BRILL
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THE JOURNAL OF WORLD INVESTMENT & TRADE
15 (2014) 1-11

The Journal of
World
Investment & Trade
Law • Economics • Politics
brill.com/jwit

Editorial

The New Journal of World Investment and Trade; Arbitrator Independence and Academic Freedom; In This Issue

The New Journal of World Investment and Trade

With the present issue *The Journal of World Investment and Trade* (JWIT) is starting a new phase. Jacques Werner, who has founded the Journal and steered its course over 14 years, has stepped down as Editor-in-Chief at the end of 2013. In assuming editorial responsibility, I would like to express my gratitude for the pioneering work he has done during his editorship. Indeed, for many investment and trade lawyers, JWIT has been a source of inspiration and a way to engage with the growing and dynamic field of international economic law. I want to continue JWIT's institutional and intellectual independence, its tolerance towards different viewpoints, and its openness to scholarship on investment and trade-related matters from different professional, educational and regional backgrounds, from new voices and early-career professionals as well as heavyweights in the field.

At the same time, I think that a journal on investment and trade law has to develop as we are progressing from pioneering times to a more consolidated phase. JWIT has to react to new realities in treaty-making, dispute settlement practice, and scholarship in investment and trade law and grapple with new doctrinal, economic, methodological and political challenges. Investment law in particular has developed rapidly: treaties and dispute settlement have grown exponentially; conferences, educational offers, and scholarship proliferate; and so has its critical analysis and contestation. In addition, investment law has moved from the fringes of international law to its center; yet, its impact on and interaction with other areas of international and domestic law, and indeed its future, are uncertain. International trade law, even though it has seen similar developments much earlier than investment law, also faces challenges in light of proliferating bilateral and regional trade agreements, burgeoning dispute settlement practice, and debates about trade and development, among others.

All of this has brought about an increase in the amount of primary and secondary material in investment and trade law and led to more mature and complex debates that require critical attention. Above all, I hope that JWIT, while being a journal that focuses on the law of foreign investment in a broad sense, manages to bring the communities of investment lawyers and trade lawyers

 | DOI 10.1163/22129000-01502001

closer together. I am convinced that both groups can benefit from mutual interaction and debates that cut across their different areas of interest. Moreover, I would like to strengthen the dialogue between international economic law, other fields of international law, and domestic law, both public and private, and encourage methodological pluralism in analyzing the field, including through comparative legal analysis and interdisciplinary approaches. This is a long-term task and continuous process, but one that can contribute to a better understanding of law in a globalized world.

The holistic and transnational vision of international investment and trade law underlying this approach is what I would like to see as the defining characteristic of JWIT. The Journal should provide space not only to reflect on the many bits and pieces of investment and trade law, but also on its fundamentals, ordering paradigms and narratives, and give an account of the field's interaction with other areas of international and national law. At the same time, I would like JWIT to assume intellectual leadership by setting benchmarks for scholarship in the field, by carving out trends and analyzing problems, and by influencing international economic law- and policy-making. Striving for the excellence of contributions that this requires will be aided through the introduction of a double-blind peer review procedure.

Against that background, JWIT's Aims and Scope have been redrafted to bring out the evolved understanding of what the Journal should do and intends to cover. It now states:

> *The Journal of World Investment & Trade* (*JWIT*) is a double-blind peer-reviewed journal that focuses on the legal aspects of foreign investment relations in a broad sense. This encompasses the law of bilateral, multilateral, regional and sectoral investment treaties, investor-state dispute settlement, and domestic law relating to foreign investment, but also relevant trade law aspects, such as services, public procurement, trade-related investment measures, and intellectual property, both under the WTO framework and preferential trade agreements. In addition, the Journal aims to embed foreign investment law in its broader context, including its interactions with international and domestic law, both private and public, including general public international law, international commercial law and arbitration, international environmental law, human rights, sustainable development, as well as domestic constitutional and administrative law.
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> The Journal is institutionally independent and ideologically neutral. It is not attached to specific national jurisdictions, but has a global outreach.

> It covers both the mainstream of foreign investment law and investment law's frontiers. It offers a place for the publication of scholarly studies dealing with fundamental and systematic problems of foreign investment relations and their solutions, but also welcomes analyses of current topics, such as international and domestic policy trends, relevant case law, and country- or industry-specific case studies, including in the natural resources and energy sectors. It is open to doctrinal analysis as well as theoretical, conceptual, and interdisciplinary approaches, including law and economics analysis, empirical analysis, historical analysis, political science analysis, or normative analysis. It aims to address scholars, government officials, members of international and non-governmental organizations, and legal practitioners in both capital-exporting and capital-importing countries.

