

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

OC - (ILA-14189) - THE POTENTIAL FOR CREATING CONSISTENT INVESTMENT TREATY CASE LAW VIA THE INVESTMENT TRIBUNAL SYSTEM

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QUALIFICATIONS

- Solicitor and Barrister (New South Wales, Australia)
- B.A., LL.B. (1:1), and Graduate Diploma of Legal Practice
- Doctor of Laws (Dr. iur., summa cum laude)
- Current position: Senior Lecturer (University of Mannheim)

PUBLICATIONS

Monograph

- 1) Contributory Fault and Investor Misconduct in International Arbitration
- Accepted for publication by Cambridge University Press with expected publication date of July 2019 (210 pages).

Articles and Book Chapters

- 1) A New Energy Charter Treaty for the Clean Energy Future
 - Forthcoming publication (Hart Publishing) in an edited collection with Professor Peter Cameron, Professor Volker Roeben, and Dr Shawn Mu serving as editors (approximately 30 pages).
- 2) Reprisals Against Illegal Investments
 - Forthcoming publication in an edited collection, with Dr. Jean Ho and Dr. Mavluda Sattorova serving as editors (approximately 30 pages).
- 3) Adjudicating on the Validity of Domestic Rules in Investment Arbitration
 - Forthcoming publication in an edited collection, with Prof. Stephan Schill serving as editor (approximately 35 pages).
- 4) "In Accordance with Host State Law"-Clauses, Inherent Legality, and Good Faith Requirements
 - Forthcoming publication in an edited collection, with Prof. August Reinisch and Prof. Stephan Schill serving as editors (approximately 25 pages).
- 5) Contributory Fault in Foreign Investment Law
 - Published as a book chapter in 'Versicherungsmechanismen im Recht' (Mohr Siebeck 2016) (pages 45 – 70)).
- 6) Legally Protecting Upstream Investments
 - Published in the University of Eastern Finland Energy Law Review (Volume 1(1) (January 2016)) (pages 50 – 79).
- 7) Optional Dispute Resolution Clauses and Conditional Arbitration Agreements: a case study of Cape Lambert Resources v. Metallurgical Corporation of China
 - Published in the Asian International Arbitration Journal (Volume 9(1) (June 2013)) (pages 39 – 53).

Conference and Workshop Papers

- 1) Fighting Corruption via Effective Transparency Obligations and Civil Participation in Investment Treaties' (approximately 28 pages)
 - Workshop: Corruption Democracy and Human Rights: Exploring new avenues in the fight against corruption.
- 2) Investor Obligations in Investment Treaties (approximately 30 pages)
 - Workshop: 2019 ESIL International Business and Human Rights Workshop.
- 3) Granting Standing to Natural Persons and Local Communities for Human Rights Based Claims in Investment Arbitration (approximately 25 pages)
 - Workshop: The Legitimacy of International Investment Law and Arbitration in Protecting Human Rights.
- 4) The Proper Role of Fault Notions in Causation in International Investment Law (approximately 30 pages)
 - Workshop: ESIL-ELTE Law School Joint Workshop on 'Attribution, causality and evidentiary rules: Mere technicalities or the heart of the matter? Secondary rules of primary importance'.
- 5) The Investment Court System and China (28 pages)

- Workshop: 2019 CIBEL Global Network Young Scholars Workshop.

