Abstract
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Competing Cultures of Law and Development in Investor-State Disputes

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The U.S. legal academy has recently witnessed the emergence of what I will call “comparative development law”: the consideration of development policy in international and comparative law with the express desire to frame the analysis cross-geographically and, if possible, transhistorically. In this comparative development law frame, the rubric of “the culture of public and private” can be understood as a map for tracing conflicting concepts within relevant law and policy discourses. Transnational business agreements between developing-country governments and private international investors form one salient locus of conceptual conflict between “public” and “private.” Within this subset, international development finance offers a particularly complex problematique.

Two types of legal questions often arise in such disputes. First, the public capacity of the government party to the investment contract can trouble the tribunal in its decision on the threshold, jurisdictional question of whether the dispute can be heard at all, or whether it must be dismissed with any remedy left to intergovernmental diplomacy. The investment disputes arising out of Libya’s oil nationalizations of the 1970s and 1980s provide a well-known example of the jurisdictional question. Despite Libya’s assertion that its sovereignty allowed it to null the contract, voiding not only the substantive contract dispute but the dispute settlement provision granting the tribunal jurisdiction, the arbitral tribunals elected to exercise jurisdiction and to award damages to the private investor counterparties.

Second, even if the tribunal exercises jurisdiction, in applying substantive law it will often reconsider the relationship between the state’s competing identities as public sovereign and private investor. For example, recent arbitral tribunals have struggled with the question of whether the doctrine of necessity (a close cousin to force majeure) excused the Argentinean government from certain obligations arising in its investment contracts with foreign energy investors during the country’s 15-month economic crisis from 2001 to 2003. These tribunals have reached apparently contradictory decisions,

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1 See, e.g., DAVID M. TRUBEK & ALVARO SANTOS., THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (Cambridge University Press, 2006).
with the 2006 LG&E tribunal finding the doctrine of necessity provided an excuse,\textsuperscript{3} and the 2005 CMS Gas Transmission tribunal finding that it did not.\textsuperscript{4}

A policy tension between two competing theories of development surrounds such questions. On the one hand, developing countries are urged to adopt the “rule of law” – to establish stable and predictable private law regimes that assure investors of recourse to justice and remedy. On the other hand, modern development theories have recognized that in weak economies, the state is essential as an centralizing force to “intervene” in market dynamics with the requisite “big push” to attain economic growth.

If you like, this tension could be viewed as an opposition between two “cultures” in law and development discourse, if “culture” can be understood to describe an association of overarching values or mores. The “legal cultures” that coincide here are, on the one hand, the ideal within neo-Weberian discourse of the development state as a promoter of private law as an \textit{end in itself}; and, on the other, the premise within instrumentalist discourse that law is a \textit{means}, not an end, for the development state to use in implementing the overriding goal of economic change.

The question of to what degree the state can “interfere” in markets to attain specific economic outcomes – with those outcomes now being viewed not only as private transactions but also as having immediate public implications – does not only beleaguer poorer countries. The Supreme Court’s controversial 2005 decision of \textit{Kelo vs. New London}\textsuperscript{5} tried to answer the same question, to widespread consternation. In that decision, the Court rejected the proposition that “economic development does not qualify as a public use,” finding instead that the City of New London could condemn and transfer property from one private party to another, if such actions were taken in conjunction with a development plan. In other words, the Court found that economic development was a “public purpose,” even when the parties in question were all private actors.

Yet the scale of this quandary looms much larger in the transnational development context, particularly in an era of dramatic increases in cross-border investment. The current moment of economic globalization has, consequently, brought with it the prominence of hybrid mechanisms for resolving investor-state contract disputes. Such mechanisms are hybrid in that they largely uphold private law substantive doctrines, but are a product of the concerted efforts of states seeking to protect the economic interests of their nationals. The profusion of bilateral investment treaties (BITs) establishing protection for foreign investors – increasing from 385 in 1990 to 2,495 in late 2005 – exemplifies this trend.\textsuperscript{6} The recent ascendency of the International Centre for the Settlement of Investment Disputes (ICSID), a World Bank body originally established in

\textsuperscript{3} LG&E Energy Corp. vs. Argentine Republic, 46 ILM 40 (2007).
\textsuperscript{5} 545 U.S. 469 (2005).
\textsuperscript{6} UNCTAD IIA Monitor No. 3 (2006), \textit{The Entry Into Force of Bilateral Investment Treaties}, pp.2-3 (AKB).
1966, has accompanied the rise of BITs, since most BITs select ICSID as a forum for settling disputes between state parties to the treaty and nationals of other state parties.

