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## “Investment and ...” – The Broader Picture of Investment Law

To international trade lawyers the “trade and”-debate has been a familiar notion for at least a decade.<sup>1</sup> After the broad scope of the Uruguay-Round negotiations leading to the WTO-Agreements and with the growing jurisprudence of the WTO dispute settlement institutions since 1995, trade law is no longer pure trade law. Instead, it has an impact on environmental, cultural, human rights and other issues, necessarily calling for ways to avoid or at least mitigate friction among conflicting goals. Meanwhile, it has become an established wisdom for WTO-lawyers that the GATT and its side agreements cannot be seen “in clinical isolation”<sup>2</sup> of the rest of international law and that non-trade interests have to be taken into account also in the course of settling trade disputes.

In international investment law, a more junior discipline than GATT/WTO-law, this awareness is still in its infancy. Most investment arbitration specialists, often legally socialized in the field of international commercial arbitration rather than public international law, are only gradually embracing the full impact of general international law. However, the “*topoi*” chosen in this exercise are rather limited. There is a recurring insistence on the canon of treaty interpretation as laid down in Article 31 of the Vienna Convention on the Law of Treaties;<sup>3</sup> there are regular invocations of certain rules of the

<sup>1</sup> See only J. P. Trachtman, Trade and ... Problems, Cost-Benefit Analysis and Subsidiarity, 9 *European Journal of International Law* 32 (1998).

<sup>2</sup> Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 29/04/1996.

<sup>3</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331, 8 ILM 679 (1969); According to *AAP v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, 4 ICSID Reports, 246, 263, para. 38, “the true construction of the Treaty’s relevant provisions in conformity with the sound universally accepted rules of treaty interpretation [...] as codified in Articles 31 of the Vienna Convention on the Law of Treaties.” More recently, the ICSID tribunal in the *Salini*

law of State responsibility,<sup>4</sup> in particular those relating to the attribution of conduct to a (host) State<sup>5</sup> and the grounds for precluding the wrongfulness of certain acts.<sup>6</sup> In addition, a few of the international law *causes célèbres* are repeatedly invoked as highly authoritative precedents, ranging from the *Chorzów Factory*<sup>7</sup> case before the Permanent Court of International Justice to the International Court of Justice's *Barcelona Traction*<sup>8</sup> and *ELSI*<sup>9</sup> cases.

Apart from these rather timid border-crossings, international investment arbitration remains a highly specialized dispute settlement mechanism, often rather narrowly focusing on the interpretation of the applicable BIT (or other international investment agreement) or of the relevant contractual arrangement between the investor and the host State. Non-investment matters are touched upon, but they rarely reach the limelight of investment disputes.

It is against this background that the present set of essays is particularly noteworthy. These contributions transgress the core of international investment law and reach deeply into other areas of growing relevance to the settlement of international investment disputes. Investment and culture, investment and human rights, "investment and ..." will become more and more important.<sup>10</sup> In fact, matters not directly addressed in the usual investment instruments have already entered the dispute settlement arena and arbitral tribunals have found diverse, sometimes rather imaginative ways of accommodating them.

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Case expressly "proceed[ed] to the interpretation of [a BIT] Article in conformity with Articles 31 to 33 of the Vienna Convention on the Law of Treaties which reflect customary international law." *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, para. 75 (Decisions and Awards not yet published may be found at <http://ita.law.uvic.ca>).

<sup>4</sup> ICSID tribunals regularly rely on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in: Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, 43, UN Doc. A/56/10 (2001).

<sup>5</sup> See *only* the award in *Azurix v. Argentina* where the tribunal held that "responsibility of States for acts of its organs and political subdivisions is well accepted under international law. The Draft Articles [on State Responsibility] are the best evidence of such acceptance and as such have been often referred to by international arbitral tribunals in investor-State arbitration." *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 50.

<sup>6</sup> See *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, 44 ILM 1205 (2005), and *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, 46 ILM 40 (2007).

<sup>7</sup> Case concerning certain German interests in Polish Upper Silesia (*Germany v. Poland*), Judgment of 25 May 1926, 1926 PCIJ Ser. A, No. 7.

<sup>8</sup> *Barcelona Traction, Light and Power Company (Belgium v. Spain)*, Judgment of 5 February 1970, 1970 ICJ Reports 3.

