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The Public Interest in International Arbitration

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fields involve inter-state treaty relationships *and* affect a state's right to regulate domestically. In this way, these fields are both international and public.

I believe that we will see increasing cross-fertilization between these international public law fields and investment treaty arbitration. Let me focus on trade as an example. While some people characterize trade and investment as two sides of the same coin of international economic law, these fields have historically been based on different treaties and populated by different professionals. As a result, there has been less influence of case law and principles from one field to the other than might have been expected.

However, there are signs that these fields might be converging. Investment provisions are now being included in Free Trade Agreements, bringing trade and investment lawyers into the same room. Some substantive ideas are moving from trade to investment, e.g., Canada's Model BIT includes provisions that look similar to Article XX of GATT, and the U.S. Model BIT includes provisions on financial services that look similar to those in GATS. And some tribunals, chaired by arbitrators with significant trade law experience, have sought to define concepts like necessity by reference to trade law jurisprudence (e.g., *Continental Casualty*).

CONCLUSION

Overall, one can expect a growing cleavage to develop between investment and commercial arbitration as the bodies of law and profiles of participants diverge. But this is a dynamic process, and we are likely to witness some countervailing-veiling forces led by two key players.

First, to the extent that investors do not like the movement from a more private law approach to a more public law orientation, we can expect them to use their power to counter it by, for instance, moving their emphasis from treaties to contracts and by choosing commercial arbitral rules (e.g., ICC or UNCITRAL) rather than specialized investment ones (e.g., ICSID).

Second, advocates and arbitrators who can happily inhabit the world of investment treaty and commercial arbitration will continue to emphasize the similarities between these fields, but may also be happy to see some investment treaty cases repackaged as commercial ones, as this plays to their comparative advantage.

THE PUBLIC INTEREST IN INTERNATIONAL ARBITRATION

*By Jan Paulsson**

Here and there, speakers and writers who address the topic of investment-treaty arbitration have attempted to draw a line around what they evidently wish us to see as a new, distinct process, different from other types of arbitration which they often refer to as commercial arbitration. That is a reductionist term. I prefer "traditional arbitration"—or perhaps "pre-1988" arbitration."

What is the nature of this line being proposed to us? The question merits a few moments of reflection. Let us begin with a couple of trivial possibilities. First, this might be a *librarian's* line, born of a sense of tidiness and a desire to subdivide the unmanageable flood of legal developments in the international community. If that's what it is, why not? It is surely not worth a debate, one way or another.

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Alternatively, we might be talking about a *territorial* line drawn by jealous explorers, who want to declare the discovery of new *terra nullius* just across their proposed border, thus creating a special zone over which they can exercise dominion—perhaps to stake exclusive claims as founders of a new scholarly sub-discipline. Again, why not? Proclaim your realm, hoist your flag! Soon enough, we shall see if others will salute it.

But, to consider a third possibility, is this an *analytical* line? This is where I say, *hold your horses!* Let us not too quickly accept the proposition that investment arbitration by its supposedly unique nature is to be understood as the crucible in which the international community regulates, or fails to regulate, something we are to understand as global public administrative law. I am unconvinced. My quarrel is not with Benedict Kingsbury, who with various colleagues has admirably explored a number of non-traditional international processes by which public action may be tested. What concerns me is the fallacy of the suggestion that this is always the function of investment-treaty arbitration, and never the function of international arbitration as we knew it before 1988. Both of these propositions are false.

Every investment-treaty arbitration does not necessarily implicate important issues of interest to society as a whole. And there were many pre-1988 arbitrations that did.

For those who doubt that last sentence, I need only produce a single Black Swan. I could use Emmanuel Gaillard, but I haven't asked for his permission, so allow me to play the role myself.

My first assignment, fresh out of law school in 1975, was to work on arbitrations arising out of the Libyan nationalizations. Those disputes were decided under arbitration clauses signed by the state. International law was explicitly applicable. My first client, a few years later, was an investor called SPP which sought redress from the government of Egypt for the cancellation of a vast tourism project which, so it was said, was too close to the pyramids and therefore a threat to the cultural heritage of not only Egypt, but all mankind. That dispute was submitted to ICC arbitration in Paris by reference to a contractual clause endorsed by the Minister of Tourism.

