SIGNIFICANCE OF THE SEPARATION OF POWERS PRINCIPLE AND THE POLITICAL QUESTION DOCTRINE FOR INTERNATIONAL LAW

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POST-RELEASE

On January 21, 2021, St. Petersburg International Legal Forum with the support of the International and Comparative Law Research Center held a conference "Significance of the Separation of Powers Principle and the Political Question Doctrine for International Law".

As part of the conference, such matters as the significance of the separation of powers principle, the place of the political question doctrine and the issue of justiciability in international law, as well as the questions of where the border of the collision of politics and law lays, and how to sustain political neutrality of international justice were discussed.

Mikhail Galperin moderated the first panel of the event which included Sergei Belov, Alexei Avtonomov, Alexei Ispolinov.

Baiju Vasani acted as the moderator of the second panel which included Surya P. Subedi QC, Erik Bjorge, Lindsay Reimschussel.

PANEL 1. SEPARATION OF POWERS AND INTERNATIONAL LAW

MIKHAIL GALPERIN*

Moderator of the Panel

Historically, the "political question" issue was raised in the USA where up to this day the courts are tied up with this doctrine when they discuss the executive powers and defense policy. In recent 2019 case, *Rucho v. Common Cause*, that concerned partisan gerrymandering the Supreme Court ruled that while partisan gerrymandering is "incompatible with democratic principles" the federal courts cannot review such allegations, as they present non-justiciable political questions outside the remit of these courts. The number of cases where this doctrine is applied is growing both in national legal systems and in international law and justice.

Almost any large international arbitration that is an object of public attention is connected with politics. The political aspect of the claim itself does not make the matter non-justiciable. However, such issues, including questions connected with the separation of powers, cannot be ignored by international bodies. Therefore, the application of the corresponding legal norms and international treaties can be expected to become wider both in international and national law. Such legal norms include Article 46 of the Vienna Convention on the Law of Treaties which, on the one hand, deprives the State of the right to invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law, and, on the other, directly presents an opportunity to do so if that violation was manifest and concerned a rule of its internal law of fundamental importance.

However, all the above-mentioned facts should not lead to a conclusion that it

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is possible to not abide by the rules of international law. It is worth noting that not only international courts and tribunals, but domestic constitutional institutions and courts as well are responsible for developing and overseeing the implementation of international law. They are to respond to violations of fundamental principles and norms, including those of international law, especially in case where international bodies exceed its authority, by ensuring the correct application and interpretation of international law.

It has to be noted that this is a pressing issue not only for Russia. The questions connected with the transfer of certain questions to ISDS tribunals, its legitimacy, democratic accountability, the ability of private arbitrators to evaluate the public policy measures and exercise of public power by the Government, including those exercised in the interest of its citizens, and its constitutional authority, are on the agenda in the European Union, European countries, and many other countries, including those that are considered to be the pillars of liberal law (such as the Netherlands, Germany, France, Italy, and Canada). The distinction between investment arbitration and commercial arbitration is becoming clearer. The latter is based on the equality of the parties, and the former is in many ways a juridical control mechanism of public authority implementation.

SERGEI BELOV*

Evident and Probable Aspects of the Particular State's Implementation of the Separation of Powers Principle

Article 46 of the Vienna Convention on the Law of Treaties states that a State may invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law only if the violation (a) concerned a rule of its internal law of fundamental importance and (b) was manifest for the other parties to the international interaction.

Under what conditions do these criteria apply to the separation of powers principle in a constitutional system of a particular State? How can an international or foreign court rule that the separation of powers principle in the Russian Federation is not only formally recognized but is applied as a fundamental principle of law and is distinct in its nature for the Russian system of power, for the political and constitutional systems?