<sup>9</sup> *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, 1989 ICJ Reports 15.

<sup>10</sup> See also M. Hirsch, *Interactions between Investment and Non-Investment Obligations in International Investment Law*, in P. Muchlinski/F. Ortino/Ch. Schreuer (Eds.), *The Oxford Handbook of International Investment Law* (forthcoming 2008).

For instance, the issue of bribery and corruption has been addressed by the recent ICSID award in the *World Duty Free v. Kenya*<sup>11</sup> case. The tribunal managed to take this concern into account as a matter of the *international ordre public*. It dismissed the claims brought on the basis of an investment contract procured by a bribe, arguing that “[i]n light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.”<sup>12</sup>

In a similar way, the tribunal in the *Inceysa v. El Salvador*<sup>13</sup> case considered that the fraudulent activities of the investor in the course of the bidding process leading to the awarding of a contract to him should deprive him of the contractual benefits of investment arbitration. The tribunal held “that the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, ‘nobody can benefit from his own fraud’.”<sup>14</sup> In the *Inceysa* case, the tribunal’s line of argument was based not only on general principles of law, but more specifically, the tribunal relied upon a provision, often included in BITs, pursuant to which investments have to be made “in accordance with host State law.” As laid down in more detail in the contribution by *Christina Knahr*,<sup>15</sup> this BIT clause has been generally interpreted to relate to the legality of an investment and not to its definition. In the case of *Inceysa*, it served to integrate a concern not directly relating to the core content of investment agreements into investment dispute settlement. In fact, both the *World Duty Free* and the *Inceysa* cases are significant because they managed to take investor obligations into account. As such, these cases may very well signify a gradual broadening of the scope of investment arbitration.

Investor obligations are frequently discussed in human rights circles under the modern labels of “corporate governance” or “corporate social responsibility”.<sup>16</sup> Their inclusion in international investment agreements

<sup>11</sup> *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006.

<sup>12</sup> *Id.*, para. 157.

<sup>13</sup> *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006.

<sup>14</sup> *Id.*, para. 242.

<sup>15</sup> C. Knahr, *Investments “in Accordance with Host State Law”*, in this volume, at 27-42.

<sup>16</sup> See P. Muchlinski, *Corporate Social Responsibility and International Investment Law*, in P. Muchlinski/F. Ortino/Ch. Schreuer (Eds.), *The Oxford Handbook of International Investment Law* (forthcoming 2008).

is frequently demanded.<sup>17</sup> However, until now this request has not been fulfilled. Instead, some more indirect forms of controlling the human rights performance of investors are gradually established. One is the possibility of being sued under the US Alien Tort Claims Act<sup>18</sup> for corporate complicity in human rights violations committed outside the US – due to its implicit extraterritoriality, a rather controversial option. Another is the more indirect and thus less controversial home state regulation via financial incentives or rather disincentives through the precise coverage of investment insurance. As discussed in the contribution by *Rekha Oleschak*,<sup>19</sup> human rights concerns gain increasing prominence as relevant criteria for the awarding of investment insurance. This may have at least a certain steering effect and it seems worthwhile to follow this recent investment and human rights debate.<sup>20</sup>

While the “investment and human rights” debate primarily raises the issue of human rights obligations of investors, the question of human rights entitlements of investors is an equally interesting field. Some substantive treatment obligations clearly find parallels in human rights entitlements: the protection against expropriation relates to the right to property, aspects of the international minimum standard to the right to a fair trial, etc. Yet, most importantly, the direct access of individuals to dispute settlement without the “mediating” role of home states, figuring prominently in traditional diplomatic protection, sets an important precedent for the strengthening of the role of the individual in international law. *Matthias C. Kettemann*'s<sup>21</sup> contribution on the position of the individual in international law and the special role of investment law as a “laboratory” for new conceptual approaches to the rather low-key role of non-state actors in traditional international law rightly suggests that investment law should be viewed not only as a highly sophisticated form of

<sup>17</sup> See the Model BIT published by the International Institute for Sustainable Development, IISD Model International Agreement on Investment for Sustainable Development, available at [http://www.iisd.org/pdf/2005/investment\\_model\\_int\\_agreement.pdf](http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf).