To work towards this vision, I am grateful to have found invaluable support among friends and colleagues who have agreed to contribute to JWIT's work. As you will see from the masthead, JWIT has a fully revamped editorial structure, with enlarged editorial and editorial advisory boards, bringing together some of the finest minds in investment and trade law, and an enthusiastic group of associate and assistant editors. I am grateful for this support and look forward to our future work.

As regards content, there are a few further developments worth noting. In addition to articles, JWIT will have a permanent section for case comments. This reflects my conviction that cases are one of the most important drivers of the development of international investment and trade law. We therefore aim to feature shorter comments on what we consider to be the most noticeable development, not only of investment treaty tribunals and the WTO dispute settlement body, but also of other international and national courts and tribunals, to the extent they are relevant for trade or investment law. Finally, we attach great importance to book reviews in JWIT's new book review section. Given the proliferation of literature, above all in investment law, I think it is indispensable to critically assess and evaluate those writings and engage with their arguments.

I hope this new program for JWIT will prove to be attractive and palatable.

Occasional Comment: Arbitrator Independence and Academic Freedom

The Editorial is also a place that I want to use for occasional comments on issues of investment and trade law that I consider noteworthy or alarming.

One such alarming development is a recent challenge decision in an UNCITRAL arbitration under the Mauritius-India bilateral investment treaty (BIT) in *CC/Devas and others v. India* against two arbitrators, Francisco Orrego Vicuña and Marc Lalonde. It was decided by the President of the International Court of Justice (ICJ), who was designated to do so under the BIT, but has not become public so far. My outline of the facts and of the reasoning are therefore based on media reports, above all an article in Luke Peterson's excellent IAReporter.[1]

The challenge was brought because both Messieurs Lalonde and Orrego Vicuña, in the Respondent's view, had prejudged the meaning of the essential security-clause in the applicable BIT: Mr. Lalonde because he had been an arbitrator in both *CMS v. Argentina* and *Sempra v. Argentina* where the essential security clause in Article XI of the US-Argentina BIT had been an issue; and Prof. Orrego Vicuña because he had been an arbitrator, together with Mr. Lalonde, in the same two arbitrations, as well as in *Enron v. Argentina*, which involved the same provision of the US-Argentina BIT. On top, Prof. Orrego Vicuña had written an article in which he analyzed the tribunals' approach to the necessity defense under customary international law and to the essential security-clause.[2]

While ICJ President Tomka rejected the challenge against Marc Lalonde, stating that merely expressing prior views on an issue in an arbitration did not result in a lack of impartiality or independence, he upheld the challenge against Francisco Orrego Vicuña, because the latter had stuck to his approach to interpreting essential security-clauses through three arbitrations and in the academic article in question, although all three awards had been partially or totally annulled because of the tribunals' treatment of the essential security-clause. Comparing the challenges against Messieurs Lalonde and Orrego Vicuña, it seems that the academic article written by Prof. Orrego Vicuña made all the difference. The case may therefore be read as boiling down to upholding a challenge of an arbitrator based on a view he or she has taken in an academic article on the interpretation of certain questions of law that play a role in the arbitration at stake. This decision is alarming, in my view, not only for

1 *See* Luke Peterson, 'Francisco Orrego Vicuna is Disqualified from Sitting in India BIT Arbitration due to Appearance of Having Fixed View as to Meaning of "Essential Security" Clause', *IAReporter Vol. 6 No. 19,* 9 October 103 <www.iareporter.com/downloads/20131111> (11 January 2014).

2 The piece at issue, it appears, is Prof. Orrego Vicuña's contribution to the Festschrift for Michael Reisman. *See* Francisco Orrego Vicuña, 'Softening Necessity' in M.H. Arsanjani, J. Katz Cogan, R.D. Sloane and S. Wiessner (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff 2011) 741.

investment arbitration, but for scholarship in the field – and the work of JWIT, or in fact any journal on international investment law and arbitration.

To start out, the decision in *CC/Devas* parts with an earlier decision on a similar issue. In *Urbaser v. Argentina*, the respondent-appointed arbitrator Campbell McLachlan was challenged for lack of impartiality because he had expressed views on the application of most favored nation (MFN) clauses to questions of arbitral procedure in his treatise, co-authored with Laurence Shore and Matthew Weiniger, on *International Investment Arbitration*.[3] In this book, Prof. McLachlan criticized the landmark ruling in *Maffezini v. Spain* as "heretical" and stated that the competing line of jurisprudence in *Plama v. Bulgaria* and others was "to be strongly preferred." Secondly, in an article published in *International & Comparative Law Quarterly* Prof. McLachlan had discussed the defense of necessity and criticized the way the tribunal in *CMS* had conflated the customary international law doctrine of necessity with the non-precluded measures clause in the applicable BIT. Since both issues also played a role in the *Urbaser* arbitration, the claimants were of the view that Prof. McLachlan had prejudged the case in important regards.