The focus on the separation of powers between the different branches of government has become the most prominent feature of the separation of powers principle interpretation in the Russian Federation. Undeniably, the balance of powers, the balance of authority, the mutual control of different branches of government are all important characteristics of the separation of powers principle. However, it seems that the approach of the domestic doctrine, emphasizing, on the one hand, the singularity of the governmental authority and the unity of its objectives, on the other hand, the difference between the functions, requires a unique interpretation of the separation of powers principle in our country.

Following this general doctrinal approach, the Constitutional Court of the Russian Federation has emphasized in several cases the stipulation of the general principles of separation of powers and authority between the branches of government in the Constitution of the Russian Federation. One of the more striking examples is the separation of rule-making powers. In this respect, the Constitutional Court has emphasized that rule-making, issuance of legal acts and general provisions of various nature lie within the legislative branch of government precisely due to the separation of powers principle and in accordance with the constitutional provisions. It follows that

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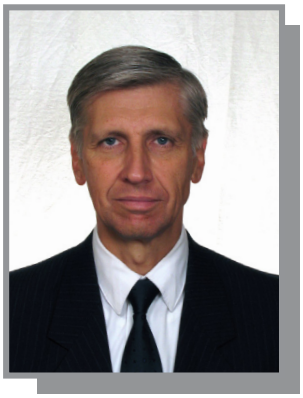
certain rule-making powers may be transferred to the executive branch as part of the so-called delegation of authority. For example, in the Resolution of January 27, 2004, the Constitutional Court described in detail the ways of delegating the rule-making powers from legislative to executive branch. In this Resolution, the Constitutional Court pointed out the existence of certain situations in which subject-matter regulation is to be transferred at the discretion of the executive branch, but it also distinctly stipulated that the evaluation of such transfer is the question of implementation of the separation of powers principle.

Afterwards, the Constitutional Court of the Russian Federation stated that the Constitution contained the rules of "limited delegations", according to which any type of transfer of rule-making powers from the legislative branch to the executive is possible only within distinct and definitive limits. The legislative branch does not have the authority to delegate the rule-making authority if, in particular, it is of common nature or is connected with certain fundamental matters (such as those relating to the State sovereignty). A similar doctrine is known to the constitutional law of the USA, a so called "non-delegation doctrine".

To summarize, the long-standing practice of the Constitutional Court of the Russian Federation together with the doctrinal development of the separation of powers principle shows that this principle can at present be viewed in the Russian Federation, on the one hand, as the basis for functioning of a system of governmental authorities, and, on the other hand, as a component of the system of constitutional principles and norms which are evident and manifest in practical rulings of the Constitutional Court and other public authorities on different levels.

ALEXEI AVTONOMOV*



International Rule of Law Standards and Their Manifestation in the Constitutional Principle of the Separation of Powers

Up to this day, the separation of powers principle is not considered as fundamental in every country (for example, in the UK, Sweden, Norway, or New Zealand). That is why it is important to know the extent of the legislative powers, whether it has the supreme power, and whether the authority can be transferred to someone without treading on the constitutional principles, the rule of Parliament and the separation of powers.

Generally speaking, international bodies, including judicial, often refer to national law, discuss, analyze, and evaluate it. However, it should be noted that there is a tendency towards considering matters, which have exclusively been in the realm of the national law, at international level. Nowadays, we see an increase in the application of common principles at international level and assessment of conformity of State practice and legislature to international principles and standards.

The separation of powers principle itself is not established internationally because the universal strengthening of the role of Parliament was not considered at the time when most international instruments were created. However, the question of the separation of powers is attracting more and more attention nowadays. As such, it is worth noting the 2020 EU Rule of Law Report where, among other criteria characterizing the rule of law, certain aspects which are in one way or another connected with the system of checks and balances are touched upon. In this respect, the role of Parliament in strengthening the rule of law is considered to be quite significant. In this regard, it

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seems that the application of international treaties, which are provisionally applied without approval of the Parliament or its other appropriate reaction, can be considered as arbitrary executive action treading on the authority of the Parliament. Great attention to the role of Parliament and the restriction of executive branch not only by the judiciary, but also by the Parliament is also paid in the rule of law indices published by individual organizations.

