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Judicial Restraint in Investment Treaty Arbitration

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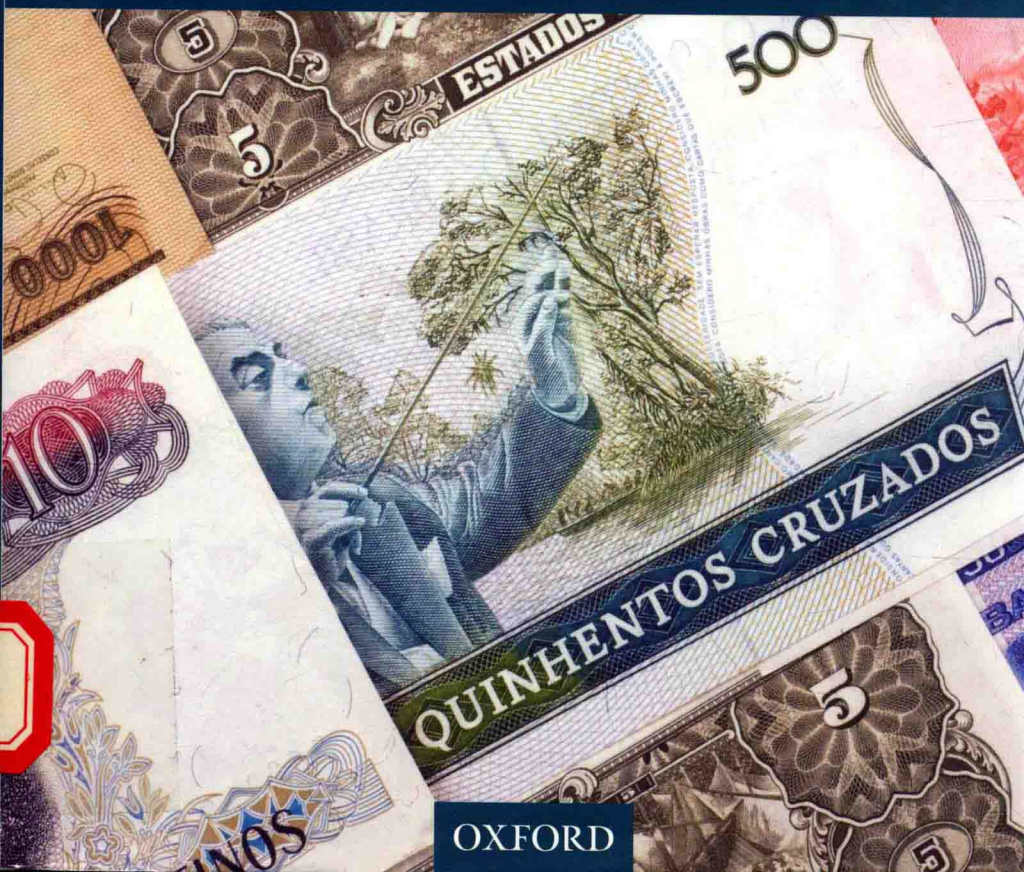

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SOVEREIGN CHOICES AND SOVEREIGN CONSTRAINTS

Preface

This book is an empirical study of the discretionary choices of investment treaty arbitrators. The study relied on systematic reviews of the arbitrators' reasons to investigate their review function and their exercise of restraint. Its first contribution is to document that the arbitrators reviewed legislative, executive, and judicial decisions in an array of areas of state decision-making and that their adjudicative role often overlapped with that of domestic courts, contract-based forums, and, to a lesser extent, other international courts and tribunals. Its second contribution is to reveal that the arbitrators, unlike courts in various contexts and jurisdictions, in general did not signal restraint based on rationales arising from the relative accountability of legislatures, the relative capacity of governments, or the relative suitability of other adjudicative forums. One notable exception to this finding, especially in NAFTA investor-state arbitration, was the tendency of some arbitrators to exercise general deference and in-built restraint due to the residual role of domestic courts. These observations highlight that the arbitrators interacted with other institutions of sovereign decision-making and that the arbitrators, in comparison to common judicial approaches, appear to be reconfiguring the review role of adjudication.

The purpose of the study was to observe and analyse arbitrator performance. It was not to recommend or guide a particular approach to adjudicative restraint. A possible way for the arbitrators to re-frame their role on more prudential terms is laid out in the book's conclusion. This model was constructed from the scattered examples of arbitrator restraint that emerged from the study in order to indicate that credible alternatives exist. Importantly, the presentation of this model is not intended to suggest that a shift in direction away from arbitrator assertiveness or indulgence and towards restraint seems likely under the current make-up and management of investment treaty arbitration. Also, it is open to debate what would need to change—institutionally, procedurally, or substantively—to facilitate a shift, if one were thought desirable.

