborated as to be a potential source of assistance in the future. With respect to some of these issues, it would be possible for me to reach a particular conclusion on one legal basis, and avoid considering other possible bases for reaching the same conclusion. I have not always, however, taken this path of maximum avoidance. The parties to this case have devoted a great deal of thought, energy and expense to arguing a variety of legal points and have expressly indicated their desire for some broad guidance for the future. I would think it might be rather diseconomic from their point of view for me to now refrain from expressing the opinion I have formed on some important points that have been fully debated in these proceedings and which will likely be of considerable ongoing interest.

"Completeness" and "the parties have invested time and effort in briefing these issues" are perhaps the most oft-cited bases for addressing legal matters unnecessary for the resolution of the dispute. For example, in *Allard v. Barbados*, a case administered by the PCA under the UNCITRAL Rules (1976), the claimant alleged that his property was subject to environmental degradation due to various acts and omissions by the Respondent. In a 2016 award, the tribunal ruled that the claimant failed to establish, as a factual matter, that his property was degraded, but nonetheless "for the sake of completeness" went on to assess the alleged acts and omissions of the respondent (¶¶ 139-140). The tribunal concluded after this unnecessary analysis that "even if it had found that there was a degradation of the environment . . . it would not have been persuaded that such degradation was caused by any actions or inactions of Barbados," and therefore that the claimant had failed to establish causation (¶ 166). Despite the fact that the claimant had proven neither loss nor causation, the tribunal went on to conduct a detailed analysis of the alleged breaches of the BIT at issue, "having regard to the exhaustive compilation of the Parties' pleadings and the joinder of issue." (¶ 167).

Likewise, in *KT Asia Investment Group v. Kazakhstan*, an ICSID case, the tribunal dismissed for lack of jurisdiction on the ground that no contribution had been made by the investor that could comprise an "investment." Nonetheless, the tribunal explained, "[f]or the sake of completeness and because the Parties have briefed these matters, the Tribunal will now briefly examine the other elements of an investment, i.e. duration and risk." The Tribunal in *Nova Scotia Power v. Venezuela* followed a similar approach.

Perhaps the most interesting reference to judicial economy appears in the 2010 award in *Merrill & Ring v. Canada*. In *Merrill & Ring*, Canada had presented a jurisdictional time-bar argument that was credible and could have disposed of the entire case. Instead of addressing that issue, the Tribunal launched into a long discussion of fair and equitable treatment under NAFTA Article 1105's minimum standard of treatment provision, which the tribunal admitted was "[t]he most complex and difficult question brought to the Tribunal in this case. . . ." (¶182). The *Merrill & Ring* tribunal defined Article 1105 more expansively than previous NAFTA tribunals, basing its interpretation on the concept of "reasonableness" and suggesting that regulatory transparency, legal stability, and legitimate expectations may be requirements of customary international law. This Article 1105 analysis, which has been heavily criticized by a number of scholars, comprises 26 pages and 64 paragraphs, before the award reveals that the tribunal was unable to reach a conclusion on Canada's liability in that case (¶ 246).

The *Merrill & Ring* tribunal then turned to damages and found that even assuming Canada was found liable, the claimant had not established its damages to the satisfaction of the tribunal. It was only after the lengthy exegesis on Article 1105 and the conclusion on damages that the tribunal turned to the far simpler and less controversial topic, Canada's time-bar objection. Having found that the claimant had failed to establish damages for its Article 1105 claim, the tribunal asserted that it was applying judicial economy to refrain from ruling on the time-bar objection.

Merrill & Ring's supposed reliance on judicial economy was a perversion of the concept; in expansively and controversially interpreting NAFTA Article 1105, instead of resting only on the simpler damages issue or addressing the time bar objection at all, the tribunal made the process less – not more – economical.

Considerations in the Application of Judicial Economy

Several considerations come into account when determining whether to apply judicial *economy* in drafting an award. Above all, it is the economy of judicial economy that should drive its use. If it would be more efficient to resolve a dispute simply and quickly, without having to dedicate time to analyze complicated or difficult legal and factual issues, that should be the route chosen by the tribunal in order to minimize the financial burden on the parties.

Arbitrators must also consider their obligation to address the issues presented by the parties. If, as in the ICSID system, a tribunal is obligated to resolve every question submitted to it, such an obligation limits the tribunal's discretion to invoke judicial economy. These concerns may be what drive some tribunals to address arguments, unnecessary for the disposition of the award, for the sake of "completeness." Depending on the specific rule involved, however, such "completeness" concerns might be addressed by summarizing the parties' arguments while refusing, on the basis of judicial economy, to rule on those issues. This was the approach taken, for example, in *InterTrade Holding v. Czech Republic*, a PCA case under the UNCITRAL Rules (1976), in which the tribunal ruled first that it did not have jurisdiction, and proceeded "for the sake of completeness" to detail the parties' merits arguments without ruling on them (¶ 205).