This approach can be contrasted with that, for example, of the Convention on the International Sale of Goods (CISG), which seeks to harmonize certain provisions of the private law of contract, but which does not seek to affect the forum for their adjudication. In that sense, ICSID has the puzzling quality of being a hyperpublic phenomenon – the product of a treaty between states – to create a hyperprivate process – to remove investment law disputes affecting private international actors not only from a country’s courts, but from the country altogether.

Of course, such attempts at removal cannot be entirely successful. Given that the counterparty to a dispute with a private international investor is a state, the state’s identified public role and interests inevitably come into play. The risk of the removal strategy is political backlash, as exemplified by Bolivia’s decision earlier this year to withdraw from ICSID, following its tumultuous experiences with domestic protests against its water privatizations and other initiatives significantly involving private international investors.7

The current age of globalization is not the only one to have featured such dynamics. An historical view reveals that the colonial era of Western expansionism contains some resonant narratives, as well. Consider, for example, the history of the Mixed courts of Egypt, established in 1876 to provide separate courts, within Egypt but populated by a majority of foreign judges, to adjudicate disputes involving foreign nationals. The establishment of the courts formed part of the effort of Egypt’s ruler at the time, the Khedive Ismail, to promote modernization and to secure Egypt’s reputation as a peer and member of “civilized nations.” Almost immediately, foreign lenders to the Khedive brought suit against him in the very same Mixed courts that he had established. Although the Khedive argued that the debts were “acts of sovereignty” and therefore not subject to the Mixed courts’ jurisdiction under the terms of their establishment, the courts held otherwise. In the Affaire Carpi of 3 May 1876, the Mixed Court of Appeal held that Cesare Carpi was entitled to act on two bills of exchange drawn by the Daira Sanieh (the Khedive’s estate in the south of Egypt).8 Hundreds of similar decisions soon followed.

Though the Mixed Court decisions were viewed by contemporaneous legal scholars as victories of judicial independence9 (much as they would be viewed by analysts of later

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8 This and the following from Mark S.W. Hoyle, The Mixed Courts of Egypt 1875-1885, 1 Arab Law Quarterly 441-445 (1986).
decades as symbols of colonial domination), their enforcement within Egypt was, unsurprisingly, difficult. Eventually, the governments whose foreign nationals were implicated forced a political solution by pressuring the Ottoman Empire to depose the Khedive, which dismissal occurred in 1879. Notwithstanding, and likely in part due to, this political "solution," the Mixed Courts continued to be symbolically divisive within Egypt, fueling nationalist sentiment that culminated in both the infamous Orabi uprising and the British occupation that responded to it, formally establishing Egypt as a "veiled protectorate" of the British Empire in 1882.

Viewed in historical and comparative perspective, the story of the Mixed Courts and the Khedival debt provide a stark example of the ways in which state and private interests intersect in international transactions. With international finance and international development both featuring particularly close interactions between private and public interests, it is no surprise that the intersection of the two, international development finance, has produced notable examples of legal hybridity. Thus, the Mixed Courts can be seen as a predecessor of latter-day efforts at debt restructuring at the turn of the twentieth century. The coordination, in these more recent episodes, between private financiers and their governments have arisen in a range of instances, from the relationship between the Paris Club (governments) and London Club (financiers) in brokering debt repayments, to the private law governing the status of creditors who "hold out" against such brokered group restructurings. Elucidating the formal and substantive specifics of these efforts provides the emerging field of comparative development law with an important case study.

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