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How to Improve International Investment Law

Todd N. Tucker, Roosevelt Institute

International law is in a rough period. Since 2016 institutions as varied as the European Court of Human Rights, the World Trade Organization, and the International Criminal Court have been harshly criticized by politicians chafing at their strictures. The reasons for growing dissatisfaction vary. Africans unhappy with human rights prosecutions can point to a disproportionate prosecutorial focus on their continent. Russia and China see conflicts between their geopolitical ambitions and liberal norms. And the United States – a frequent target of trade dispute settlements – has had gripes with international legal systems for years. President Donald Trump expresses them out loud when he calls the World Trade Organization a "catastrophe."

Criticisms of the Investor-State Dispute Settlement Process

In gripes about international law, few other procedures have been singled out for as much scorn as the investor-state dispute settlement system – which for simplicity I will call "investment law." Incorporated into thousands of treaties signed in recent decades, the dispute settlement system allows multinational investors to challenge regulations imposed by host governments before three-arbitrator tribunals. The challenged nation appoints one arbiter; the company appoints a second and has a say on the third. These arbitrators decide only the case at hand, but their members rely on a regular flow of litigants for repeat business.

Without these treaties, foreign companies with a gripe about national policy would have to seek to influence local legislators or make cases to local tenured judges. Their claims would be limited to whatever was allowed under domestic law, and the judge would have no financial stake in her decision. In the United States for example, companies unhappy with Environmental Protection Agency proposals can sue the government. But assuming an agency is acting constitutionally, plaintiffs cannot win monetary settlements just for having to comply with rules that every other company faces.

Here's where the international investment rules come in. Well-heeled companies like Philip Morris have used these rights to target common sense tobacco regulations in Australia and Uruguay, as did Enron over Argentina's response to their 2001 financial crisis. To critics on the left, these lawsuits are a way to undermine national health and safety regulations.

On the right, Trump's trade advisor Robert Lighthizer lamented to a congressional panel that the system allows "three guys in London to say we are going to overrule the entire U.S. system." Leftists and Trump officials do not have much in common – except their shared aversion to investment law's outsourcing of policymaking beyond national boundaries.

Are Criticisms Valid?

But much of this criticism is overwrought. As I show in my new book *Judge Knot*, national states have done remarkably well in fending off the most opportunistic claims from companies. Overall, states win more than they lose; and even when governments lose, the remedy is not domestic policy change but cash payments to the aggrieved investor. Although companies have demanded over $400 billion since the first investment law case in 1990, arbitrators have awarded taxpayers only a fraction of that. The median investor received only 14 percent of claimed damages, and most got nothing. Compared to the World Trade Organization where challenged states lose nearly 90 percent of the time, investment law starts to look downright pro-sovereign.

That's not to say the system cannot be improved. Though the complaining investors are rarely made whole, their lawyers and litigation financiers do quite well, with returns on legal costs of up to 1,500 percent in some years. With this kind of money to be made, lawsuits move along further than they should. Indeed, a whole

hedge fund industry has popped up on the side of investment law, bankrolling cases in exchange for a share of the final damages. Furthermore, my interviews with arbitrators reveal that most of the lawyers involved in these cases know little about democracy and development. To them, as to the judges, a rule is a rule. This is hardly unique. In domestic law, however, excessive legalism can be checked by legislators who can impeach wayward judges or overturn bad precedents. But there is no global legislature, so poor arbitration matters.

The Real Problem in International Law and How to Fix It

The worry over international lawyering speaks to a deeper anxiety. Since the Cold War, the idea that law could trump power has become increasingly influential. Developing countries took hope that rules could constrain America's backsliding on free trade. American policymakers promised that rules could constrain the rise of China and Russia. In an era of resurgent nationalism, such optimism may no longer be warranted.

But this does not mean the world should give up on the idea of global order. Here, the investment regime offers a counterintuitive but useful template. Rather than pretending to be globalization's supreme court, investment law's untenured arbitrators offer up their conclusions as one take among many. Tribunals can and do disagree with one another, even in cases that appear similar at first blush. Arbitrators that specialize in commercial law dissent vigorously from colleagues with public law training, and vice versa. Uninformed or biased arbitrators can be and are winnowed away – either by being denied repeat appointments or by having their impartiality challenged by litigants. The system allows for greater deference to democratic decision-making than the World Trade Organization and some of the other embattled global courts.

Investment law as it stands now is not wholly appropriate. Outsized financial gain and rent-seeking by lawyers and arbitrators must be curtailed. Domestic judges, for good reason, do not have incentives to decide more cases. Society needs them to make the right calls, not just more calls – and the same should hold at the international level. Moreover, labor, environmental, and consumer interests should be allowed to appoint their own arbitrators, just as investors do now. This would give a more diverse set of interests a voice in international legal decisions.

No one reform can definitively bridge the centuries' old gap between legal globalists and nationalists. But by lowering the financial stakes and increasing the number of players, it should be possible to fashion international legal venues worth the support of more of the world's citizens.

Read more in Todd Tucker, *Judge Knot: Politics and Development in International Investment Law* (Anthem Frontiers of Global Political Economy, 2018).