A Look At The Public Interest In Investment Arbitration: Is It Unique? What Should We Do About It?

By
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The transparency movement in investment arbitration—a movement driven by non-governmental organizations (NGOs)—believes that arbitration, a private method of dispute settlement, is an inappropriate means of adjudicating disputes involving sovereigns. It therefore aims to make investor-State arbitration more public, through greater access to documents and through public access to the arbitral proceedings themselves, principally through amicus participation and public hearings.

The transparency movement has been tremendously successful. The 2006 amendments to the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules and the transparency-enhanced procedures of new investment treaties are demonstrative of this success. ICSID Arbitration Rule 32(2), for example, provides that:

Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

The U.S.-Singapore Free Trade Agreement, signed in May 6, 2003, includes a section entitled “Transparency of Arbitral Proceedings” and provides in Article 15.20(2) that:

The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected

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information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.¹

The success of the transparency movement may be attributed at least in part to the wide acceptance of its simple two-part message: (1) there is a public interest in investment arbitration, and therefore (2) investment arbitration must become more transparent through greater access to documents and to the arbitration process itself. This message has such broad acceptance that the arbitration community is focusing more and more on how arbitral tribunals can best implement those demands for transparency in practice.²

The widespread notion that, because there is a unique public interest in investment arbitration, greater transparency in the arbitration proceedings is the inevitable solution requires further examination, however. A joint statement made by two leaders of the transparency movement in investment arbitration, the Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD),³ concerning possible amendments to the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules is demonstrative:

Arbitrations brought by an investor against a State under the terms of a treaty (“investor-State arbitrations”) differ significantly from commercial arbitrations involving only private parties because the former implicate the public interest in ways the latter do not. This fact is now widely acknowledged within the international arbitration community, but it is worth elaborating why the difference exists.

First, the very presence of a State as a party to the arbitration raises a public interest because the nationals and residents of that State have an interest in how the government acts during the arbitration and in the outcome of the arbitration. Moreover, the existence of this public interest has implications for the conduct of the arbitration: according to principles of human rights law and good governance, government activities should be subject to basic requirements of transparency and public participation.

Second, investor-State arbitrations often involve large potential monetary liability for public treasuries. And any


award of compensation will affect the State’s budget. As above, the public’s interest is clear.

Third, many investor-State arbitrations, such as those arising under treaties for the protection of investments, involve direct allegations of governmental misconduct. Again the public interest, e.g. in knowing what the allegations, facts and outcome are, is self-evident.

Finally, an increasing number of investor-State arbitrations raise profoundly important issues of public policy that penetrate deeply into domestic decision-making processes (as is described in greater detail below). Moreover, some treaties enable claimants to invoke contractual provisions that purport to constrain a State’s power to regulate, such as stabilization clauses. In these cases, the public interest is also clear.4

This joint statement of the IISD and CIEL reflects an increasingly common trend in the arbitration community to isolate investment treaty arbitration from commercial arbitration. It is a trend supported by academics and practitioners who warn, for example, that commercial arbitrators should be careful not to adjudicate investment treaty disputes while wearing a commercial arbitration “hat.”5 However, it may be a mistake for the arbitration community to isolate investment treaty arbitration from commercial arbitration, since those involved in the former may learn valuable lessons, good and bad, from what goes on in the latter.

Indeed, the very premise that investment treaty arbitration involves a greater “public interest” than commercial arbitration may be refuted. A purely commercial arbitration dispute can directly impact the public and implicate fundamental questions of public policy. A patent dispute, for instance, can affect the public’s access to important generic medicine. Questions of human rights, labor disputes, and other important issues of public policy can arise in a commercial or private arbitration.

Does it follow that the public interest in investment arbitration is unique because, as suggested by IISD and CIEL, a State is involved? That would mean that every commercial arbitration to which a State is a party (and where tribunals decide to extend an arbitration clause to a State as a non-signatory) necessarily triggers a public interest, even in cases where the dispute involves a straightforward supply contract.

