

Investor-State Arbitration:

Implications for Inequality



**Columbia Center
on Sustainable Investment**
A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY


Investor-State Arbitration: Channels Impacting Inequality

- (1) providing unequal substantive rights
- (2) providing unequal procedural rights
- (3) providing unequal remedies
- (4) entrenching unequal systems, and
- (5) creating inequalities in terms of who writes the rules

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- (1) providing unequal substantive rights that strengthen the legal force of certain economic rights and “expectations”, with potentially negative impacts on competing rights and interests;
- (2) providing unequal procedural rights to a certain class of actors, easing their ability to challenge regulatory measures negatively impacting their economic operations and performance, while retaining relatively high barriers for other individuals and entities to use legal actions to protect and enhance broader public interest aims;
- (3) providing unequal remedies that require governments to pay significant financial compensation to “property” holders for interference with their economic rights and expectations while violations of non-economic rights and interests can be perpetrated without the same financial consequences for governments;
- (4) entrenching unequal systems and hindering the ability of domestic institutions (including courts and legislators) to address inequalities; and
- (5) creating disparities in the ability of different actors to participate in understanding and shaping relevant rules through relevant domestic and international institutions.

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Occidental relates to new interpretation of tax law; this has implications for situations – not uncommon – when a government agency charged with enforcing the law shifts its interpretation and enforcement strategy;

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How does scope of protection of substantive economic rights under investment treaties compare with property rights protections under other systems with strong property rights protections (e.g. under domestic US law?)

- Tribunals much more protective of economic rights and expectations, shielding them against government/policy interference
- Reported success rate for claimants in ISDS – roughly 40%
- Cf. success rates for claimants in US indirect expropriation cases – 4%



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providing unequal substantive rights that strengthen the legal force of certain economic rights and “expectations”, with potentially negative impacts on competing rights and interests

Example: Investor A sought to develop a mine in the host country. Certain government officials sought to encourage the investment, while other officials and members of local communities expressed concerns that the project would result in harms to the human and natural environment.

After an environmental assessment of the project was conducted, government officials at the provincial and federal level rejected the proposed mine. The reasoning behind their decision adopted an approach to environmental analysis that was more precautionary and responsive to environmental/social concerns than had been applied in approving previous projects.

Investor A brought an ISDS case to challenge the decision to reject its project. The tribunal determined that the government had created, and then frustrated, the investor’s “legitimate expectations” regarding approval of the mine and therefore violated the investment treaty.



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providing unequal procedural rights to a certain class of actors, easing their ability to challenge regulatory measures negatively impacting their economic operations and performance, while retaining relatively high barriers for other individuals and entities to use legal actions to protect and enhance their or broader public interest aims


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Indeed, ISDS has led to awards of unprecedented size to foreign investors in the context of international review of sovereign countries. The total ordered compensation in ISDS has been approximately as follows based on a review of 86 ISDS awards (all amounts in USD):⁴


- From states to large⁵ (over 1 billion in annual revenue) or extra-large (over 10 billion in annual revenue) companies: 7.5 billion
- From states to very wealthy individuals (over USD 100 million in net wealth): 1.1 billion
- From states to other individuals (under 100 million in net wealth): 325 million
- From states to other⁹ companies (over USD 100 million in annual revenue, less than 1 billion): 270 million
- Total from states to foreign investors: 9.2 billion

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Implications due to:

- Who drafts the treaties? (e.g., executive at federal level) With what input?
- Who interprets the treaties? (private arbitrators appointed by parties, not public officials; not accountable to states; decisions not reviewable – errors of fact or law can stand)
- What power do tribunals have? (power is significant due to the very vague wording used in treaties; treaties represent a significant delegation of power to arbitrators to give the treaties their content)
- Who can participate in disputes –
 - Investors who bring the claim –
 - The state – but who is the state? Often, the state entity who has control over whether and how to defend the case, and whether to settle and on what terms, is the federal government, and the executive branch; this is a significant concentration of power, that can operate to the detriment

- of the power of other branches of government, and local government officials;
 - Other individuals and entities, even if they will be affected by the outcome of the dispute, or their own rights are at stake, do not have any right to participate in the dispute; cf approach taken in, e.g., US law of permitting if not requiring intervention, both to hold the government accountable and to ensure that non-parties aren't negatively affected.
 - Moreover, disputes can still take place confidentially, which limits the ability of domestic citizens to follow the cases or their outcomes.
- Where do disputes take place –
 - Often outside of the host country and in a language that is different from the official language in the host country – affects who can follow the dispute.
 - What is the role of domestic officials and institutions in interpreting the law?
 - Treaties allow for creative framing – domestic law questions can be framed as breaches of international investment treaties. When investors do this, they then ask tribunals to step in and provide interpretation of domestic law contract, administrative, and legislative norms. The ISDS tribunals thus can play a key role in shaping the contours of domestic law, not just international law;
 - E.g., tribunal interpretations of contracts; in domestic legal systems, courts often police private contracts, and decline to enforce deals that are so one-sided as to be unconscionable, or whose terms are void as against public policy; I've reviewed various database of international arbitral decisions, and haven't found any case in which a tribunal has agreed with a state's argument that the underlying contract was unenforceable on any of those grounds;
 - E.g., tribunals are also being called to interpret questions of domestic law. Recently, a case against Ecuador in which the tribunal is interpreting an Ecuadorian environmental law which seeks to enable companies to be held liable for pollution they have caused. The company argues that the law cannot have any retroactive effect, cannot result in the company being held liable for pollution it caused prior to passage of the law. The government of Ecuador argued, in contrast, that the law does indeed have that effect, and can result in liability for past pollution. The question appears to be unsettled under domestic law; the tribunal is thus responsible for providing its novel interpretation:

“The Tribunal considers that where a particular regime that can give rise to damages claims has governed the conduct of a complex activity such as hydrocarbons exploitation, although the standards can be made more stringent with respect to activities engaged in after their entry into force, in respect of attempts to impose tortious liability after the fact, an operator can in general be held only to the legal standards that applied to its conduct at the time.” (para. 357).

This stance that the tribunal takes against post-conduct liability is strikingly inconsistent with much of US law; indeed the US tort system is based on a notion that individuals and enterprises can be held liable for harm-causing conduct even if that conduct was technically legal at the time. The notion is that the harm-doer has to pay compensation. Here, in *Perenco*, the tribunal interpreting domestic law announces a principle that such an approach will not be permitted. I would submit that this is a side-effect of this system of outsourcing the judicial function to private arbitrators.