A premise of the book is that investor-state arbitration is a vehicle for the exercise of sovereign authority and a site for contesting sovereign choices. This position was presented in the author's *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007) and it is not elaborated further here. Rather, the conceptual starting point for the present work is simply that investor-state arbitrators rely on sovereign authority for their decision-making

authority and that investor-state disputes often stem from disagreements about the role of the state.

Because this is an empirical study, it is important to be transparent about the author's expectations before the study was carried out. First, it was anticipated that the arbitrators were engaged in the review of a wide range of decisions—reflecting a model of regulatory adjudication rather than commercial dispute resolution—although it was unknown the extent of that engagement across different areas and types of state decision-making. There was a modest expectation that investment treaty arbitration would typically involve decisions by executive actors that targeted in some way the claimant and that such decisions would be more likely to generate findings of a treaty violation by the arbitrators. Thus, it was somewhat surprising to see the extent of the arbitrators' role in reviewing general laws and policy measures and quite surprising to see how much their role overlapped with other adjudicative forums, especially contractually-agreed forums. This pointed in turn to the significance of most arbitrators not having exercised restraint in the face of contractual exclusive jurisdiction clauses or treaty-based wait periods and forks-in-the-road.

On the issue of restraint, there was a general expectation that the arbitrators would favour an approach to investor protection that might not sit comfortably with judicial accommodations of the democratic regulatory state in the modern context and, particularly, that arbitrators might not be as inclined to adopt deference and balancing in general and might typically limit themselves to such reasoning techniques in the application of specific treaty standards only. This latter expectation was borne out, although there was less evidence than expected of even standard-specific restraint. However, it was startling to see how rarely the arbitrators discussed any of the institutional rationales for restraint that are commonplace in courts, how as a group they used language of restraint more often when expanding than when limiting their authority, and how repeatedly they employed interpretive devices to avoid restraint even when it appeared to be supported directly by language in the treaty or a contract. It was also surprising to see the extent to which arbitrators, especially a frequently-appointed core of arbitrators, favoured approaches to ambiguity in the treaties that expanded their authority and the prospect of state liability and how, on the whole, they did not show restraint in the review of legislatures and governments, even though many arbitrators were clearly aware of options for restraint due to the submissions of states and the arbitrators' discussions of topics such as the deference shown by domestic courts to arbitrators. These findings informed the brief but strong conclusions on the arbitrators' approach to their review role as presented in the conclusion of this book. Finally, although they did not stem from the expectations that originally framed this study, some comments on evidence that emerged about the

arbitrators' characterizations of democracy and government are highlighted in Chapters Three and Four.

Methodologically, the study involved an evaluation of arbitrator decision-making in known cases with reference to pre-set criteria for coding and analysis. Some aspects of the underlying research were aimed at prescriptive findings and subjected to statistical analysis. However, for the purposes of this book, the findings are limited to descriptive aspects of the arbitrators' reasoning and do not purport to predict future behaviour. The study also does not allow any conclusions to be drawn about the intentions or plans of any individual arbitrator and its overall findings and conclusions, although applicable to arbitrators as a group, may not apply to any particular individual. Because the study is focused on systemic evaluation, it does not provide in-depth case-by-case analysis of the factual and legal quandaries confronted by arbitrators or of the context for challenged state decisions, for related investor activities, and for the resulting disputes. These aspects of individual variation, case-specific detail, and decision-making context are obviously important for all sorts of reasons—tactical litigation, doctrinal study and refinement, or evaluation of the credibility of a tribunal's reasons—but they may also lose sight of wider developments. A benefit of the present systematic method, alongside its limitations, was that gaps and other features of the arbitrators' reasoning were revealed in ways that would not have been apparent if one focused on what a selection of tribunals, whose decisions are prominent, for example, or favoured or disfavoured by the researcher, have said and done.

The study focuses on the arbitrators' reasons as a source of information on the arbitrators' characterization of their review function and signalling of restraint. It also draws supplementarily on other searchable materials such as party submissions and domestic court decisions in investment treaty cases as well as secondary literature. Yet the main source was publicly-available awards (and decisions, orders, etc) in known cases. Information from this source was coded, classified, and analysed for basic information on the case, for the areas of decision-making into which challenged state measures appeared to fall, for the types of decisions that were subject to review, and for the use of terms and concepts that might indicate restraint. In the analysis of restraint, in particular, the arbitrators' reasons were studied for evidence of a variety of markers of judicial restraint. These markers were identified at the outset of the study from secondary literature on judicial approaches to restraint in administrative and constitutional law in Canada, France, Germany, the United Kingdom, and the United States as well as in international review at the European Court of Human Rights, the European Court of Justice, and the World Trade Organization. Secondary literature was also reviewed on judicial restraint in private law due to potential overlaps with another adjudicative forum.

