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Legitimacy and International Arbitration: An Alternate View

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Over the last few years, legitimacy has become a hot topic in international arbitration. Although the investment regime has borne the brunt of the attack, commercial proceedings have also suffered from criticism. The range of voices questioning the propriety of arbitration has been at times quite diverse and has included journalists, judges, governments and human rights advocates as well as parties themselves.

To its credit, the arbitral community has not ignored these concerns but has instead responded with a series of public and private reforms. For example, demands for increased transparency have been answered in the investment realm by the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration and by the Case Law on UNCITRAL Texts (CLOUT) project and ArbitratorIntelligence in the commercial realm.

Practitioners and policymakers are not the only ones interested in the integrity of the arbitral process. Academics have also sought to address concerns about the legitimacy of international arbitration, primarily in the form of an ever-increasing number of empirical studies relating to the nature and quality of arbitral procedures. Although these studies strongly suggest that international arbitration can indeed be considered a legitimate form of dispute resolution, critics of arbitration tend to ignore or downplay this data.

Recent years have seen a rise in the number of people who refuse to recognize the veracity of scientific data, leading to concerns about how policy debates can realistically proceed. The problem in the arbitral realm is to some extent exacerbated by the fact that lawyers are trained to believe that the best form of persuasion is through content-based arguments. This preference for "hard evidence" has led the arbitral community to respond primarily to external criticism by addressing the merits of the dispute. This approach often reflects the underlying belief that erroneous policy positions are generated by an incorrect or incomplete understanding of the relevant facts. However, as discussed in my forthcoming article, empirical research by political scientists Brendan Nyhan and Jason Reifler has shown that pervasive misconceptions about objectively identifiable facts often do not arise as a result of information deficits. Instead, mistaken beliefs are often caused or perpetuated by a variety of other factors.

One of the most important elements of Nyhan and Reifler's research is the discovery that political misperceptions are significantly affected by people's preexisting worldviews. In fact, Nyhan and Reifler found that "[d]irectionally motivated reasoning – biases in information processing that

occur when one wants to reach a specific conclusion – appears to be the default way in which people process (political) information."

This conclusion is supported by research conducted by social scientists in other fields. For example, psychologists interested in the decision-making process have found that "cognitive distortions" often arise as a result of implicit or unconscious biases. One of the most well-established phenomena involves the status quo bias, which reflects an emotional preference for the established legal or social norm, regardless of the rationality of that preference. Not only has the status quo bias been empirically proven, it also appears to provide a potential explanation for why critics of international arbitration refuse to recognize the validity of empirical research suggesting that international arbitration is at least as good as (if not better than) international litigation in resolving cross-border commercial and investment disputes.

Adherents of the law and economics movement will recognize that the effect of the status quo bias is in many ways analogous to the effect of legal defaults. Indeed, economists have shown that defaults tend to assert a psychological pull in the direction of the established norm, regardless of the rationality of that particular position. Because litigation operates as the default in dispute resolution, judicial procedures can be considered to reflect the status quo. This suggests that international arbitration will always suffer, at least to some extent, from an unconscious bias in favor of litigation, particularly among those who are unfamiliar with international arbitration.

What does this mean for the arbitral community? First, it suggests the need to educate the legal and policymaking communities about the effect that unconscious biases can have on discussions about the legitimacy of international arbitration. This is not to say that some criticisms of the procedure are not valid, it is simply to recognize that comparisons between litigation and arbitration are affected by certain factors that do not reflect optimum or rational decision-making.

Second, this analysis suggests that it may be necessary or at least useful to "reset" cultural expectations about the status quo by adopting new defaults regarding international dispute resolution. This initiative could be implemented through treaties or legislation that establish arbitration as the legal default in international commercial matters or through judicial rules (such as those establishing a strong version of negative competence-competence) that would create a presumption in favor of arbitration. Various commentators, including Gary Born, Gilles Cuniberti and Jack Graves, have proposed these types of measures, and it may be time to give those proposals some serious thought.

Third, the issues identified in this post suggest a possible need to rethink how the arbitral community communicates with other segments of society. Traditionally, law and policymakers have relied on a point-counterpoint approach to legal debate, but scholars like Nyhan and Reifler have shown that that style of argument can actually exacerbate pervasive political misconceptions. These findings raise significant questions as to what types of communication will actually prove persuasive to those who hold different viewpoints. To answer that question, it may be necessary to consult with experts in communications theory to identify alternative means of discussing the legitimacy of international arbitration, as I argue in my recent article.

This is obviously a very complex subject, and this post has only touched very briefly on a few of the relevant points. However, it is hoped that this discussion has demonstrated how interdisciplinary research can help the arbitral community overcome certain recursive problems in the field.

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