While the significant differences between commercial and investment treaty arbitration should not be overlooked, the two types of proceedings have a

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great deal in common—at a minimum, they share the fundamental requirement of consent—and should be viewed on a continuum. Viewing them on a continuum helps us better understand: (1) at what point an investment treaty arbitration dispute is “triggered” and (2) what is it about investment treaty arbitration that gives rise to a unique public interest.

WHAT TRIGGERS AN INVESTMENT TREATY ARBITRATION DISPUTE

The Saipem v. Bangladesh award⁶ is illustrative of the continuum between commercial and investment arbitration. It reveals how an ordinary commercial arbitration can evolve into an investment treaty arbitration. Saipem, an Italian company, entered into a contract to build a gas pipeline with Petrobangla, a state-owned company of Bangladesh. The contract was governed by the law of Bangladesh. The contract contained an ICC clause, designating Dhaka, Bangladesh, as the seat of the arbitration.

A dispute arose when, following completion of the pipeline and its takeover by Petrobangla, Petrobangla refused to repay the retention money stipulated in the contract, even though Saipem had released a warranty bond.⁷ Saipem initiated ICC arbitration under the terms of the contract. The ICC tribunal held its hearings in Dhaka. After Petrobangla failed in a number of procedural requests before the ICC tribunal, it decided to resort to the courts of Bangladesh. In April 2000, a court of Dhaka issued a decision revoking the authority of the ICC tribunal, finding that a miscarriage of justice had taken place based on the way in which the ICC tribunal had handled evidence. Following the revocation of the ICC tribunal’s authority, the ICC tribunal nevertheless proceeded with the arbitration.⁸ Petrobangla continued to resort to the courts of Bangladesh to seek to set aside the ICC tribunal’s orders. When the ICC tribunal finally handed down an award in which it found Petrobangla liable for damages, Petrobangla sought to have the award set aside. The High Court Division of the Supreme Court of Bangladesh denied the application, finding it “conceived and incompetent inasmuch as there is no Award in the eye of the law, which can be set aside. [. . .] A non-existent award can neither be set aside nor can it be

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⁸ In Himpurna California Energy Ltd. v. Indonesia, an arbitration with its seat in Jakarta. Pertamina, the state-owned oil company, sought an injunction restraining Himpurna from proceeding with the arbitration. The tribunal moved to the Hague to conduct further hearings and ignored the Jakarta court injunction. See 15 MEALEY’S ARB. REP. 1, A1 (February 2000); excerpts in 25 ICCA Y.B. 109 (2000). See also Jan Paulsson, Interference by National Courts, THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION 131-134 (Lawrence W. Newman & Richard D. Hill eds., 2nd ed. 2008).
Saipem then brought a claim before ICSID under the Agreement between the Government of the Republic of Italy and the Government of the People’s Republic of Bangladesh on the Promotion and Protection of Investments dated March 20, 1990 (BIT). Saipem relied principally on Articles 5 and 9(1) of the BIT. The BIT’s investor-State dispute resolution provision only encompassed claims for expropriation. Saipem did not claim that a denial of justice had taken place, but rather, that its right to arbitration was expropriated by the intervention of the courts of Bangladesh. The tribunal held Bangladesh liable for unlawfully expropriating, in violation of the BIT, finding that (i) ‘Saipem’s residual contract rights under the investment as crystallized in the ICC award’ was a property right that was expropriated (paras. 128, 202); (2) the actions of the Bangladeshi courts ‘in substantially depriving Saipem of the benefit of the ICC award. . . [were] tantamount to a taking of the residual contractual rights. . . amount[ing] to an expropriation within the meaning of Article 5 of the BIT’ (para. 129); (3) Bangladesh’s expropriation was illegal (paras. 201-202); (3) Bangladesh committed an abuse of rights under international law (paras. 160-161); and (4) Bangladesh violated the New York Convention (paras. 167-168, 170). The tribunal awarded Saipem the amount that the ICC tribunal had awarded, with simple interest. It refused to award Saipem legal costs.