The contexts and jurisdictions reviewed were not exhaustive but they allowed for the collection of a pool of indicators of restraint that might be adopted by the arbitrators.

Thus, approximately 50 terms and concepts were searched (see below) to identify references in the arbitrators' awards and other materials that appeared relevant broadly to restraint in the sense that the surrounding discussion touched on the arbitators' framing of their authority or other aspects of their review role in relation to other decision-makers. Detailed results of the searches are summarized in footnotes in Chapters Three, Four, and Five and compiled in Annex A. Notably, although the study was also informed by secondary literature on investor-state arbitration, the conclusions and comments on the arbitrators' review role and exercise of restraint were derived exclusively from the findings that emerged from searches of the primary materials even though, on occasion, references to related secondary sources are included in footnotes to the discussion of findings.

Data was collected from publicly-available awards in the great majority of known investment treaty cases. Where awards were not covered for some topics it was usually because they were not available in English or because they were available only after cut-off dates that ranged from May 2010 to October 2012; see Annex D. That said, known awards do not necessarily reflect the full universe of cases because it is not possible to know the number of confidential cases that exist and because many of the known cases are not fully public in that some or (rarely) all of the awards or (in nearly all cases outside of NAFTA) party submissions are not publicly available. Because party submissions and other documents, other than awards, typically were not available, some of the coding projects discussed below were limited to awards only, in all cases, to maintain consistency across treaty contexts. As an aside, confidentiality in the system, especially at private arbitration houses like the International Chamber of Commerce, is a problem not only for researchers but also for the system as a whole. Investor-state arbitration should be based on a presumption of openness to ensure both independence and transparency and to ensure also that state decision-making with significant implications for public policy and for resource allocation, as well as for rights and interests of actors other than the disputing parties, is known and accountable to those who are affected.

The study encompasses several coding projects, all of which examined awards and, in some instances, other materials in investment treaty cases. The cases covered by the projects varied, as indicated in Annex D, due to the different cut-off dates for coding and the varying degrees of availability of documents. The sources and methods for each project are as follows. First, the search of keywords associated with judicial restraint was carried out by the author

based on awards and other materials in 243 investment treaty cases for which there was a searchable document on Investor-State Law Guide as of cut-off dates (varying per keyword) from August to October 2012. The keywords on restraint were: accountable, accountability (no stemming); anxious scrutiny, strict scrutiny; balance or balancing within ten words of interest or expectation or priority or objective or right or factor or test; Brussels regime, Brussels treaty; Chevron; chill (no stemming), regulatory chill; comity; complex; constituency, constituencies; conveniens; data within five words of complex or complexity; defer, deference; democracy, democratic, elect, election, electoral; discretion, discretionary; exhaust or resort or available or access within ten words of court or remedy or remedies or arbitration or tribunal or adjudication; fact within ten words of legislative or legislator or legislature; fallible, fallibility (no stemming); field sensitivity; first seised, first seized; general within five words of policy or measure or decision or law or regulation or choice or welfare (but not within five words of customary or international or principle or counsel); general within ten words of discrete or particular or specific or direct or individual; hard look; in dubio; justiciable, justiciability; forum within five words of convenient; institutional competence, institutional capacity; limit or limitation or weakness or disadvantage within ten words of court or judge or judicial or arbitration or arbitrator or arbitral or adjudicator or adjudicative; Lochner; margin of appreciation; Oakes; parallel within five words of process or proceedings or fora or forum or adjudicator; pendens; police powers; polycentric; proportionality, proportionate, disproportionate; proximity, proximate (no stemming); prudent, prudence, prudently, prudential, prudentially (no stemming); resource allocation, allocation of resources, allocate resources; respond or responsive within ten words of regulation or regulatory; respect within five words of show or afford or give or demonstrate or express or have; be respectful, in a respectful; restrain, restraint; right within ten words of fundamental or critical or major or priority or high or higher or strong or stronger or privilege or privileged or special or important; right to regulate; searching review, searching examination; second guess, second-guess; self-determine, self-determination; special or specialized within five words of mandate or remit; standard of review; subsidiarity; target; and Wednesbury.