<sup>18</sup> The Alien Tort Claims Act of 1789 provides: “The district courts shall have original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. 1350. See also R. Steinhardt and A. D’Amato (Eds.), *The Alien Tort Claims Act: An Analytical Anthology* (1999). On corporate complicity see also A. Clapham and S. Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 *Hastings International and Comparative Law Journal* 339 (2001).

<sup>19</sup> R. Oleschak, *Export Credit and Investment Insurance Agencies – Extraterritorial Obligations of Home-States of Investors*, in this volume, at 115-139.

<sup>20</sup> See also U. Kriebaum, *Privatizing Human Rights. The Interface between International Investment Protection and Human Rights*, in A. Reinisch/U. Kriebaum (Eds.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold* 165 (2007).

<sup>21</sup> M. C. Kettemann, *Investment Protection Law and the Humanization of International Law: Selected Lessons from, and Experiences with, the Position of the Individual in Investment Protection Law*, in this volume, at 151-172.

economic dispute settlement but also as a further potential of “privatizing” or “humanizing” international law in the sense of giving real and effective entitlements to individuals.

Investment and culture is another highly topical “investment and ...” issue that has reached into investment arbitration, leading an early ICSID tribunal in the so-called *Pyramids* case<sup>22</sup> to conclude that an expropriation was in the public interest and thus lawful. With regard to the Egyptian termination of a contract providing for the construction of a hotel and tourist site close to the pyramids of Gizeh, the Tribunal found that “as a matter of international law, the Respondent was entitled to cancel a tourist development project situated on its own territory for the purpose of protecting antiquities. [...] The decision to cancel the project constituted a lawful exercise of the right of eminent domain.”<sup>23</sup> However, as *Annette Froehlich*<sup>24</sup> rightly reminds us in her contribution on investment and cultural concerns, it is not only in the case-law of investment tribunals that cultural issues are addressed. In fact, culture figured quite prominently in the negotiations for a multilateral investment agreement under the auspices of the OECD, the ill-fated MAI.<sup>25</sup> Some commentators even believe that the impossibility to agree on a “cultural exception” may have been one of the main reasons for the failure of the MAI negotiations in 1998. Indeed, the fact that it was the announcement of the French government no longer to take part in the negotiations which effectively brought the negotiations to a halt supports this interpretation. But the problem is still alive and the recently adopted UNESCO Convention<sup>26</sup> and its rather unclear relationship to GATT/WTO law demonstrate that “investment and culture” is probably as unsettled as “trade and culture”.<sup>27</sup>

While investment rules laid down in international investment agreements and made more precise in the case-law of investment tribunals are often perceived as a threat to non-investment interests such as human rights, culture or the environment, traditional investment law may be “challenged” in its current form by other legal systems. Though many investment law specialists seem to be either unaware of this development or prefer to ignore it, it becomes increasingly evident that the current BIT-based system of investment law is less “threatened” by a new multilateral investment agreement than – on a regional level – by the ever broadening scope of the external competences of the EU.

<sup>22</sup> *SPP v. Egypt*, Award, 20 May 1992, 3 ICSID Reports 189 [year].

<sup>23</sup> *Id.*, at 226.

<sup>24</sup> A. Froehlich, *Cultural Matters in Investment Agreements and Decisions*, in this volume, at 141-150.

<sup>25</sup> OECD, *MAI Negotiating Text*, Final Version of 24 April 1998, DAFFE/MAI(98)7/REV1, 11.

<sup>26</sup> 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>.

<sup>27</sup> See T. Voon, *Cultural Products and the World Trade Organization* (2007).

At least for its member states, it is apparent, as *Niklas Maydell*<sup>28</sup> reminds us in his contribution, that the EU is determined to expand its Common Commercial Policy powers to cover also investment issues. While the current Platform on Investment<sup>29</sup> seems rather modest, the groundwork for future competences has already been set in the Draft Constitution of the EU. But it is not only the future of treaty-making powers of the EU that may bring significant changes to the European BIT *acquis*, possibly depriving Member States of their powers to conclude BITs with third states. It is also the existing rules of EU law, in particular, the EC Treaty provisions on the freedom of establishment and – as *Steffen Hindelang*<sup>30</sup> points out – particularly the free movement of capital pursuant to Article 56 EC Treaty which may be regarded as a substitute for certain investment law provisions. The rather complex relationship between these two EC freedoms remains opaque also in the jurisprudence of the ECJ. Because of a potential pre-emption of the free movement of capital, the liberalizing effect toward third countries inherent in Article 56 (1) EC Treaty which prohibits “all restrictions on the movement of capital [...] between Member States and third countries” is kept within limits.

