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BOOK REVIEW

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

Akriti Gupta[1]

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Investment treaty arbitration is most commonly looked at as a hybrid between public international law and international commercial arbitration. It is usually considered to be an offshoot of international commercial arbitration. Therefore, it resembles more of private law than public international law. Eric De Brabandrere, however, in his book *Investment Treaty Arbitration as International Law: Procedural Aspects and Implications*, has argued against this common perception. He has taken upon a daunting task of showing how investment treaty arbitration is essentially public international law.

The principal argument put forth by De Brabandrere is that investment treaty arbitration is a public international law dispute settlement mechanism, which is "fundamentally concerned with the international legal obligations of states under public international law and is founded on an international treaty containing the consent of the states."[1] The author then argues that since investment treaty arbitration is part of public international law, the rules of public international law impact the procedure applicable to investment treaty arbitration. The author deviates from the idea that investment treaty arbitration is a "hybrid" or that it is equated to public/administrative law dispute settlement.[2] The book is divided into two parts.

[1] ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW: PROCEDURAL ASPECTS AND IMPLICATIONS, 2 (Cambridge University Press 2014).

[2] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (Oxford University Press 2007) (disagreeing with Van Harten, the author does not endorse the view that international investment arbitration is analogous to public law.).

✉ Akriti Gupta
12jgls-akriti@jgu.edu.in

[1] Jindal Global Law School, Sonepat, Haryana, India

The first part establishes investment treaty arbitration as public international law. The second part takes the first as a point of departure and builds the argument further. It highlights the procedural implications that occur due to the public international law characteristics of investment treaty arbitration.

The book compares investment treaty arbitration to be as complicated as a web. The nature of investment treaty arbitration is *prima facie* deemed to be complex and so most academics have taken the approach of terming it as hybrid. However, the author dismisses the term "hybrid" and states that investment treaty arbitration needs to be peeled layer by layer. He concludes that while doing so one can discern that investment treaty arbitration is essentially public international law.

De Brabandere has defended his proposition of investment treaty arbitration as being a part of public international law. He explains that there exists two layers of obligations in international investment law. First, at a contractual level due to the individual contracts entered into between the host state and the investor. Second, at the treaty level in view of the international treaty entered into by the State parties. The latter requires the states to conform to the prescribed standards of public international law that govern the protections granted to the contracting parties. These protections are termed as substantive obligations that the state has towards the investor, such as the most favored nation treatment, fair and equitable treatment and full protection and safety provision to name a few. It is the breach of these substantive obligations by the host state, which brings a claim for investment treaty arbitration. Thus it can be noted that these substantive obligations are a part of public international law. Furthermore, the author argues that consent also plays an important role in bringing out the public international character of international investment law. He states that the backbone of investment treaty arbitration is the international treaty and that the consent required to take the State to the concerned tribunal requires the State to act in its sovereign capacity. This sovereign capacity is derived from the *International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts* under public international law.

The author highlights that investment treaty arbitration, unlike international commercial arbitration does not only affect the interests of the parties to the dispute but a broader range of entities and individuals. Keeping this in mind the author has dedicated *Chapter Five* of the book to *Transparency and Public Access in Investment Treaty Arbitration*. He draws a contrast between the confidential nature of international commercial arbitration and the public access to the awards in investment treaty arbitration. This is one of the many procedural aspects that the author has used to bring out the public international character of these proceedings. The other procedural aspects highlighted by the author are the role, functions and qualifications of the arbitrators and public international law remedies, which include compensation, non-pecuniary remedies, and oral damages.

De Brabandere also discusses the various features of investment treaty arbitration in light of human rights where he demonstrates that in situations where there is a conflict between the state's human rights obligations and obligations under international investment treaty, it is the general principles of international law that can resolve this conflict. In *Chapter Four*, *The Applicable Law and Non-Investment Considerations in Investment Treaty Arbitration,* he further argues that though the

tribunals are reluctant to adjudicate on matters pertaining to human right obligations, there has been a recent trend where tribunals have relied upon jurisprudence of human rights courts in determining whether the rights of the investor have been breached. Thus the author notes that the arbitral tribunals do not operate in an exclusive legal regime.

The book is an excellent read and has introduced unique perspectives in understanding the convergences between international investment arbitration and public international law. It provides an analysis and systemic perspective on how the public international law character of the dispute mechanism can influence the international investment arbitral proceedings. This book could be particularly interesting for those who have always considered that investment treaty arbitration takes a lot from international commercial arbitration or public/administrative. The author has debunked these ideas and seeks to provide a public international law character to investment treaty arbitration.