The arbitrators' reasons were reviewed whereever a keyword was mentioned in order to determine whether the arbitrators discussed any issue that appeared relevant in some way to restaint. A flexible approach was taken to relevance and those excerpts that were not entered in the spreadsheet (see Annex A) were noted generally to allow detailed reporting of the results. It is possible that some examples of restraint escaped this search although various cases and decisions came up repeatedly across the keywords. Unless otherwise

indicated above, all keywords were searched with stemming (but not synonyms or fuzzy type features) for a date range of 1899 to the relevant cut-off date from August to October 2012. A handful of awards were not available in English; these were searched but based only on the English keywords. On the issue of in-built restraint, the evidence that emerged from the searches related to fair and equitable treatment, full protection and security, and indirect expropriation and, to a lesser extent, non-discrimination and umbrella clauses. Other standards, especially performance requirements, capital transfers, and judicial access guarantees, were not examined closely for evidence of in-built restraint.

Secondly, the coding of 196 cases to identify affected areas of state decision-making was carried out by the author based on a review of factual information in awards or, in the NAFTA context, other documents. A judgment was made about the areas of policy, regulatory, or other state decision-making to which the challenged measures, as described in the materials, appeared to relate; see Annex B. Cases often engaged multiple areas and were classified as such. The areas of decision-making used for classification were developed ad hoc, with periodic re-checks of earlier coding. For various reasons, the coding is approximate, especially because it was not based on research beyond the information contained in awards and other materials. For instance, in the NAFTA context, the availability of party submissions allowed for more thorough coding of the areas engaged by challenged measures. In some awards, factual information on the decisions under review was very brief. As such, the coding should be taken as under-inclusive and is useful more to highlight some of the affected areas of decision-making than to gauge the relative impacts in different areas. The cut-off dates for coding (per award or other document) fell in May and June 2010 and, for NAFTA materials, in August 2011.

Thirdly, 162 cases were coded to generate more specific information on the types of decisions that were challenged. These cases were coded for whether the cases appeared to involve legislative, executive, or judicial decisions and for whether the measure under review appeared to be general or specific in its application. Where a measure appeared general in its application, the relevant case as a whole was classified as involving a general rather than a specific decision. Some measures and cases were challenging to classify in this respect and were noted as such. It was also noted where the dispute in a case appeared to involve a previous or concurrent process in domestic courts or where it appeared to relate to a contract (to which the claimant or a related actor was a party). Initial coding notes were prepared by a research assistant for review by the author without further consultation with the research assistant; thus, the coding decisions should be attributed to the author. Cut-off dates for coding fell in May and June 2010.

Fourthly, an elaborate content analysis of the arbitrators' reasoning was undertaken with cut-off dates in May and June 2010. The analysis examined

how arbitrators resolved a series of pre-defined jurisdictional and substantive issues. This was part of a larger project to examine the arbitrators' tendencies to adopt either expansive or restrictive approaches to the resolution of issues that were contested within the system. The coding was carried out by research assistants and by the author and subjected to a tie-breaker process by an outside party if coders did not agree on the coding of an issue resolution. Only some of the findings from this project are incorporated in this book (see Chapter 2 (nn 178–9), Chapter 5 (nn 8, 45, and 103), and Chapter 6 (n 31)). The findings, methodology, and other aspects of this project, and of some other coding projects outlined here, are discussed in G Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 OHLJ 211; and at <http://www.iiapp.org>.

Fifthly, other information on investment treaty cases, including the remedial outcomes in cases and the treaty standards found to have been violated, was collected by research assistants and audited by the author. The data was based on publicly-available information in known cases as of cut-off dates in May and June 2010. It did not incorporate set aside or annulment decisions. For remedial outcomes, claimant success meant that the tribunal found a treaty violation and awarded compensation or announced that a damages award was pending. Respondent success meant that all claims were dismissed for lack of jurisdiction or based on a finding that the respondent state did not violate the treaty. *Canfor v US*, which consolidated three cases, was treated as a single case for the coding of remedial outcome; *Biwater Gauff v Tanzania*, in which the tribunal found a treaty violation but awarded no damages, was coded as a loss for the claimant; *Vivendi v Argentina* was counted as both a claimant loss (first tribunal) and a claimant win (second tribunal). Information on remedial outcomes, as reported in Chapters Three, Four, and Five, was unavailable in 25 of 60 cases found to have involved legislative measures, in 49 of 155 cases involving executive measures, and in 21 of 71 cases involving domestic courts; the information was unavailable because a decision on whether the state had violated the treaty was pending or because the case settled prior to such a decision. Like the other findings reported in this book, the findings on remedial outcomes are descriptive and do not purport to predict future outcomes.

