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Eric De Brabandere: Investment treaty arbitration as public international law: procedural aspects and implications

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Investment Treaty Arbitration (ITA) has emerged as one of the most important dispute settlement mechanisms in international law. However, ITA – a core aspect of international investment law – stands in the line of fire in search for its legitimacy as far as its public international law character is concerned. The legitimacy of international investment law itself has often been challenged on the ground of adopting a private law dispute settlement mechanism in the form of arbitration to judge the regulatory measures of States vis-à-vis the claims of foreign investors. In this backdrop, the monograph *Investment Treaty Arbitration as Public International Law – Procedural Aspects and Implications* argues that ITA is a public international law dispute settlement method concerning the international legal obligations of the States, and derives its validity from an international law instrument, i.e. Bilateral Investment Treaties (BITs).

The monograph is divided into two parts. Part I discusses the public international law character of ITA. This discussion is spread over two chapters (Chapters 1 and 2). Part II, which consists of four chapters (Chapters 3–6), then delves into the procedural aspects of the public international character of ITA and the implications and consequences that ensue therefrom.

In order to substantiate the claim that ITA is primarily a public international law dispute settlement method, the author discounts the

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normative claims regarding ITA's "hybridity," i.e. characterizing ITA as a hybrid of public international law and international commercial arbitration (ICA). The author also disagrees with the idea of characterizing international investment law as a public law system. Additionally, so far as the private law dimension of ITA is concerned, the same is acknowledged by the author, but relegated to being subsidiary to public international law aspects of the former. Based on the aforesaid premise in the introduction, the author builds his arguments in the subsequent chapters.

In Chapter 1, the author argues that ITA is rooted in public international law. This is done by analyzing the rationale of granting foreign investors the right to invoke ITA (i.e. *right of direct access*). The author argues that the "right of direct access" is a pragmatic response to the problems associated with the exercise by States of the customary right of diplomatic protection, specifically in context of investment-related disputes, the basis whereof being consent of the States expressed in BITs, which are public international law instruments. The author maintains that mere granting the right to invoke ITA to an investor does not transform the nature of investment dispute into private dispute. The dispute essentially remains a public international law dispute, stemming from the treaty obligations undertaken by a State under BITs. Thus, the question of violation of those treaty obligations shall be governed by the rules of state responsibility. However, apart from the treaty-origin of investment disputes, another source from where investment disputes might originate is an investment contract. The latter, however, is merely a contractual claim where one party is the state. In this backdrop, the author addresses the complications of elevating contractual claims as ITA disputes through the umbrella clauses in BITs.

In Chapter 2, the author discusses the characterization of the right of foreign investors to invoke ITA. He considers this right, the basis whereof is a BIT, as a mere removal of the procedural barrier on the individual's access to forum under public international law. With respect to the nature of the aforesaid right – as to whether they are direct or derivative – the author asserts that such a right *clearly being the right of investors is derived* from his home state.

In Chapter 3, the author discusses how the public international law character of ITA, despite there being several similarities between ITA and ICA, has resulted in some significant deviations from the latter.

These deviations pertain to matters such as nationality, qualification, independence and impartiality of arbitrators. The author emphasizes on the mandatory nature of the requirement to give reasoned award under ICSID Convention as compared to UNCITRAL Arbitral rules where such requirement can be waived if the parties agree. According to the author, this is a consequence of the public international law nature of ITA.

Chapter 4 deals with applicable law in ITA and the non-investment concerns therein. The author addresses the possibility of non-investment norms – more specifically human rights norms – as a part of applicable law. This is done by analyzing the ITA awards, particularly those cases, where human rights obligations have been invoked as a defence against the claims of treaty violations. Chapter 5 discusses the rationale for moving away from stringent rules relating to privacy and confidentiality requirements in ITAs. The principle of confidentiality, although inherent in choice of arbitration, is pitted against the competing requirement of transparency in ITAs owing to the involvement of host States in their sovereign capacity and the implications of ITAs on the policy choices of host States. The author also discusses the related issue of granting access to proceedings and submissions in ITAs to the third States, which are not party to the dispute, where an issue of public interest is involved. Such an access to third parties is uncharacteristic of ICA and only reflects the public international law character of ITAs. Finally in Chapter 6, the author, acknowledging the prevalence of pecuniary compensation as remedy in ITAs, argues for the possibility of non-pecuniary remedies such as restitution and satisfaction. However, the author also acknowledges the practical limitations that have rendered other modes of reparation in ITAs less preferred.

The author's attempt to characterize ITA as public international law is a break from the existing trend of characterizing ITA as a hybrid system or analogical to public law system. The arguments made have been substantiated through analysis of significant ICJ judgments, ITA awards and rules of ICSID, UNCITRAL and other arbitral fora. Also important is the fact that while arguing for the public international law nature of ITA, the monograph does not go out of bounds and does acknowledge the limitations, as in ignoring them one would run the risk of denaturing arbitration itself as a mode of settlement of investment disputes. The monograph is a meticulous attempt at establishing the

legitimacy of international investment law and ITA as a branch of public international law. For, academicians, students and even practitioners of international investment law, this monograph is a must read.