Investment Arbitration and National Interest

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Council on International Law and Policy
Indianapolis, 2018

This book was published in cooperation with the University of Szeged and the Iurisperitus Kiadó and with the generous support of the PADA Foundation (PADA Alapítvány).

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Published by
Council on International Law and Politics LLC., Indianapolis
55 East 70th
Indianapolis IN 46220
USA
http://www.cilpnet.com
Publications Coordinator: Kitti Kelemen and Ildikó Kovács
Printed by Iurisperitus Kiadó in Hungary and Create Space in USA
ISBN-13: 978-0-9858156-8-4
ISBN-10: 0-9858156-8-X

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INVESTMENT PROTECTION AND NATIONAL INTEREST

With the emerging wave of new-generation free trade agreements, investment arbitration, a more than half-century old pattern, came to be one of the central issues of the contemporary discourse on international economic relations.

Some argue that investment disputes are settled in the frame of intransparent *ad-hoc* arbitral proceedings devoid of any democratic legitimacy, which are inconsistent and unpredictable because of their *ad-hoc* and secretive nature. Critics assert that the current pattern of the settlement of investment disputes quite often strips national courts, including national constitutional courts, of their legitimate powers and vests *ad-hoc* and intransparent bodies with the competence to adjudicate public law questions. These questions include the validity of national legislation adopted by parliaments having democratic legitimacy; the review of the rationality of national regulatory decisions; the supervision of the fairness of national legal procedures and the exercise of contractual rights emerging from genuine commercial agreements.

The first bilateral investment treaty (Germany-Pakistan treaty of 1959) was meant to convert certain constitutional requirements e.g., expropriation, protection of legitimate expectations, into international obligations so as to guarantee them (guarantee function). The initial purpose of these treaties was to project certain constitutional requirements to the level of international disciplines as they were normally concluded between developed and developing countries and led by the concerns respecting the latter's legal system. The obligations were assumed to be, as a matter of courtesy, mutual i.e., reciprocal. However, these treaties did not aim at establishing higher, or in any sense different, standards for investment protection than the ones already part of the constitutional traditions of western democracies. The rationale was to convert the relevant constitutional rights and principles into international law guarantees in the form of bilateral agreements, so they could not be nullified unilaterally.

Nonetheless, there was no global agreement and especially no uniformity as to the investment protection standards. It is noteworthy that although goods, services and knowledge (intellectual property) are regulated in the global system of world trade (WTO), investment issues, including investment protection, were almost entirely left out, with the exception of the relatively insignificant provisions of TRIMs. The major turning point was when even developed democracies started concluding bilateral investment treaties.

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Today, investment protection became an integral part of new-generation free trade agreements, some of which are concluded between developed democracies (Canada, European Union, United States). With this, the guarantee function was put into the shade, and investment protection law fully detached from its original *raison d'être*.

Interestingly, investment protection, at least as far as substantive standards are concerned, has in essence remained bilateral, without a realistic chance to a multilateral system. During the last half-century, this pattern brought about a labyrinthine network of bilateral arrangements and investment protection took a life of its own. Instead of a duplicate it became an independent parallel system.

The major sources of uncertainty are the investment treaties'"treatment provisions" – fair and equitable treatment, security and protection, non-discrimination and national treatment. These principles center around fluid concepts, and confer on arbitral tribunals extremely wide powers to review national policy decisions and national administrative and judicial proceedings, entailing far-reaching consequences for states.

Furthermore, investor-state arbitration subjected genuine public-law disputes to an arbitral procedural pattern, initially designed for purely commercial disputes, which is devoid of democratic legitimacy due to its secrecy, intransparency and *ad-hoc* nature.[1]

The above developments were topped by new-generation free trade agreements, which are blamed for reinforcing these loose standards and the attached dispute settlement mechanisms lacking democratic legitimacy, thus making them part of the relations between developed democracies.

The first question which emerges in the context of bilateral investment protection treaties relates to their necessity. The reason is, obviously, the lack of appropriate standards and dispute settlement mechanism under (customary) international law concerning the protection of foreign investments.

The ontological analysis of investment protection treaty law inevitably raises the question whether the existence of this regime is warranted in the light of the constitutional standards of developed democracies and whether its maintenance is justified between developed democracies. Critics argue that the standards developed by investment tribunals are higher than the generally recognized constitutional standards of developed democracies and place a more onerous burden on national regulatory sovereignty than the burden accepted in a democratic society. An interesting gauge is the jurisprudence of the European Court of Human Rights – why should foreign investors enjoy a higher level of property protection than ordinary citizens? The contrasting of the case-law of investment tribunals and the constitutional practice of developed democracies, and the jurisprudence of the European Court of Human Rights, is susceptible of revealing whether the claim that in international investment protection treaty law investors are

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[1] *Cf.* Joseph H.H. Weiler, *European Hypocrisy: TTIP and ISDS*, 25(4) European Journal of International Law 963 (2014) ("[T]he Bar that adjudicates them [investment disputes] is of a limited range […], and dominated by arbitrators from private practice rather than public interest backgrounds […]; and most damning of all, the substantive provisions of the investment treaties, when it comes to protecting societal interests, are woefully defective and inferior when compared with similar public interest provisions in trade agreements such as the WTO itself.").