Because of the sheer quantity of investment treaty case references in the book, an abbreviated approach to referencing cases was adopted. First, in the footnoted case information, a distinction is drawn between (1) awards (including any decision or order on issues of jurisdiction, merits, or damages) by tribunals, (2) other decisions or orders (on matters such as challenges to arbitrators, consolidation, the place of arbitration, or other procedural issues)

by tribunals, (3) decisions by ICSID annulment committees, and (4) submissions by the claimant, respondent, or *amicus*. Secondly, documents arising from a cited investment treaty case are identified in the footnotes as: *short name of case* (type of document: date of document) pinpoint page or paragraph number. Pinpoint page and paragraph numbers track to the version of the document that was searched on Investor-State Law Guide. Other information on these documents is available in the table of international investment arbitration cases which is organized alphabetically by the short name of the case. This table lists arbitrators' separate opinions individually only where the opinion had a different date from the award of the tribunal's majority; otherwise, a separate opinion can be found in the award of the same date. An outline of further information on the coded cases is provided in the Annexes of this book. However, only cases mentioned in the text or footnotes of the book, and not in the Annexes, are included in the table of cases. Documents in other investment treaty cases can be obtained from the websites listed below. Lastly, domestic court decisions arising from investment treaty cases are cited like other court decisions and listed in the table of court cases rather than the table of international investment arbitration cases.

The team of research assistants who worked on these projects included Constance Abebreseh, Rana Arbabian, Pavel Malysheuski, Kirsten Mikadze, and Maria Sagan. Their dedication and enthusiasm is very much appreciated. I also wish to thank Kelly Goldthorpe, who advised on statistical design and analysed much of the data, and Heather Krause who developed the statistical model for the content analysis of issue resolutions. I am grateful to those colleagues with whom I have discussed the field and empirical methods in recent years, especially Jose Fontoura Costa, Kevin Gallagher, Laurence Helfer, Sol Picciotto, Lauge Poulsen, Anthea Roberts, David Schneiderman, Ken Shadlen, and Kyla Tienhaara. The editorial assistance of Oxford University Press and the financial support of Osgoode Hall Law School and York University are acknowledged. Above all, I am grateful to my wife Susanne Hamm and our children Olivia and Mattias for making at least as many sacrifices as I did towards the completion of this book and to my parents for their support and advice. The book is dedicated in loving memory to my grandmother Marie Hugh.

List of Abbreviations

BIT	bilateral investment treaty
CAFTA	Dominican Republic-Central America-United States Free Trade Agreement
DFAIT	Department of Foreign Affairs and International Trade (Canada)
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECT	Energy Charter Treaty
EU	European Union
FDI	foreign direct investment
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ITA	Investment Treaty Arbitration
MFN	most favoured nation
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
SE	Secretaría de Economía (Mexico)
TRIMs	Trade-Related Investment Measures
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

List of Key Websites

Department of Foreign Affairs and International Trade (Canada) (DFAIT) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>: awards and party submissions in NAFTA claims against Canada.

Investor-State Law Guide <http//www.investorstatelawguide.com>: searchable awards and other documents in investment treaty arbitration.

International Centre for the Settlement of Investment Disputes (ICSID) <http://www.worldbank.org/icsid/cases/cases.htm>: awards and annulment decisions in ICSID arbitrations.

International Investment Arbitration and Public Policy (IIAPP) <http://www.iiapp.org>: information on investment treaty arbitrations (maintained in part by the author of this book).

International Investment Claims (IIC) <http://www.investmentclaims.com>: awards and other documents in investment treaty arbitrations.

Investment Treaty Arbitration (ITA Law) <http://www.italaw.com>: awards and other documents in investment treaty arbitrations.

NAFTA Claims <http://www.naftaclaims.com>: awards and documents in NAFTA arbitrations.

Permanent Court of Arbitration (PCA) <http://www.pca-cpa.org/showpage.asp?pag_id=1029>: awards in UNCITRAL Rules arbitrations.

Secretaría de Economía (Mexico) (SE) <http://www.economia.gob.mx/comunidad-negocios/comercio-exterior/solucion-controversias/inversionista-estado>: awards and party submissions in NAFTA claims against Mexico.

US State Department <http://www.state.gov/s/l/c3439.htm>: awards and party submissions in NAFTA claims against the United States.

Table of Cases

INVESTMENT ARBITRATION