The ability of a State to resort to its use of superior government power (in the case of Saipem, through the court system) to extinguish the rights of a foreign investor under a contract, is the essence of investment treaty arbitration and what makes investment arbitration different from commercial arbitration. It is also the use of State power, power that cannot be exercised by a private party in a commercial transaction, that makes the public interest in an investment treaty dispute different from a commercial arbitration dispute.

It is the notion that investment arbitration may limit or punish a State for the exercise of regulatory authority, particularly in the area of the environment, that has triggered the outrage of a number of NGOs. According to the IISD:

11. Id. at ¶¶ 120-121 (June 30, 2009).
12. Id. at ¶ 205 (June 30, 2009).
13. According to a 2001 publication by the Hemispheric Social Alliance: “NAFTA’s Chapter 11 goes further than any other agreement in the world to extend rights and protections to international investors. The most controversial aspect of the agreement is that it allows private investors to sue the governments of the NAFTA parties directly to demand compensation for a breach of any of Chapter 11’s long list of obligations. This unprecedented power granted to corporations restricts the ability of governments to protect the environment and public welfare and to ensure that foreign investment supports social, economic, and environmental goals.” NAFTA Investor Rights Plus: An Analysis of the Draft Investment Chapter of the FTAA, Hemispheric Social Alliance 1 (June 19, 2001), available at http://www.ciel.org/Publications/HSAInvestmentAnalysisFinal.pdf
The investor protections provided in Chapter 11 of NAFTA have been used repeatedly to challenge new environmental laws, or applications of existing laws, that have negative economic impacts for the foreign investors. The link between the investor protections and their use to challenge environmental laws and regulations is the investor-state dispute resolution process. This NAFTA process is the first one in any multilateral trade or investment agreement to give foreign private investors the capacity to directly challenge host governments on their compliance with the Agreement. It is the unexpectedly broad and aggressive use of this process to challenge public policy and public welfare measures that has caught governments and observers off guard, and led to the preparation of this paper.14

While demanding that they be allowed to participate as amici curiae in investment treaty arbitration in order to represent the public interest, NGOs leading the transparency movement simultaneously claim that investor-State dispute resolution should be eliminated entirely as it is not the right means of adjudicating disputes involving government regulations.

According to CIEL, it is unfortunate that the U.S.-Morocco Free Trade Agreement provides for investor-State dispute settlement, ―[f]urther tilt[ing] international investment rules in favor of investors at the expense of the ability of governments to regulate in the public interest. . .‖15 CIEL further proposes that ―[t]he reliance on domestic courts in the first instance, and on state-to-state dispute settlement only if needed, provides more appropriate fora for balancing the rights of investors against the public interest.‖16

The question remains, why are transparency procedures, particularly amicus participation in investment arbitration, the solution for addressing the criticism that arbitral tribunals are wrongfully restraining a State’s ability to regulate? Investment arbitration’s neglected cousin, commercial arbitration, provides some guidance for answering this question.

In the context of commercial arbitration, when a party insists that there is a public policy reason that precludes the private adjudication of the dispute by arbitral tribunal, the issue is one of arbitrability, or whether an issue should be better determined by courts than arbitral tribunals. Arbitrability, in the words of Tom Carbonneau, “establishes the respective domains of law and arbitral adjudication. It is the essential dividing line between public and private


16. Id.
If the issue in investment arbitration is that the regulatory powers of a State, such as those pertaining to the environment, should not be arbitrated, then the movement should focus on taking the power to adjudicate regulatory authority away from arbitrators, rather than on legitimizing, through transparency procedures, the arbitrators’ ability to determine whether a state’s environmental regulation is a breach of an investment treaty obligation. Instead, the transparency movement has concentrated much of its efforts on getting inside the process and purportedly attempting to change it from within. However, by side-stepping the arbitrability question and replacing it with a vague notion of transparency, the NGOs, together with arbitrators and arbitration institutions, are giving investment treaty arbitration more legitimacy and power to adjudicate the very issues that the transparency movement claims should not be arbitrated in the first place. Thus enhanced transparency procedures in investment arbitration continue to blur the line between public and private adjudication.