Also the other contributions of this volume manage to set investment law in a broader context. *Alexandra N. Diehl*<sup>31</sup> provides the historical background of investment law which is currently in a kind of post-Baby-Boom-era. She links the investment law debate to the more general international law discussion covering the relationship between treaty law and customary law. Indeed, the treaty/custom paradox, aptly characterized by Richard Baxter<sup>32</sup> in his commentary to the ICJ’s *North Sea Continental Shelf*<sup>33</sup> case, has been revived in connection with the question of the potential influence of BITs on the content of general international law on the protection of foreign investments.<sup>34</sup>

<sup>28</sup> N. Maydell, *The European Community’s Minimum Platform on Investment or the Trojan Horse of Investment Competence*, in this volume, at 73-92.

<sup>29</sup> Minimum Platform on Investment, Council of the European Union, 15375/06, 27 November 2006.

<sup>30</sup> S. Hindelang, *The EC Treaty’s Freedom of Capital Movement as an Instrument of International Investment Law? The Scope of Art. 56 (1) TEC in a Third Country Context and the Influence of Competing Freedoms*, in this volume, at 43-72.

<sup>31</sup> A. N. Diehl, *Tracing A Success Story Or “The Baby Boom of BITs”: Characteristics and Particularities of the Tight Net of Bilateral Investment Treaties Existing Today*, in this volume, at 7-26.

<sup>32</sup> R. Baxter, *Treaties and Custom*, 129 RdC 25 (1970 I).

<sup>33</sup> *North Sea Continental Shelf (Germany v. Netherlands/Denmark)*, Judgment of 20 February 1969, 1969 ICJ Reports 3.

<sup>34</sup> Cf. S. Hindelang, *Bilateral Investment Treaties, Custom and a Healthy Investment Climate – The Question of Whether BITs Influence Customary International Law Revisited*, 5 *Journal of World Investment and Trade* 789 (2004); S. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 ASIL Proceedings 27 (2004).

In addition to this fascinating doctrinal issue, Diehl raises meta-legal problems concerning the actual effectiveness of investment law as a tool of investment protection often underestimated in business circles.

The lack of appreciating the practical value of investment law protection is gradually receding. This is largely a result of the expansive case-law of ICSID and other investment tribunals. On the jurisdictional level, the broadening of the protective scope of investment law is evident when one compares the restrictive approach of the ICJ in its *Barcelona Traction*<sup>35</sup> case towards shareholder claims with the investment law regulation of this issue in BITs and in the case-law of investment tribunals. Because shares are regularly included in the treaty definitions of “investment”, the circumstantial detour via the corporate nationality, which proved to be decisive for the outcome of the *Barcelona Traction* case, is no longer required. Instead, – as *Markus Perkams*<sup>36</sup> explains – the corporate veil is effectively pierced through the admissibility of shareholder claims before investment tribunals.

Finally, *André von Walter*<sup>37</sup> brings investment law back home. His thorough investigation of the multifaceted role of legitimate expectations in today’s investment law practice demonstrates the lively development of a relatively young branch of law, largely shaped by arbitral decisions. Investor expectations do indeed embody a sort of *Leitmotiv* of modern investment law. They first appear at the jurisdictional stage; they figure prominently in the law on expropriation and reappear in the context of fair and equitable treatment as well as of breach of contractual relations; and they may become crucial again at the stage of assessing an investor’s compensation or damages. This multidimensional function of the expectation of investors demonstrates that investment law is alive and well. And the intellectual efforts of young scholars like those contributing to this volume will ensure that the discipline remains a hotspot of international law.

<sup>35</sup> *Barcelona Traction, Light and Power Company (Belgium v. Spain)*, Judgment of 5 February 1970, 1970 ICJ Reports 3. See also more recently *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ Judgment of 24 May 2007.

<sup>36</sup> M. Perkams, *Piercing the Corporate Veil in International Investment Agreements: The Issue of Indirect Shareholder Claims Reloaded*, in this volume, at 93-114.

<sup>37</sup> A. von Walter, *The Investor’s Expectations in International Investment Arbitration*, in this volume, at 173-200.