Thus, it seems that questions which are of utter importance to the State, including the questions of conclusion and entry into force of international treaties, cannot be resolved without Parliament. Therefore, the rule of law cannot exist where Parliament, which represents the will of the people, is excluded from the decision-making process on such matters.

ALEXEI ISPOLINOV*

Provisional Application of International Treaties and State's Consent to Investment Arbitration

On the one hand, international treaties have become the main way to regulate State-to-State relations nowadays. On the other, conclusion and entry into force of treaties is contingent upon the domestic politics in each State due to the disparity between the time of conclusion of a treaty, its ratifications, and entry into force. Various examples can be given of international treaties coming into force years and decades after they were concluded, or not coming into force at all due to the ratification predicaments or to a small number of ratifications.

Among other things, in order to solve such problems States often agree to apply certain treaties provisionally. Provisional application of treaties was widespread even before the Vienna Convention on the Law of Treaties, Article 25 of which stated that "a treaty or a part of a treaty is applied provisionally pending its entry into force if (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed".

However, it should be noted that there is a number of problems connected with the provisional application of international treaties. In particular, in case of evident Parliament opposition, Article 25 of the Vienna Convention can be viewed by the executive branch as a way to get around the Parliament procedures necessary for ratification.

Moreover, where international treaty is applied provisionally a question on the role of internal law arises. It seems that where international treaty is applied provisionally internal law plays a different role compared to a situation defined in Article 27 of the Vienna Convention, which concerns a treaty that has entered into force. As a result, the question of application of a provisionally applied treaty that does not conform with internal law arises.

A common solution to the problem of relationship between internal law and contradicting to it provisionally applied treaty is a reservation providing that an international treaty may be provisionally applied unless it conflicts with internal law. Besides, in many States it is imperative to get the consent of Parliament in one form or another to apply a treaty provisionally. Some States simply forbid provisional application of treaties making reservation to Article 25 of the Vienna Convention specifying that their constitution forbids provisional application of treaties.

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In the 1994 Energy Charter Treaty (hereinafter, "**ECT**"), there are two solutions to the problem of provisional application: (1) prohibition of provisional application and (2) provisional application of the ECT by the State that signed but did not ratify the to the extent that such provisional application is not inconsistent with its constitution, laws or regulations. The second option was chosen by the Russian Federation when signing the ECT.

As for the *Yukos* case, the most pertinent question for the Russian Federation is the issue of provisional application of Article 26 of the ECT which concerns submission of disputes to arbitration. Particularly, if Article 26 of the ECT may not be applied provisionally, then there was no consent of the Russian Federation to submit disputes under the ECT to arbitration, and, therefore, the arbitral tribunal should not have exercised jurisdiction in the *Yukos* case. In this regard, it should be noted that at present the separation of powers principle is becoming the cornerstone in solving the issue of provisional application of Article 26 of the ECT.

This problem initially was touched upon in the ruling of the District Court of The Hague in 2016 and then in February of 2020 in the ruling of The Hague Court of Appeal which ruled not in favor of the Russian Federation. In support of its position, The Hague Court of Appeal, among others, referred to the Resolution № 8-П of March 27, 2012, of the Constitutional Court of the Russian Federation, which does not appear to have taken into account the ongoing process in the *Yukos* case.

In this regard, it is worth noting the Ruling of the Constitutional Court of the Russian Federation of December 24, 2020, and making the following conclusions:

1) The Ruling was a logical, although a belated continuation of the Resolution № 8-П of March 27, 2012, of the Constitutional Court of the Russian Federation;

2) The stance of the Constitutional Court to provide conditions for provisional application of international treaties can be fully supported, taking into account that the Federal Law "On International Treaties" does not contain any provisions of the kind;

3) The Constitutional Court is pursuing the line of conditional priority of international law on case-by-case basis;

4) The conclusions of the Constitutional Court can be used within the frames of the ongoing process of the Supreme Court of the Netherlands in the *Yukos* case.

