

The unique authority of international investment arbitrators

Investment arbitrators exercise a distinct set of powers relative to other international courts and tribunals, as outlined below.

Claims by private parties

The authority of investment arbitrators stems from the standing given to private investors (typically, companies that own substantial foreign assets) to bring claims directly against states under international law.

[IIAPP comment: This aspect of international investment arbitration, by itself, does not make international investment arbitration unique. Other international courts and tribunals also hear claims from private parties. However, the scope of the standing given to investors, based on the other factors described below, tends to give investment arbitrators a distinctive authority.]

No requirement to resort to domestic legal processes

Unlike other international courts and tribunals, investment arbitrators can hear international claims by investors without any requirement for the investor to resort first to reasonably-available remedies in the host state.

[IIAPP comment: The removal of the duty to exhaust local remedies is intended to address concerns that host state courts may be biased against foreign investors or otherwise unfair. On the other hand, this aspect of the system limits opportunities for domestic decision-makers to respond to an investor's grievances. It also means that, for states that have robust judicial institutions, there is no way to defend against a claim on the basis that domestic courts offer a fair forum to the investor. Lastly, in many states, domestic courts enjoy institutional safeguards of judicial independence and fair process that are not present in international investment arbitration.]

Final resolution of public law and public policy

Unlike in conventional commercial arbitration, investment arbitrators rule on questions of public law and public policy. That is, in a very wide range of fields, they may rule on the scope of sovereign authority, the legality of public decision-making, and the appropriateness of monetary or other penalties against a government. Investment arbitrators may also review decisions of any branch or level of government in a host state.

[IIAPP comment: An implication of this broad power is that arbitrators can rule on the legality of domestic legislation, general policies, and court decisions in addition to state conduct that affects a specific investor in a targeted way. This highlights the important role of investment arbitrators in policy-making. It also illustrates that international investment arbitration, more than other international courts and tribunals, resembles the role of domestic courts in deciding constitutional or administrative law.]

The broad scope of the review authority of investment arbitrators means that the decisions of investment arbitrators may affect rights or interests of other actors, such as domestic investors, local governments, or individuals. However, those actors cannot obtain full standing, alongside the foreign investor and national state, in the arbitration process. In some cases, representative groups have been allowed to make submissions after a tribunal granted them standing as amicus curiae. Yet the scope of these submissions is limited in important ways and the role of amicus curiae in the system has prompted criticism that it puts an unfair burden on the disputing parties that fund the arbitration. This highlights the tensions arising from the use of a private model of arbitration to resolve, on a final basis, questions of public law and public policy. In domestic legal processes that decide public law, all parties with a legal right or interest in the dispute would typically have the right to seek full standing in the process.]

Generality of the legal standards

Like many courts and tribunals, arbitrators have wide discretion to interpret the law because key concepts under investment treaties and investment contracts – such as investment, fairness, equity, expropriation, and discrimination – are framed with general language and can be interpreted in various ways. In the case of investment treaties, these standards virtually always operate to regulate host state conduct with respect to investors. They do not regulate the conduct of investors with respect to host states or constituencies within those states.

[IIAPP comment: Because investment treaties regulate host states, but not investors, it follows that an investment treaty arbitration can be established only based on a claim by an investor. In this respect, the investment treaty system has been described as asymmetrical or non-reciprocal. On the other hand, under investment contracts, either the investor or the state can usually initiate an arbitration arising from a contractual dispute. Other than for stabilization clauses and other contractual provisions that bind only the state party to the contract, international arbitrations pursuant to investment contracts are thus formally reciprocal in that they may involve rights or obligations for both disputing parties.]

Authority to order monetary compensation

Unlike many international tribunals, where a tribunal decides that a government has violated an investment treaty or contract, the arbitrators can order the payment of public compensation to the investor. Amounts awarded may be substantial, with several cases having led to awards in the hundreds of millions of dollars. Unlike other international regimes, this authority to grant monetary compensation is usually not limited by, for example, a requirement of a “sufficiently serious” breach of the law, caps on monetary penalties, or a requirement to tailor the amount awarded to the host state’s economic size and development status.

In some cases, investment arbitrators have issued non-monetary orders against a state. For example, in *ATA v Jordan*, the arbitrators ordered the Jordanian courts to terminate domestic legal proceedings and permit a commercial arbitration to proceed.

[IIAPP comment: The authority of investment arbitrators to award monetary compensation is especially noteworthy because the retrospective award of damages against the state is not the remedy of first

resort in domestic public law. Rather, non-monetary public law remedies that compel or restrict government action are relied on as the primary remedy.]

Enforceability against state assets

Unlike other international tribunals, awards are enforceable against the respondent state's assets abroad. This is based on the incorporation, into investment treaties, of arbitration enforcement treaties like the New York Convention of 1958 and the ICSID Convention of 1965.

[IIAPP comment: This enforcement structure subjects a respondent state to the authority of foreign domestic courts with respect to the respondent state's assets in their jurisdiction. For investors, this means that the disciplinary power of the system over respondent states may depend on the likelihood of seizing state-owned assets abroad.]

Insulation from judicial review

Investment arbitration awards are subject to enforcement under the New York Convention or the ICSID Convention. For awards under the New York Convention, domestic courts in the legal "seat" of the arbitration may review an award issued by an investment arbitration tribunal. Under the ICSID Convention, tribunals are subject to review by an annulment panel of three separate arbitrators appointed by the World Bank President. In both cases, the role of the reviewing court or annulment panel is limited in scope.

[IIAPP comment: Based on the New York Convention and the ICSID Convention, the decisions of investment tribunals become enforceable by domestic courts without close review in a court, whether domestic or international. In arbitrations under the New York Convention, judicial review in domestic courts is usually restricted by domestic legislation and case law that was designed typically to facilitate the enforcement of international commercial arbitration awards. In arbitrations under the ICSID Convention, awards are subject to review by an ad hoc ICSID annulment panel. However, like domestic courts operating under the New York Convention, ICSID annulment panels lack the authority to override legal or factual errors of the original tribunal. In general, under both conventions, the decisions of investment arbitrators are reviewed mainly for jurisdictional errors or serious procedural unfairness.

This is noteworthy because, although international investment arbitrators have broad authority to decide questions of public law and public policy, they are subject to less rigorous processes of judicial review than other international courts and tribunals. For example, World Trade Organizations panels that decide trade disputes between states are subject to more comprehensive review by a permanent WTO appellate body whose members are, in effect, international judges.]

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