SPEAKING ENGAGEMENTS

- 1) Catholic University of Portugal, Portugal (October 2019).
 - Topic: 'Imposing Directive-Based Human Rights Obligations on Investors in International Investment Law'.
 - Workshop: Socially Responsible Foreign Investment under International Law.
- 2) National and Kapodistrian University of Athens, Greece (September 2019).
 - Topic: 'Investor Obligations in Investment Treaties'.
 - Workshop: 2019 ESIL International Business and Human Rights Workshop
- 3) University of Oslo (PluriCourts), Norway (September 2019).
 - Topic: 'Granting Standing to Natural Persons and Local Communities for Human Rights Based Claims in Investment Arbitration'.
 - Workshop: The Legitimacy of International Investment Law and Arbitration in Protecting Human Rights.
- 4) Strathmore University, Kenya (July 2019).
 - Topic: 'The Validity of Investor Obligations in Investment Treaties'.
 - Conference: Fourth African International Economic Law Network Biennial Conference.
- 5) European University Institute, Italy (June 2019).
 - Topic: 'Fighting Corruption via Effective Transparency Obligations and Civil Participation in Investment Treaties'.
 - Workshop: Corruption Democracy and Human Rights: Exploring new avenues in the fight against corruption.
- 6) University of New South Wales, Australia (May 2019).
 - Topic: 'The Investment Court System and China'.
 - Workshop: 2019 CIBEL Global Network Young Scholars Workshop.
- 7) McGill University, Canada (May 2019).
 - Topic: 'The Reactionary Police Powers Defence'.
 - Conference: 12th Annual McGill Graduate Law Conference.
- 8) Eötvös Loránd University of Budapest, Hungary (May 2019).
 - Topic: 'A Theory of Causation for International Investment Law'.
 - Workshop: ESIL-ELTE Law School Joint Workshop on 'Attribution, causality and evidentiary rules: Mere technicalities or the heart of the matter? Secondary rules of primary importance'.
- 9) University of Sydney (Sydney Centre for International Law), Australia (February 2019 (invited speaker)).
 - Topic: 'State Responsibility for the MH17 Incident'.
 - Conference: 2019 SCIL 'Year in Review'.
- 10) University of Canterbury, New Zealand (February 2019).
 - Topic: 'Reimaging Expropriation in International Investment Law'.
 - Conference: ANZSIL International Economic Law Interest Group 2019 Workshop.
- 11) National University of Singapore, Singapore (January 2019 (invited speaker)).
 - Topic: 'Reprisals Against Illegal Investments'.
 - Workshop: 'Investors' International Law' (closed-door workshop).
- 12) University of Vienna, Austria (December 2018 (invited speaker)).
 - Topic: "'In Accordance with Host State Law"-Clauses, Inherent Legality, and Good Faith Requirements'.
 - Workshop: 'Investment Protection Standards and the Rule of Law' (an event organised by the International Law Association's Committee 'Rule of Law and International Investment Law').
- 13) University of Dundee, United Kingdom (December 2018 (invited speaker)).
 - Topic: 'The Defence of Mismanagement in International Investment Law'.
 - Presentation for the monthly academic staff meeting of the Centre for Energy, Petroleum and Mineral Law and Policy.
- 14) Hungarian Academy of Sciences (Szeged), Hungary (May 2018 (invited speaker)).
 - Topic: 'Rethinking Expropriation of Intellectual Property Investments'.
 - Conference: 'Free trade, public interest and reality: new generation free trade agreements and national regulatory sovereignty'.
- 15) Masaryk University, Czechia (April 2018).
 - Topic: 'Environmental Warning Labels: the Perspective from International Investment Law'.
 - Conference: 'Contemporary Challenges to International Law and Policy on Sustainable Development, Energy, Climate Change, Environmental Protection, Intellectual Property and Technology Transfer'.
- 16) University of Sydney (Sydney Centre for International Law), Australia (August 2017).
 - Topic: 'An Overview of Contributory Fault Defences in International Investment Law'.

- Workshop dedicated to topic.
- 17) Kobe University, Japan (January 2016).
- Topic: 'Intellectual Property Investments and the Locality Condition for Jurisdiction'.
- Conference: '2nd Kobe Seminar on International Investment Law 2016'.
- 18) University of Luxembourg, Luxembourg (November 2015).
- Topic: 'Causation, Expropriation, and Taxation'.
- Conference: 'Settlement of Tax Disputes Under International Law'.
- 19) Ludwig Maximilian University of Munich, Germany (May 2015).
- Topic: 'Contributory Fault in Foreign Investment Law'.
- Conference: 'Versicherungsmechanismen im Recht' (Insurance Mechanisms in Law).
- 20) University of Eastern Finland, Finland (February 2015).
- Topic: 'Expropriation of Upstream Assets'.
- Conference: 'Energy Transitions'