PANEL 2. POLITICAL QUESTION DOCTRINE AND ITS APPLICATION IN INTERNATIONAL JUSTICE

BAIJU VASANI*

Moderator of the Event

I have practiced in the field of international dispute resolution, primarily Investor-State Dispute Settlement (ISDS), for about 20 years. And even in that period of time, which is relatively short when one considers the history of international law, I have seen a burgeoning of cases, particularly in the ISDS field. That growth has not been welcomed with universal adoration, and in particular, States have been critical of the system. One can call it an attack on sovereignty, in other words, the ISDS as it grows treads on the rights, the ability of States to do various things. Examples of such things include the ability of State to regulate or the *Achmea* case with the interplay between the ISDS and the EU law. Other political questions, I think, have not been vastly explored, in particular, in relation to questions of jurisdiction, such as the ability of ISDS tribunals to traverse on political matters. In order to answer these questions, we first have to understand the history and origins of political questions and justiciability. We then have to understand how the concept has been approached by various courts and tribunals of what I would call fixed abode, the European Court of Human Rights (ECtHR), the International Court of Justice (ICJ) and others, because they are really, one could say, guardians of this type of public international law. Finally, we will address the question at hand from the point of the ISDS tribunals.

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SURYA P. SUBEDI QC*

Justiciability: Its History and Significance in International Law

History of the notion of justiciability

Generally speaking, the notion of justiciability refers to matters not within the realm of the judiciary. It functions as a limitation to the judicial review of executive decisions and refers mainly to matters of a political nature. It also signifies that the courts should not entertain matters when it can be foreseen that the judgment would be unenforceable, or would go against public policy, or would result in the violation of human rights or the established norms of democracy, including the separation of powers.

The history of the notion of justiciability is intertwined with the political question doctrine, which is firmly rooted in the US legal system, but analogous doctrines are also applied in other countries, including the United Kingdom, France (*Acte de gouvernement*), Italy (*atto politico*), and several Latin American countries (*actos politicos*).

The political question doctrine is based on the relationship between the judicial branch and the other branches of the government and especially the executive branch. The non-justiciability of a political question is primarily a function of the doctrine of the separation of powers and derives from the notion of the rule of law at the national and international level. The political question doctrine involves deciding whether a matter has in any measure been committed by the constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed. In recent cases, courts in common law jurisdictions have been considering both the political question doctrine and the act of state doctrine as if they were the same or very similar.

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In *United Bank, Ltd.* v. *Cosmic International, Inc.*, the court stated that "[t]he act of state doctrine is the equivalent in international law of the 'political question doctrine', and was devised to prevent intrusion by our courts into the political affairs of foreign countries". The US Ninth Circuit has stated that "[t]he act of state doctrine is similar to the political question doctrine in domestic law. It requires that the courts defer to the legislative and executive branches when those branches are better equipped to resolve a politically sensitive question".

Another area of concern raised in some quarters is the interface between state sovereignty, including regulatory powers of the State, and the perceived "judicial activism" on the part of some international investment tribunals. Therefore, the challenge faced by such tribunals is to strike a balance between the need to protect the legitimate rights and expectations of foreign investors on the one hand, and the need not to restrict unduly the right of host governments to implement their public policy on the other.

Significance of the notion of justiciability in international law

With regard to disputes relating to international matters, it is possible to find the following three main concerns underlying judicial abstention or restraint. First, there is the worry not to hinder governmental action in the international arena. In this field, it is believed, the executive must take quick and delicate choices which cannot undergo judicial review. Second, there is the need to avoid the judiciary being manipulated by the world of politics. Third, there is the demand to ensure that in international relations the state speaks with one voice, namely that of the executive. This need is particularly acute in those areas where there is the risk that the position taken by courts in the context of a domestic proceeding contrasts with the stance adopted by the executive within international order (e.g. invalidity and termination of treaties, recognition of States and so on). These concerns are generally hard to question.

