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## The public law challenge: Killing or rethinking international investment law?

by
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At the heart of the so-called "legitimacy crisis" of international investment law, prominently reflected in the *Public Statement on the International Investment Regime*,[1] is what I call the public law challenge. It builds on the observation that one-off appointed arbitrators, instead of standing courts, review government acts and reach far into the sphere of domestic public law by crafting and refining the standards governing investor-state relations. Arbitrations against Uruguay and Australia concerning cigarette packaging are the most recent examples of genuinely public law disputes now settled in arbitration. The disputes about Argentina's emergency legislation and Canada's ban on pesticides are others. These arbitrations create friction with domestic public law as arbitrators, having little democratic legitimacy, often operate in non-transparent proceedings and produce increasing amounts of incoherent decisions.

Many domestic public lawyers, and also some international lawyers, therefore view investment treaty arbitration as a threat to public law values, such as democracy and the rule of law.[2] Comforted by the recent trend among states to recalibrate their investment treaty policies, or even to withdraw from the ICSID Convention, some demand a return to domestic law and domestic courts.[3] This, however, is not desirable when domestic systems do not offer sufficiently independent and effective protection against undue government interference. Notwithstanding, international investment law will continue to face calls for increased transparency and for leaving states sufficient policy space -- precisely because of the impact of investment treaties on domestic public law. Unless international investment law and investment arbitration allow public law values to thrive, the present system may succumb to

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[1] "Public statement on the international investment regime," August 31, 2010, available at: http://www.osgoode.yorku.ca/public_statement.

[2] See Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007); David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008).

[3] See supra note 1.

the public law challenge. That is why international investment law should tackle this challenge by enculturating public law thinking.

We should thus explore how public law can help rethink rather than kill investment arbitration, namely by expanding public law thinking into international investment law.[4] Along these lines, investment treaty standards should be understood as standards of public law that can be further concretized by comparative law methods. Investment tribunals, in turn, should understand themselves as exercising a form of, albeit internationalized, judicial review, similar to that of administrative or constitutional courts, and as being engaged in public law adjudication rather than pure commercial arbitration. After all, investment arbitration is not only about settling individual disputes under the principle of party autonomy, but about implementing principles of good governance and the rule of law for international investment relations.

Given that the global nature of international investment law prohibits solutions tied to singular national laws, arbitral tribunals should draw on comparative public law, both domestic and international (for example, WTO law, human rights law, EU law), and on that basis develop general principles of public law applicable as a recognized source of international law.[5] This should promote the use of proportionality analysis to balance investors' rights and host states' regulatory interests, and help to relate investment law concepts, such as the protection of legitimate expectations, to principles of public law. Similarly, comparative public law can help rethink investment arbitration procedure, for example, by outlining appropriate public law standards of review, or by developing a convincing conceptual basis for transparency and third-party participation.[6] All this should reinject legitimacy into investment law by stressing parallels with domestic public law.

The utility of such an approach has already fallen on fertile ground in practice. The tribunals in *Total v. Argentina*[7] and *Lemire v. Ukraine*[8] interpreted the fair and equitable treatment standard by drawing on domestic and international public law. As these decisions show, comparative public law is a useful tool because traditional methods of treaty interpretation and recourse to customary law face limits in concretizing investment law principles for the modern regulatory state. Taking the public law challenge seriously, therefore, does not mean killing international investment law. What is needed is not so much institutional change of the present system nor a return to domestic law, but a change in the mindset of those active in the field. Arbitrators, to start with, should draw more extensively on comparative public law concepts when applying and refining investment treaty standards and should reconsider their own role, and their responsibilities, as public law adjudicators who have an impact not only on the dispute before them but on the entire system of international investment protection.



[4] See Stephan Schill, ed., *International Investment Law and Comparative Public Law* (Oxford: OUP, 2010).

[5] See Article 38(1)(c) of the Statute of the International Court of Justice.

[6] These issues, amongst others, are explored in the book referred to supra note 4.

[7] Total S.A. v. Argentina, ICSID Case No. ARB/04/1, *decision on liability* (December 27, 2010), at 111 and 128-134.

[8] Lemire v. Ukraine, ICSID Case No. ARB/06/18, *decision on jurisdiction and liability* (January 14, 2010), at 506.

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