by the parties and the argument that arbitrators are merely giving effect to pre-agreed instruments is hardly sufficient to legitimize the exercise of the global governance functions of arbitral tribunals. After all, system-building and law-making by arbitral tribunals means a challenge for global democracy.[10]

This challenge, in my view, does not render arbitration unsuitable or illegitimate as a global governance mechanism.[11] But it requires the international arbitral system to endorse and conform to accepted principles relating to the administration of international justice. After all, arbitration is one way for states to fulfill their obligation to grant access to justice.[12] These principles include, inter alia, the right to be heard, independence and impartiality of decisionmakers, equality of the parties, determination of claims within a reasonable time, and the right to a reasoned decision.[13] The reasoning, in particular, should be addressed not only to the disputing parties, but to all those concerned by a decision. Finally, in investment arbitrations involving states or state entities, transparency is of paramount importance.

Although there is a dearth of external control mechanisms, arbitrators will have a self-interest in living up to these standards of international adjudication, provided that disputing parties, and particularly states, voice the expectations they have about how international arbitration should operate as a system of governance. After all, if arbitrators fail to meet the continuously evolving expectations, they will receive fewer and fewer appointments and be phased out as influential arbitrators. Heterarchy in international arbitration then is neither an obstacle for arbitrators to exercise power and actively contribute to forging international arbitration as a system, nor does it constitute an impediment for effective control mechanisms preventing arbitrators from misusing their powers.

Divergence Between Investment and Commercial Arbitration

By Anthea Roberts[*]

Introduction

A central question about the emerging system of international arbitration is whether we are likely to witness growing uniformity and convergence or increasing specialization and divergence. In addressing this question, I am going to focus on the growing divergence between commercial and investment arbitration, which I believe is occurring due to differences in the fields' substantive law and professional communities. In doing so, I will focus on two phases: where we have come from and where we are heading.

Where We Have Come From

Investment treaty arbitration grafts public international law (as a matter of substance) onto international commercial arbitration (as a matter of procedure). It has also historically married two professional communities, one coming from the world of inter-state dispute resolution

[10] *See* Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 Eur. J. Int'l L. 7 (2012).

[11] *See* Gus Van Harten, Investment Treaty Arbitration and Public Law (2007).

[12] Lithgow and Others v. United Kingdom, ECHR Series A No. 102, para. 201 (July 8, 1986).

[13] *Cf.* Judgment No. 2867 of the ILO Administrative Tribunal, ICJ Advisory Opinion, para. 30 (Feb. 1, 2012), *at* http://www.icj-cij.org.

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and the other from private contractual arbitration. The fact that investment and commercial arbitration involve similar, and sometimes identical, dispute resolution procedures has led many to see them as two sides of the same coin. But the influence of public international law qualifies this approach.

First, investment and commercial arbitration differ in their applicable substantive law. Commercial arbitration is typically characterized by an emphasis on private law, private contracts, and private parties. Even when states take part in commercial arbitration, they are generally understood to be acting in their private capacity. Investment treaty arbitration, by contrast, involves public international law rather than private law, treaties in addition to or instead of contracts, and states acting in their public capacity as sovereigns (which enter into treaties) and regulators (which govern populations).

These substantive differences have, in turn, led to procedural divergences between investment and commercial arbitration. As investment treaties typically have similar provisions and investment awards often become public, investment treaty arbitration has developed a robust system of quasi-precedents, with the citation to and analysis of previous awards becoming a routine feature of investment pleadings and awards. The public interest in investment treaty arbitration has also led to procedural tweaks, such as the publication of many awards and some pleadings, as well as the opening of certain hearings and the participation of amici.

In terms of professional communities, many advocates and arbitrators cross-specialize in investment and commercial arbitration, while others cross-specialize in inter-state dispute resolution and investment arbitration. As the investment treaty field has undergone a process of professionalization, an increasing number of arbitrators have been drawn from private practice rather than from, for instance, the ranks of ex-judges from Western states. However, a significant minority has always come from academia and public international law, much more so than in commercial arbitration.

The profile of arbitrators has important effects on how the investment treaty field is developed because people with different professional backgrounds often approach the system in different ways. While some arbitrators are truly bilingual in public international law and international commercial arbitration, most have a pronounced mother tongue. Although any analysis of the connection between one's background and one's approach involves stereotyping and will be subject to exceptions, some broad trends can be discerned:

- Arbitrators with a background in public international law often focus on the inter-state treaty basis of the system; the intention and wishes of the treaty parties; how the system is embedded within a broader framework of public international law; and the importance of individual decisions contributing to a growing body of jurisprudence.
- Arbitrators with a background in international commercial arbitration, by contrast, often focus on the investor-state dispute resolution relationship; the equality and autonomy of the disputing parties; the significance of commercial expectations; and the importance of deciding the particular case rather than contributing to a broader system.

Investment treaty arbitration might historically have been characterized by a clash between commercial arbitration specialists (who had an interest in emphasizing the similarities between commercial and investment arbitration) and public international lawyers (who had an interest

in emphasizing the differences). But, moving forward, it will not be possible to continue to characterize the investment field simply by reference to these two professional communities.

Where We Are Heading

As investment treaty arbitration has gained in profile and notoriety, and as the links between investment arbitration and other fields of law (such as EU law, human rights law, and environmental law) have become more evident, lawyers with other backgrounds are increasingly becoming interested in the field. In looking at the potential influence of these other legal disciplines, I am going to focus on two main movements: (a) the domestic public law movement, and (b) what I term the international public law movement.

Domestic Public Law

Since the mid-2000s, a number of scholars have argued that investment treaty arbitration should be understood as a form of international judicial review, which is more analogous to domestic administrative or constitutional law review than to inter-state dispute resolution or commercial arbitration. These academics include Van Harten and Schneiderman, who use the domestic public law analogy as an external critique requiring significant structural reforms, and Schill and Montt, who use the analogy to develop principles to rehabilitate the system from within.

Unlike the public international law approach, which tends to focus on the horizontal relationship of equality between the treaty parties, or the international commercial arbitration approach, which tends to focus on the horizontal relationship of equality between the disputing parties, the domestic public law approach focuses on the vertical relationship between host states (as governors) and private investors (as governed).

In terms of the impact of this approach, the domestic public law movement has generated more heat within the academy than in practice, at present. Few advocates or arbitrators could credibly claim to be specialists in public law, and public law expertise is not so far recognized as a prerequisite within the field of practitioners. Despite this, it is possible to discern the movement of some pubic law ideas into the practice, as shown by the following:

- Public law principles are being included in some recent investment treaties and Model BITs, such as the 2004 and 2012 U.S. Model BITs that incorporate a test for indirect expropriation derived from the *Penn Central* case.
- Public law cases are being cited in various briefs, such as *Glamis Gold v. United States,* in which the United States drew on comparative public law when arguing for deference to legislative and administrate bodies by investment tribunals.
- Public law principles are also making some appearance in investment awards, such as the interpretation of ''legitimate expectations'' in *Total v. Argentina,* in which the tribunal conducted a comparative analysis of domestic public law, European human rights law, European Union law, and public international law.

International Public Law

In addition to the classic public international law approach, we are increasingly seeing an interest in the interaction of principles and people from other sub-fields of international law, such as trade, human rights, and environmental law. Like the investment treaty field, these

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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