An area associated with the notion of justiciability is the act of state doctrine, which is a subcategory of the political question doctrine. A judge, not willing to be lured into the political thicket, must limit him or herself to applying international norms as they really are, locking up the door to the creation of new individual (or collective) rights or to an evolutive interpretation of pre-existing international standards. By so doing, courts will never be able to impinge upon sensitive interests in the foreign affairs area. Courts have thus to work out ways to reconcile the "speak with one voice" principle with the judicial duty in interpreting and applying international law without encroaching upon areas belonging to the executive department alone.

Judicial intervention in such matters might affect essential interests of the State or even imperil its very existence. Therefore, the national courts have sought to use the notion of justiciability to dismiss at the outset disputes relating to international matters by resorting to doctrines which impose not to rule on "political questions" (according to the common law wording) or "political/governmental acts" (according to that of civil law). It is well known that both these doctrines envisage the existence of a political power whose exercise is entirely exempt from judicial review.

Just the way the decisions of the UN Security Council, the executive arm of the UN, are not reviewable by a judicial mechanism, if the decisions are within the executive

realm of the organization, the matters pertaining to the executive realm of states seem to enjoy immunity from judicial review by international courts and tribunals under the political question doctrine and its subsections — justiciability and the act of state doctrine, unless the state in question has consented otherwise. This is how international law seeks to sustain political neutrality of international justice which is informed by the practice of national courts since such practice constitutes evidence of State practice capable of contributing to the formation of customary international law or representing an example of general principles of law as listed in the sources of international law stipulated in Article 38 of the Statute of the ICJ.

ERIK BJORGE*

Doctrines Similar to Political Question and Justiciability before International Courts and Tribunals

Is there something special about "political" disputes in international law?

Already in the first half of the twentieth century, Sir Hersch Lauterpacht observed that "[t]he State is a political institution, and all questions which affect it as a whole, in particular in its relations with other States, are therefore political". On this basis, he disagreed with those who took the view that political disputes were non-justiciable before international courts and tribunals. In the intensely political *Nicaragua* case, the ICJ observed that, as its first case, *Corfu Channel*, showed, "the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force". Later, the ICJ reiterated the *Nicaragua* statement in the *Wall* advisory opinion, advising that it could not accept the view that it had no jurisdiction because of the "political" character of the question posed. The ICJ referred to its longstanding jurisprudence in pointing out that the fact that a legal question also has political aspects was not enough to deprive it of its character as a "legal question" and hence of its competence.

Comparisons between domestic and international law

If we were to compare domestic and international law, a useful distinction may be drawn from the case called *Lord Carlile of Berriew QC*, relating to the free speech rights in the UK of an Iranian dissident, in which Lord Sumption said that the concept of "deference" had two distinct aspects: (1) the constitutional principle of the separation of powers and (2) no more than a pragmatic view about the evidential value of certain judgments of the executive, whose force will vary according to the subject-matter.

Under the first aspect, some issues are for the Parliament or for the executive to determine, others are for the judiciary. Under the second aspect, the court may have to determine that in principle the matter before it is one that it may determine, but in doing so it will give due deference to the expertise and judgement of the primary decision-maker, which could be a government agency, i.e. a part of the executive.

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If we try to draw on that distinction for the purposes of international law, to the extent that that is possible, then we might say that questions as to whether an international court or tribunal has jurisdiction and/or whether a matter is admissible before it will relate to the first aspect. Questions relating to doctrines such as the margin of appreciation will relate to the second aspect.

"Separation of Powers" considerations in international law?

In order to look into "Separation of Powers" considerations in international law, it is proposed to look at two recent and important inter-State cases: *Enrica Lexie (Italy v. India)* and the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*. In both cases, international tribunals found itself in a situation when it becomes necessary to adjudicate on an issue that is a necessary component in a larger picture over which the tribunal has jurisdiction. This type of a situation has the potential of the tribunal going beyond what is strictly speaking within its jurisdiction — it does so in order properly to fulfil the function of dispute settlement conferred on it by the Parties.

