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Domestic Public Law: a Useful Critique for Understanding and Developing Investment Treaty Arbitration?

Joanne Greenaway · Wednesday, February 11th, 2015

A recent seminar delivered under the Chatham House Rule considered the usefulness of an analogy between Investment Treaty Arbitration (ITA) and domestic public law, with a view to critiquing perceived imbalances in the former. The content of the seminar was grounded in the speaker's background in ITA and public law litigation including domestic judicial review (JR) and European human rights law. This post summarises the speaker's comments.

The speaker's main comments may be summarised as follows: ITA, whilst not simply another species of public law, does, like domestic JR, allow individuals to directly challenge governments and receive a remedy. Although it is not directly comparable to JR in the administrative courts, the processes used in one can be used as a tool to critique the processes in the other. This critique is explored within a context which recognises that the system of ITA is already under scrutiny and that it is possible that a "wider audience may no longer be convinced of special treatment for investors". Such a public law critique takes into account "the rights of sovereign states to regulate in the public interest and the potential that ITA has to impact the development of countries and the balance between the developed and the developing world".

After setting out the relationship between the two legal systems, the talk considered whether an analogy is apt and, if so, what its practical implications could be.

The speaker examined the following five features of the English domestic system of JR:

1. JR involves an assessment of government action to ensure that it has been carried out in accordance with law and due process. It does not take into account the merits of that decision or what the public policy should be. ITA tribunals should, like domestic judges, take care not to overstep the limits of their jurisdiction by substituting their view of the merits of a decision in cases where they may, in effect, be invited to do so.

2. JR is concerned, inter alia, with how individuals should be protected from state regulation. Whilst ITA has the same concerns, it is, by its very nature, focussed on the impact of those decisions on a selective group, namely foreign investors. (It is worth

recalling at this point that ITA developed to safeguard the interests of 'aliens' who were often considered to be comparatively disadvantaged.)

3. JR applies standards with clear foundations, albeit ones that have expanded over the years. Conversely, in the speaker's view, ITA has been unable as a system to establish universal standards of review. This is understandable given that the provisions of a particular, and often loosely-worded, treaty provide the jurisdiction and toolkit for a tribunal. However, the speaker argued that tribunals sometimes go beyond applicable standards, citing the Fair and Equitable Treatment Standard as one area where tribunals have expanded the remit beyond that provided by Customary International Law, often without sufficiently clear justification.

4. The appeals mechanism in domestic JR promotes consistency of jurisprudence whereas ITA lacks a formal system of precedent and an overarching appellate body.

5. While the domestic courts are presided over by independent adjudicators with security of tenure, members of an investment treaty tribunal can be selected by parties, which may lead those parties to try to select "sympathetic arbitrators".

As a backdrop to the discussion of the nature and usefulness of the public law critique, the speaker went on to look at whether ITA is just another form of commercial arbitration or rather whether it is purely a species of public international law. As contrasted with commercial arbitration, ITA looks at the exercise of public functions on behalf of the wider community; an ITA dispute is in the public sphere, even if it addresses commercial relations. ITA can also be contrasted with PIL. Whereas historically PIL allowed a state to protect its aliens (i.e. the principle of diplomatic protection), the crucial difference today is that ITA enables private parties to bypass both the home state and, in many cases, the domestic system of the host state, in order to commence its claim against the host state.

The speaker then looked at the practical implications of the public law critique and what can be learnt.

- One possibility is that domestic law standards – such as judicial deference, non-discrimination and proportionality in the English context – could inform investment treaty tribunals, thereby limiting their role to one of reviewing rather than decision making. Any such potential utility must of course be considered in light of the relevant treaty standards.
- Another suggestion is that, public law remedies (for example declaratory relief) might increasingly be considered appropriate in ITA. The speaker pointed out that the monetary remedies available to claimants in ITA can, if enforced, potentially bankrupt a country.

Ultimately, the public law critique was explored in order to consider whether it may enhance an understanding of ITA by providing a new prism through which to analyse and refine the system. Nonetheless, the reforms currently underway – including *inter alia* the negotiation of the investment protection chapters in TTIP, the TPP and CETA, as well as the UNCITRAL Transparency Rules 2013 – already go a long way to addressing such issues. The balance of rights in this area is an extremely delicate one

and requires multi-stakeholder consultation and buy-in. Therefore, while the public law critique provides an interesting perspective, the reforms will likely need to take place incrementally within the existing frameworks.

Promotion of future investment should, of course, be kept in mind in this context as the underlying premise of ITA, of benefit for both state and investor. Any perceived appeasement of states in breach may well remove the deterrent effect for states and consequently discourage investment. The crux of the issue may be the way in which investment treaties themselves are negotiated. Exhaustion of local remedies clauses were cited as one way of increasing the role domestic law can play in relation to ITA. For the next generation of investment treaties, legal capability upon negotiation must be perceived to be balanced in order to retain legitimacy. We may well see a move towards shorter treaty terms to enable renegotiation as the global political landscape develops.

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