"overprotected" and the clogs on national regulatory sovereignty are unduly onerous is valid.

One of the central questions of enforcement is access to the dispute settlement mechanism. Investment disputes are generally considered to be a mixture of private and public law, where a mechanism designed for the needs of the settlement of purely commercial disputes (arbitration) is used to adjudicate public law disputes.

International dispute settlement systems, as far as structure is concerned, range from *ad-hoc* mechanisms and permanent dispute settlement bodies to direct application by national courts. Investment protection law's dispute settlement mechanism concerns probably one of the politically most sensitive issues, given that this is the point where the international subjection of certain aspects of national regulatory sovereignty is perceived to crop out.

An important facet of enforcement is the consistency of the case-law and the role of precedents. Since investment arbitration has largely preserved its *ad-hoc* nature, where judgments have persuasive but no binding authority, critics have argued that this system is devoid of transparency and predictability. However, in relation to the new wave of free trade agreements, as to investment disputes, the creation of a permanent institution was proposed by the European Union.

The present volume addresses the above issues of investment arbitration in five sections.

The first section addresses the global debate and consists of two pieces.

The thought-provoking paper of Frank Emmert and Begaiym Esenkulova, "Balancing Investor Protection and Sustainable Development in Investment Arbitration – Trying to Square the Circle?", explores the mounting criticism against investment arbitration and analyzes possible solutions that may balance investment protection and sustainable development.

The paper of Dalma Demeter and Zebo Nasirova, "Trends and Challenges in the Legal Harmonisation of ISDS", examines the current landscape of international investment law consisting of thousands of different international agreements creating a fragmented legal framework and UNCITRAL's ongoing work in the field.

The second section deals with issues of legitimacy such as abuse, access, transparency and public participation.

The paper of Wasiq Abass Dar, entitled "'Abuse of Process' and Anti-Arbitration Injunctions in Investor-State Arbitration – an Analysis of Recent Trends and the Way Forward", deals with the abuse of procedural rights in investor-state arbitration employed by investors, such as multiple and parallel arbitral proceedings. His paper examines the concerns associated with this phenomenon, assesses the possible available remedies against abuse of process and proposes a balanced approach.

Rebecca Khan's paper "Third Party Participation by Non-Government Organizations in International Investment Arbitration – Transparency as a Tool for Protecting Marginalized Interests" examines a crucial question of public participation: whether non-disputing parties representing marginalized sectors may participate in international investment arbitration in an appropriate manner, channeling their interests in terms of impact of investment activities.

The paper of Bálint Kovács, "Access of SMEs to Investment Arbitration – Small Enough to Fail?" discusses the practical availability of investor-state dispute settlement mechanisms for small and medium-sized enterprises.

The third section addresses the regional perspectives of investment arbitration.

Dildar F. Zebari presents some key features of the developing case-law of the Energy Charter Treaty in his paper "The Promotion, Protection, Treatment and Expropriation of Investments under the Energy Charter Treaty – a Critical Analysis of the Case-Law".

Balázs Horváthy, in his paper entitled "Opinion 2/15 and the New Principles of Competence Allocation – a Solid Footing for the Future?", analyzes Opinion 2/15 of the Court of Justice of the European Union, which clarified the division of competences between the European Union and the Member States in relation to international trade policy in the context of the EU-Singapore Free Trade Agreement (EUSFTA).

Csongor István Nagy addresses various questions of BITs concluded between Member States and third countries in "Extra-EU BITs and EU law: Immunity, 'Defense of Superior Orders', Treaty Shopping and Unilateralism".

Pavle Flere's paper, entitled "Arbitrability of Competition Law Disputes in the European Union – Balancing of Competing Interests", addresses a classical issue of arbitration and arbitrability.

The fourth section deals with questions of enforcement and recovery.

In "Execution of ICSID Awards and Sovereign Immunity", Yue Ma addresses enforcement, a weak point of the life of ICSID arbitral awards. The paper analyzes the rationale of the ICSID's execution mechanism and evaluates the difficulties of enforcement under the recent backlash against investment arbitration.

The paper of Orsolya Tóth, entitled "The New York Convention – Challenges on Its 60th Birthday", addresses and analyzes some of the most recent challenges of the New York Convention in relation to arbitration involving a state.

The fifth and final section addresses institutional issues and consists of the paper of Zoltán Víg and Gábor Hajdu ("Investment Protection under CETA: a New Paradigm?"). This paper addresses one of the most exciting intellectual experiments of investment arbitration – the investment protection regime of the CETA, in particular the permanent international tribunal for the settlement of investment disputes.