Abstract

The Problem of Inconsistent Interpretations

Among the many criticisms levelled at the regime of international investment law, one that is oft-cited is the problem of inconsistent interpretation of investment protection standards. A case in point is the recent jurisprudence emanating from the many investment arbitrations arising out of Spain's changes to its regulatory regime for solar power plants. The losses that have accrued to the investors in these cases have been different, but, with the exception of *Charanne v. Spain*, there is no denying that the state conduct in question has been the same in all of these cases and the applicable investment treaty, the Energy Charter, has also been the same. Notwithstanding, the investors have prevailed in some cases, while Spain has prevailed in others.

A New Hope: The Investment Tribunal System

Considering the dispersive nature of international investment law with its many investment treaties and the lack of a central adjudicative body to adjudicate on disputes arising under these treaties, the problem of inconsistent interpretation should not be surprising. But the system does not have to exist like this. Although there are thousands of investment treaties, the core investment protection standards are usually verbatim copies of one another and, where there are differences in wording, it is often the case that these differently worded standards are synonymous with the usual formulations of the relevant standard. Further, the issue of a lack of a central adjudicative body for investor-state disputes is currently being addressed by the European Union with its proposal for the 'Investment Tribunal System'. Within the Investment Tribunal System, there will be an appellate tier, the specific purpose of which is to address the problem of inconsistent interpretation. On account of that development, the question that now arises is: what are the prospects that this European-led reform will resolve the problem of inconsistent interpretation?

The Actual World: Little Hope for Success

This question needs to be approached from two different perspectives. The first perspective is what is called the 'actual world'; in other words, the world that we currently live in. In this world, the Investment Tribunal System is in competition with investment arbitration. Regardless of the quality and standing of its adjudicators, the Investment Tribunal System stands little chance of resolving the problem in this world. The support for this contention is made up of several premises, the first of which is that the Investment Tribunal System will not adjudicate on the requisite number of cases to forge its own jurisprudence. At this time, only four investment treaties make provision for the inclusion of the Investment Tribunal System, whereas thousands of other investment treaties exclusively provide for investment arbitration. Second, if investors have a choice, they will generally opt for investment arbitration because of the perceived advantage that they enjoy in selecting their own arbitrator, who should be a 'pro-investor' arbitrator and who might have the standing to influence other members of the arbitral tribunal. For these reasons, the Investment Tribunal System will not be able to compete with investment arbitration.

The Hypothetical World: The Challenge of Developing a Doctrine of Precedent

But there is a hypothetical world that stands in contrast to this actual world. In this hypothetical world, the Investment Tribunal System faces no or limited competition from investment arbitration because most states around the world have ratified a multilateral treaty creating the Multilateral Investment Tribunal System. For those many states that have ratified this treaty, all of the claims launched by investors against them proceed to the Multilateral Investment Tribunal System. This is not a fantasy world. Currently, the European Union is trying to create this world through the reform process of the international adjudication of investor-state disputes at the UNCITRAL Working Group III. If the European Union can, one,

translate the 'interest' in the Multilateral Investment Tribunal System from many developing states into 'commitment' and, two, convince China that the Investment Tribunal System should be included in the China-EU Comprehensive Agreement for Investment, then the chance that this hypothetical world will become the actual world is high.

But consistent case law is not a *fait accompli* in this hypothetical world. There are legal challenges to overcome in creating consistent case law. The most significant of these challenges, and the one that this paper focuses on, is the development of a doctrine of precedent suitable for international investment law. Given the prominence of the doctrine of precedent in Anglo-American legal systems, there might be a temptation to draw from that jurisprudence to create this doctrine of precedent. That temptation must be avoided. To this end, it is argued that the adjudicators of the International Tribunal System need to build their own bespoke doctrine of precedent that takes account of the peculiar features of international investment law, particularly its multitude of treaties. In this context, the questions of what should amount to a precedent, whether there should be any exceptions to the general rule, and, if there should be exceptions, what might those exceptions be are covered.