Towards a Repository of Policy Options for IIA Reform

Research Project
International Investment Law and Comparative Public Law – Reconceptualizing Investment Law as International Public Law[1i]

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1. Investment Law's Public Law Challenge

The projects develops strategies to deal with the 'legitimacy crisis' in international investment law by making use of comparative public law methodology. It is based on the assumption that the legitimacy problems the international investment regime faces are due to the loss of authority of domestic public law and domestic courts because of a twofold internationalization of investor-State relations:

- *first*, the substantive standards of treatment limit the host State's exercise of sovereign powers in addition to, and sometimes beyond, domestic public law constraints; and

- *second*, domestic courts are displaced because of the possibility of direct access of foreign investors to investor-State arbitration.

International investment law therefore functionally serves as a substitute for domestic public law; investment treaty arbitration assumes a similar function to domestic administrative and constitutional courts. This reflects in the increasing number of genuinely administrative and constitutional law disputes in investor-State arbitration. At the same time, investor-State arbitration does not conform to the domestic public law safeguards usually in place, such as transparency and openness of proceedings, public law expertise of decision-makers, consistency in decision-making and mutual control of courts and legislators.

2. Understanding Investment Law as a Public Law Discipline

Yet, instead of perceiving international investment law as a threat to domestic public law and trying to reverse the internationalization of investor-State relations, the project takes a more proactive approach by extending public law thinking to the international level and by conceptualizing international investment law as a public law discipline. After all, the problems dealt with in investor-State arbitration are not novel as such. They have played a role in domestic administrative and constitutional litigation – and partly also in regional regimes such as the Court of Justice of the European Union or the European Court of Human Rights – ever since the rise of the modern regulatory state. With the emergence of a truly global economy the same problems of public law now surface at the international level.

Since no specific domestic public law system can provide the ultimate benchmark, comparative law methodology is most appropriate to infuse the international investment regime with public law analysis.

[1] The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

Comparative public law methodology does not treat the issues arising under investment treaties in isolation, but against the rich experience of more advanced public law systems. Thus, comparative public law can serve as a critical tool in analyzing and in further developing international investment law and investor-state dispute resolution in ways that are tested and accepted in different public law contexts. This can be of practical use for the interpretation of existing investment treaties, but can also guide IIA reform by developing through comparative public law analysis the rules and principles the future IIA regime should contain.

3. The Use of Comparative Public Law Analysis

Comparative public law analysis can serve several purposes:

(1) to **concretize and clarify the interpretation of the often vague standards of investment protection** and determine the extent of state liability in specific contexts;

(2) to help **balance investment protection and non-investment concerns**;

(3) to ensure **consistency in the interpretation and application of investment treaties** because the analytical method used is uniform for all investment treaties;

(4) to ensure **cross-regime consistency and mitigate the negative effects of fragmentation** by stressing commonalities and openness of international investment law towards other international regimes, such as human rights and environmental law;

(5) to **legitimize existing arbitral jurisprudence** by showing to what extent the solutions adopted in investment treaty arbitration are analogous to the ones adopted by domestic courts or other international courts or tribunals in comparable circumstances; and

(6) to suggest **legal reform of investment treaty making or changes to arbitral practice** in view of different, or more nuanced, solutions adopted in other public law systems.

Examples of comparative public law principles that should bear on the interpretation and reform of investment treaties are methods for balancing the protection of investment with competing non-investment concerns, for example through the use of proportionality analysis; ensuring the openness of international investment law *vis-à-vis* general international law and other specific international legal regimes, such as human rights, international environmental law, the protection of cultural property, international labor law, etc.; developing appropriate public law standards of review and deference for acts of host States; increasing the transparency of investor-State arbitration so that outsiders can assess its benefits, but also address criticism; developing further mechanisms for non-parties affected by the outcome of arbitrations to participate in the proceedings and voice their position, for example through *amicus curiae*-intervention; reconsidering the procedural maxims governing investor-State arbitrations to meet the requirements of a public governance system; and strengthening the independence and impartiality of arbitrators by excluding undue influence on their decision-making due to conflicts of interests and conflicts of roles.

[i] Publications from this research project are listed at http://www.mpil.de/de/pub/forschung/forschung_im_detail/projekte/voelkerrecht/int_invest_law.cfm