For the entire decade of the 1980s, I spent more time on a series of Iranian disputes than on any other matter. This had nothing to do with the Iran-U.S. Claims Tribunal. I acted for the French government. In the early 1970s, the French Nuclear Energy Commission had signed with the Iranian Nuclear Energy Commission an agreement by which Iran would be allowed access as a partner in the giant EURODIF consortium, a multi-billion-dollar uranium enrichment facility. After the fall of the Shah, the Ayatollah Khomeini decreed that the Iranian nuclear industry should be dismantled as a matter of national (indeed, apparently divine) policy. This, said the Iranian Commission, was a case of force majeure. That left France faced with the unacceptable prospect of having to make up the massive Iranian shortfall vis-à-vis its other European partners. The dispute resulted in a series of arbitrations in France and Switzerland, which for years filled many pages of Francophone legal periodicals. These arbitrations were conducted under the rules of the ICC, pursuant to contracts signed by the relevant agencies of the two governments.

Given this little bevy of Black Swans, you will not be surprised that when it became apparent in 1988 that investment arbitration was possible even in the absence of arbitration clauses in contracts signed by the claimant investor,¹ my sense of discovery was limited to the realization that a new jurisdictional foundation had been created—not that the *merits* of

¹ SPP v. Egypt, Decision on Jurisdiction (Apr. 14, 1988), 3 ICSID Rep. 131.

disputes involving public bodies or public policies would be affected. Broadly drafted arbitration clauses already *mandated* arbitrators to consider public laws, imperative rules, even *jus cogens*. There was nothing new in this respect.

In other words, if the presence of public interest is the test of a type of arbitration that must be segregated from private commercial arbitration, we must go back at least a century, and redraw all of our maps.

There is no analytical line to be drawn around arbitration created by treaty. It is impossible to resist the impression that the line being proposed is in fact a *battle line*, a meretricious taxonomy intended to justify an agenda which ought to step out of the shadows. Perhaps the core of all this is the idea that international disputes involving matters of public interest should only be entrusted to bodies comprised of international civil servants or persons directly appointed by states, or (as has been suggested) that all awards arising out of investment-treaty arbitrations should be subject to an appellate body before which the only disputants will be states—and any temporarily victorious private party would be left with the timorous hope that its own foreign ministry will feel that it is in its government's interest to defend the initial award.

By all means, let us debate this proposition, but let us be clear and honest about the objectives being pursued.

In particular, let us understand that if we are talking about dismantling the current system of investment arbitration—in the public interest—we should ask ourselves whether we are considering reestablishing absolute sovereign immunity from jurisdiction. That means *unwailable* immunity. That means undoing much more than the world after 1988: we would be contemplating a backward leap of a good century, to the dismantling of the distinction between *jure imperii* and *jure gestionis*, no less.

Let me conclude by accepting the premise that investment treaty arbitration has opened its doors to a disparate variety of participants, and will continue to do so. If this leads to the appearance of arbitrators versed in different disciplines and committed to different priorities, how can we improve the prospects of collaboration and reduce counterproductive rivalries?

Let us note, *en passant*, that it may be rather fatuous to stand on the sidelines and make proclamations as to the proper qualification of investment arbitrators. The composition of tribunals depends on what the parties have agreed or may yet agree, and each party will try to affect the selection process with only one thing in mind—to improve the chances of obtaining satisfaction in the case at hand, not to satisfy third parties.

Still, we should be able to agree on some best practices on the part of arbitrators as well as appointing authorities.

For the former, persons who accept the invitation to resolve international disputes ought to be aware of their contribution to the development of an important social institution. It is not enough to take the stance that one is the simple servant of two arbitants; the public interest may impinge, and when it does, it is ignored at the risk of exposing the process to criticism. Equally, an attitude of intelligent humility and open-mindedness is surely to be extolled; international disputes frequently involve the uneasy coexistence of more than one legal regime, and the resulting complexities are more readily conquered by collegial humility than by dogmatism. In society, it is perhaps worse—more dangerous—to ignore others than to disagree with them.

For the latter, it should be evident that the nomination of unqualified arbitrators may have, and indeed does have, regrettable consequences in terms of the arbitants' disaffection. It

would be sheer foolishness for an institution to follow a blind quota system. If ten cases in a row principally concern claims that require the valuation of a business venture, arbitrators conversant with business microeconomics are indispensable in each case, and there is no reason to give, say, specialists on multilateral regional trade arrangements "their turn." Amateurism is a form of arbitrariness.