As such, in the *Enrica Lexie* case the Tribunal held that it could not provide a complete answer to the question to which Party might exercise jurisdiction without incidentally examining whether the Marines enjoyed immunity. In *Sea of Azov*, the Tribunal had to decide on whether a sovereignty dispute over Crimea in the case was an issue ancillary to a dispute concerning the interpretation or application of UNCLOS, to which its jurisdiction could be extended. The Tribunal decided that the Parties' dispute regarding sovereignty was not a minor issue ancillary to the dispute under UNCLOS: the question of sovereignty was a prerequisite to the Tribunal's decision on a number of claims submitted by Ukraine under UNCLOS.

Deference to executive determinations in international law

With respect to the issue of deference to executive determinations in international law it is propose to turn to the doctrine of the margin of appreciation, which applies to merits rather than to jurisdiction.

It has in recent years been taken up by prominent investment tribunals, such as *Philip Morris* v. *Uruguay*, where the Tribunal held that "the 'margin of appreciation' is not limited to the context of the ECHR but 'applies equally to claims arising under BITs', at least in contexts such as public health. The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health". In this respect, it could be noted that this is a passage that will be heavily quoted as COVID-19 cases begin to be filed.

To summarize, it must be noted that it is sensible to draw on the kinds of doctrines developed by domestic courts for the purposes of international law, not because the latter is identical in its structure to the constitutional structures we have in domestic legal systems, but because there are numerous similarities which make it necessary.

LINDSAY REIMSCHUSSEL*

The Approach of the *Ad Hoc* Tribunals in ISDS towards Political Question Doctrine

One of the common misconceptions when using the term "political question" is the implication that the question is political and, thereby, non-justiciable, because it is a sensitive or politically charged issue. But in international law that is not the case, and not the case in Investor-State Dispute Settlement as well. The main question in this respect is whether the judicial forum is the correct place or if within the system that underlines particular judicial system the question has already been committed to a different branch.

With that question in mind, it is important to touch upon the formation of the ISDS system. Historically, foreign investors have faced challenges in their disputes with foreign governments. They often feel discriminated against in local courts and their only recourse would often be diplomatic intervention or State-to-State intervention. The former has often been unavailable, inconsistent, or inappropriate. And the ISDS partly emerged, because States wanted to "depoliticize" disputes.

Taking into consideration the above-mentioned and the fact that the political question doctrine says that the question that is still in the political forum should not be resolved by a judicial body but rather in a political forum, it becomes clear that it all boils down to consent. What has State consented that the ISDS forum would decide on? What tools (bilateral investment treaty, multilateral investment treaty, etc.) would give an *ad hoc* tribunal the authority to decide something?

It is a common misconception in ISDS that just because a State has agreed to provide certain protection to foreign investors they have also agreed to dispute resolution for any claims that could potentially fall under such protections. This is not true. So what should the tribunal do when a "political question" comes up before the tribunal which is outside the State's consent to arbitrate?

No ISDS tribunal has explicitly ruled on something what they call a "political question". However, there is a suggestion to what the tribunal's actions could be. In this regard,

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it might be useful to look at the three *Corn Syrup* cases brought under NAFTA. If faced with a preliminary question that is outside the scope of State's consent, the tribunal should decline jurisdiction, at least, until the preliminary issue has been resolved by an appropriate forum that should decide it.

With respect to the topic, last but not least thing to be mentioned is the application of the Monetary Gold principle — an international law principle that stems from the notion of consent and sovereignty. It says that an international tribunal cannot decide an issue that has serious implications for a State that is not a party to the dispute. As far as known, this principle has never been directly applied. However, certain cases, such as *Corn Products International, Inc.* v. *United Mexican States*, may open a window for a future ISDS tribunal to apply this principle.