Some arbitrators, like the concurring arbitrator in *S.D. Myers*, may also believe that they have a responsibility to develop an area of law perceived to be unclear. Such an impulse should be resisted. The arbitrators' only obligation is to the parties to the arbitration, who are paying for an efficient and effective resolution of their dispute. Arbitrators in investor-state disputes can point to no authority for a broader responsibility to develop international law for future application. Furthermore, investment treaties reflect two (or more) sovereign parties' agreement. Arbitrators should be mindful to minimize potential conflict between states on treaty interpretation issues. Extrapolation on the agreed terms of a treaty, where such extrapolation is unnecessary to render an award, is therefore unwarranted.

Finally, it should be noted that, as in all things in arbitration, the parties to the dispute have a role to play in this procedural issue. Parties can agree in the arbitration agreement, in terms of reference, or in draft procedural orders submitted to the tribunal, that the arbitrators should (or should not) utilize judicial economy. Indeed, tribunals who refrain from exercising judicial economy often cite the fact that the parties went through the effort of submitting various arguments, suggesting that the parties expect the tribunal to rule on each of those points. If parties wish the tribunal to be more economical, they can make that wish known prior to the drafting of the award. In particular, parties can agree that tribunals should determine whether there are

dispositive preliminary issues that can resolve the case without a full analysis of the merits. Obviously such a request could also include bifurcation of proceedings, although judicial economy could be invoked without bifurcation where the tribunal determines that bifurcation is inappropriate.

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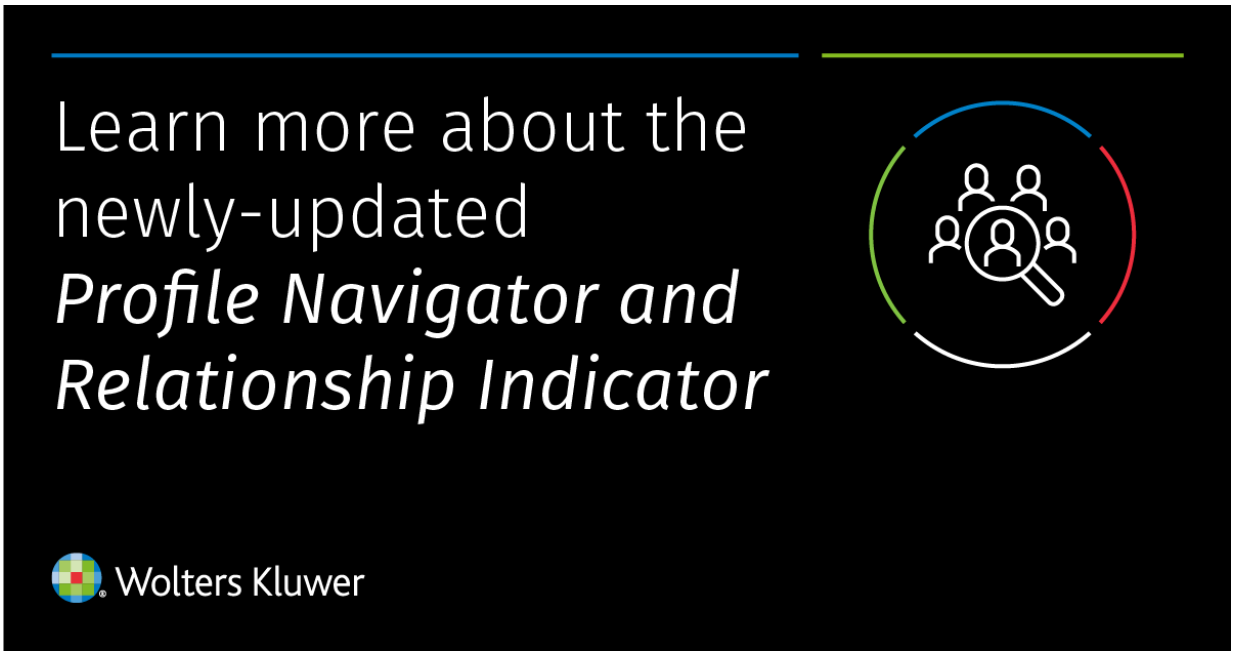

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