This challenge was, in my view rightly, rejected by his co-arbitrators. They stressed the differences of roles of a scholar, on the one hand, and an arbitrator, on the other, and emphasized Prof. McLachlan's ability as a scholar to reassess his views in light of novel arguments of the parties relating to the specific wording, circumstances, and negotiation history of the treaty clauses at issue in the arbitration.[4] For them, "[t]he requirement of independent and impartial judgment means that an arbitrator's previously adopted opinion, whether published or not, shall not be of such force as to prevent the arbitrator from taking full account of the facts, circumstances, and arguments presented by the parties in the particular case."[5]

The result reached in *Urbaser* is convincing, but the reasoning of the arbitrators misses an important distinction between law and facts. In my view, an arbitrator can rightly be challenged if he or she has expressed views in prior academic writing that are fact-specific to the case at hand. Having formed a written, even if academic view, for example on the question whether Argentina in fact was in a state of emergency during its 2001–2002 financial crisis, disqualifies an arbitrator from sitting in a case involving the impact of Argentina's

3 For the following *see Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, 12 August 2010, paras. 20-26.

4 *Ibid.*, paras. 38–58.

5 *Ibid.*, para. 49.

financial crisis on a foreign investor, because the arbitrator would not be impartial towards assessing the submissions of the parties on questions of fact. He or she would, however, not be prevented from sitting in a case involving the question whether Greece could invoke necessity due to its recent financial crisis.

By contrast, a challenge should not be successful if an arbitrator has expressed abstract views on how the applicable law in an investment treaty arbitration must be understood and interpreted, for example, whether umbrella clauses only protect against breaches of sovereign contracts or of any contractual undertaking of states vis-à-vis foreign investors, whether contractual forum selection clauses have precedence over treaty-based dispute settlement, or whether MFN clauses in principle can form the basis of jurisdiction. These questions concern objective, even if often contested and unclear, questions of law that are, and that is the important point for me, outside the disposition of the parties to the arbitration proceedings. Arbitrators have to decide on these questions of law by themselves based on the principle *iura novit curia*, and therefore do not need to be "impartial" towards the legal submissions of the parties. Having expressed views on abstract questions of law, no matter how firm that legal view is, does not reduce an arbitrator's ability to exercise "independent judgment" (Art. 14 of the ICSID Convention) in respect of the parties and their conduct that is at issue in the case, nor does it affect his or her "impartiality or independence" (Art. 11 of the UNCITRAL Arbitration Rules), because there is no predisposition to the detriment of a party and its submissions on matters of fact.

Certainly, an arbitrator in any event should also hear the parties' legal arguments and should consider whether to reassess his or her prior views on matters of law, but he or she would not be challengeable based on holding even firm prior views on the legal issues at hand. Looking at the result, the decision in *Urbaser* is therefore to be welcomed, even though the reasoning did not make the important distinction between a predisposition on facts and on law. The decision in *CC/Devas*, by contrast, is highly problematic, if the decisive point was that Prof. Orrego Vicuña lacked the necessary impartiality and independence because he had set out and defended his view on the application of essential security clauses in academic writing. Anyone is free to question whether he has the right understanding of the international law at stake, but whatever the merits are of such criticism they do not affect, in my view, the impartiality and independence necessary to sit as an arbitrator.

What the India challenge does is not only to reduce the pool of potential candidates for appointment to those who have not expressed their views on the legal matters as stake, but to discourage more broadly meaningful writing

on investment law and investor-state arbitration. This is problematic for investment dispute settlement because it makes it more difficult for parties and appointing authorities to make choices on arbitrator appointments in specific cases, and for states to make designations to arbitrator rosters, such as the ICSID List of Arbitrators. On an individual level, this can have an effect on the outcome of arbitral decisions, given that central notions of substantive and procedural law are highly elastic and moldable and their interpretation may depend crucially on who is appointed to decide the dispute. In addition, on a systemic level, this compromises the development of investment law and the ability of participants, including states, to steer that development in a certain direction by making appointment decisions that are meant to endorse the legal views of the individuals concerned. In the end, the India challenge may therefore well decrease the transparency and predictability of a system that is often criticized for a lack thereof. I therefore think that the decision in *CC/Devas* does not adopt a good policy for a system that involves the public interest and depends on tribunals to concretize the vague notions of investment law in a sensitive and foreseeable manner.