The next question is: how can investment treaty arbitration address the arbitrability question? In commercial arbitration, courts have a role to play in acting as gatekeepers for public policy issues and in preserving the line between public and private adjudication of disputes. Most investment treaty arbitrations, on the other hand, are not subject to the same court interference or judicial controls.

If the arbitration community is serious about the public interest in investment arbitration (and given the success of the transparency movement, it certainly appears to be), then the real issue, arbitrability, needs to be addressed in the treaties themselves. In certain areas, arbitrability has already been addressed. For example, Article 6 of the U.S.-Uruguay BIT, concerning expropriation, contains an intellectual property carve-out that refers to the TRIPS agreement:

This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.


The NAFTA and the 2004 US Model BIT also include elaborate provisions concerning taxation. While the treaties allow investors to bring certain claims based on taxation—including those for indirect or direct expropriation resulting from taxation—in the context of expropriation claims, they force the investors to first refer their dispute to the competent tax authorities of both Contracting Parties. Article 21 of the 2004 U.S. Model BIT, for example, provides that if the competent authorities fail to agree that the measure is not an expropriation within 180 days, then the investor can bring a claim under the investor-State arbitration procedures.

21. For a general discussion of the arbitrability of taxation measures and tax carve-outs in investment treaties, see William W. Park, Arbitrability and Tax, in Arbitrability: International and Comparative Perspectives (L. Mistelis and W. Brekoulakis eds., 2009).

22. Article 21: Taxation

1. Except as provided in this Article, nothing in this Treaty shall apply to taxation measures.

2. Subject to paragraph 7, Article 3 and Article 4 shall apply to all taxation measures, other than taxation measures relating to direct taxes (which, for purposes of this paragraph, are taxation measures on income, capital gains, or on the taxable capital of corporations or individuals, taxes on estates, inheritances, gifts, and generation-skipping transfers), except that nothing in those Articles shall apply:

(a) any most-favored-nation obligation with respect to an advantage accorded by a Party pursuant to a tax convention;

(b) to a non-conforming provision of any existing taxation measure;

(c) to the continuation or prompt renewal of a non-conforming provision of any existing taxation measure;

(d) to an amendment to a non-conforming provision of any existing taxation measure to the extent that the amendment does not decrease its conformity, at the time of the amendment, with those Articles;

(e) to the adoption or enforcement of any taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes (as permitted by GATS Article XIV(d)); or

(f) to a provision that conditions the receipt, or continued receipt, of an advantage relating to the contributions to, or income of, a pension trust, fund, or other arrangement to provide pension or similar benefits, on a requirement that the Party maintain continuous jurisdiction over such trust, fund, or other arrangement.

3. Article 6 shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:

(a) the claimant has first referred to the competent tax authorities of both Parties in writing the issue of whether that taxation measure involves an expropriation; and (b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.

4. Subject to paragraph 7, Article 8(2) through (4) shall apply to all taxation measures.

5. Section B shall apply to a taxation measure alleged to be a breach of an investment authorization or an investment agreement. 6. For greater certainty, Sections B and C shall apply to a taxation measure alleged to be a breach of Article 3, 4, 6, or 8(2) through (4), to the extent that any such Article applies to taxation measures under paragraph 2, 3, or 4.

7. Nothing in this Treaty shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Treaty and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Treaty and that convention.

If governments believe that the regulation of the environment, for example, is as dear to their sovereignty as taxation appears to be in light of the complex tax carve-outs in certain treaties, then more could be done to include similar carve-out provisions for other regulatory matters such as the environment.\footnote{CIEL has criticized the U.S.-Morocco Free Trade Agreement for not containing a true environmental measures carve-out provision similar to that contained in Article XX of the GATT. See Magraw & Karpatkin, \textit{supra} note 16 at 3-4.}

To conclude, by giving the arbitral process features that render it more open to the public eye, the transparency movement may be glossing over the challenging question of where to draw the line between public and private adjudication. To determine what matters should be arbitrated in investment arbitration is a daunting task, but it is the real one facing us.