Investor-state dispute settlement and its impact on International Investment Law

OC - (ILA-14153) - CHANGING THE NATURE OF 'INVESTMENT' ?

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Abstract

Changing the nature of 'investment' ?

The most important role of a court is to absorb legal uncertainty (Luhmann, Legitimation durch Verfahren, (1987) at p.59). Legal uncertainty is part and parcel of the Investment Law regime, in particular because of its decentralised nature: no fixed rule of precedent or codification unifies this area of law. This puts a lot of responsibility regarding the definition of the field on the shoulders of arbitrators. One particular uncertainty concerns the question whether 'investment' is limited to those investments that contribute to the economic development of a country (*Salini v Marocco*, 2001).

Attempts to change this definition are connected with general shifts in the understanding of investment, especially regarding the question of an autonomous understanding of the term in the ICSID Convention. The drafters of the convention decided not to provide a definition of 'investment' in order to leave it to state consent. While States do define 'investment' through BITs and the procedures set out by the ICSID Convention, arbitrators quickly resolved to the necessity of providing an objective test as to whether something can be regarded as 'investment' (Grabowski (2014) The Definition of Investment under the ICSID Convention, at p. 289).

More precisely, the *Salini-Test* provides that in order to qualify as 'investment', four conditions ought to be fulfilled: the activity in question must (1) involve the transfer of funds or the contribution of money assets; (2) be of a certain duration; (3) have the participation of the individual transferring the funds in the management and risks associated with the project; and (4) bring economic contribution to the host state. Hence, an investment is more than a simple money transfer: worthy of protection is not any asset that comes from a foreign state – a durable, economically beneficial link to the host country has to be established (*Salini v Marocco*, 2001). However, the fourth requirement that a contribution to the host state's development ought to be made has been rejected in other cases on the grounds that it is too ambiguous to constitute an enforceable legal obligation (*Quiborax v. Bolivia*, 2012).

In the reading of cases-law contesting the 'contribution to development' requirement, investment is in need of protection – i.e. activity by the host state, even if no economic contribution of that activity to the host state is discernible. However, while this is a serious contestation that has been repeatedly put forth, qualitative data suggests that the majority of the case law continues to require a contribution to the host state's development. Hence, this contestation reveals an attempt to shift the discourse that has not (yet) succeeded.

These fundamental differences in the definition of 'investment' demonstrate how investment arbitration tribunals play a key role in defining their own judicial capacity and field: in holding that corporations must contribute to the development of the host state or not, they define the very core of the investment law regime, i.e. which assets are entitled to legal protection.

In that context, it is crucial to note that this process of defining takes place without any formal consultation with the host state's population that should benefit from this development. This has been subject to multifaceted criticism. However, in a more general perspective on division of powers between the judging experts and the legislative power of the people, this consultation should – theoretically – be part of the building of State consent. Hence, pulling the definition of 'investment' into the realm of case law has profound repercussions on the dynamics of investment law: tribunals and not states can be blamed for not taking stock of peoples' opinions. Put differently, the argument for more implication of local communities in investment arbitration highlights the fundamental role those institutions play in shaping the investment law field.

Within this framework, this paper aims at analysing the changing notion of 'investment' in the case law of state-investor dispute settlement, and its impact on the investment law regime. Through a regression analysis over time it is possible to demonstrate the change of the requirement of 'contribution to development'. The outcome of this analysis can subsequently be put in relation to broader developments within the field of investment law.

Ultimately, the analysis of the extent to which the notion of 'investment' changed through investor-state arbitration case-law will help to conclude to what extent the case law of investor-state dispute settlements contributes to the absorption of uncertainty regarding the core of the field: the definition of the investment that ought to be protected – or to what extent this case-law, on the contrary, increases legal uncertainty by (1) multiplying definitions of 'investment' and (2) disconnecting international case-law from local communities' requirements.

This work forms part of a broader research endeavour being conducted at the Global Governance Center of the Graduate Institute of International and Development Studies in Geneva (https://paths-of-international-law.org/). The project focuses on selected case studies of successful and failed normative change among different issue-areas of international law, with the purpose of better understanding dynamism in international law. It does so by building and testing hypotheses about how normative change takes place through different paths depending on different contextual factors, including the salience of the norm in question, the institutional availability in a given field, the stability of prior normative understandings, and the influential actors that have stakes in the matter. Ultimately, the project seeks to contribute to the debate on change in international law by providing a balanced theoretical account that incorporates both normative and social insights into it, something that has so far been seldom done.

Palavras-chave : Salini test, development, uncertainty