Moreover, what concerns me as the editor of a journal that aims at producing cutting-edge scholarship on international investment law, is the effect such challenge decisions have on the science of international investment law. The India challenge, if considered good law, will disincentivize already established actors in the field to make meaningful contributions to legal scholarship on investment law, as writing a law review article may have the effect of costing future appointments. At the most, it would produce contributions that merely describe existing practice, but refrain from any normative arguments for the future or from dealing with legal issues that are still to pop up in actual cases. This is often not the type of writing – naturally, there will be exceptions – that will lead to advances in knowledge and innovation. Similarly, for those aspiring to become arbitrators in the future, producing scholarship would not be a way to develop and show expertise. Instead, building a career in investment treaty arbitration would require behind-the-doors networking in order to catch the attention and favor of those who are influential in making appointment decisions.

What would be left for scholarship on international investment law are people who only understand themselves as critical outside observers, without the intention, nor in fact the opportunity, to become a future actor in practice. I do not want to be misunderstood. Having such scholars is not the problem. To the contrary, independent observers often make the most pertinent and important contributions because of the distance they have to practice. What concerns me is the absence of scholarship that could have great importance for the field,

but that is not produced because the author may harvest hopes to be appointed in future investor-state arbitrations. The India challenge, if adopted generally, could therefore have negative effects on the type of scholars we have and their scholarship, and indirectly restrict academic freedom. Challenge decisions should not have such an effect. On the contrary, they should respect the freedom of legal academia. Although challenge decision certainly do not aim at regulating the scholarly profession, they do have that effect if they equate a pronounced scholarly opinion on legal issues with a lack of independence and impartiality to apply that law to individual cases.

In sum, I think that decisions like that in the India challenge against Francisco Orrego Vicuña are bad for both investment arbitration practice and scholarship in the field. Much better are decisions like that in *Urbaser* discussed above, or the very recent one of the Chairman of the Administrative Council of ICSID in *Repsol v. Argentina* against Francisco Orrego Vicuña, which concerned the very same issue and the same academic article as that in *CC/Devas*, but did not find a lack of arbitrator independence.[6] I therefore hope that the decision in *CC/Devas* remains an outlier. Its continued endorsement in future challenges would not only be harmful for investment arbitration, it would have detrimental effects on the scholarship on investment law and the work of JWIT.

In This Issue

This issue contains contributions on a variety of issues. In the first article, Mona Pinchis takes a historical perspective and analyzes the concept of 'equitable treatment' elaborated in the League of Nations during the inter-war period as a basis for international economic co-operation. The concept, as Pinchis shows, helped building a legal infrastructure for global trade that was both flexible and responsive to different needs and interests of states in light of the changing economic circumstances at the time, but still provided a vision for a multilateral framework for global trade. The concept of 'equitable treatment' is of interest not only because it was the nucleus for the non-violation nullification or impairment remedy in multilateral trade law, but also because it may be one of the precursors of the fair and equitable treatment standard enshrined in modern investment treaties. Pinchis' analysis

6 *Repsol S.A. and Repsol Butano S.A. v. Argentina Republic*, ICSID Case No. ARB/12/38, Decision on the Proposal for Disqualification of the Majority of the Tribunal, 13 December 2013, para. 79.

thereby serves as a reminder of the common origins of international trade and investment law.

The second article by Tillmann Rudolf Braun addresses a topic of great interest for the theory and practice of investment law, which should also resound with trade lawyers. Braun inquires into the status of the individual and the nature of substantive and procedural rights granted in international investment treaties. Do these rights vest, similar to human rights, directly in the individual herself? Or are they no more than a rights-reflex because the contracting states, for purposes of convenience and cost, merely intended investors to play the role of enforcing inter-state bargains through arbitration? This question has practical implications, as Braun shows, for the law of countermeasures, the possibility of waiving investment treaty rights, and the termination of investment treaties. But it has even greater impact for our philosophical conception of international investment law: Is it still a law made by and for states? Or do we have to think it with the human being at its center?

The third article turns to a doctrinal topic. Patrick Dumberry deals with the prohibition of arbitrary treatment under Article 1105 of the North American Free Trade Agreement (NAFTA). He argues that arbitrariness constitutes a stand-alone cause of action that forms part of NAFTA's provision on fair and equitable treatment. Its precise contours have been concretized through arbitral decisions during the last one and a half decades. Most importantly, arbitrariness has been found to be independent from domestic law, so that a simple illegality does not translate into arbitrariness. Instead, "something more" is needed to trigger a breach, such as an "outright and unjustified repudiation" of domestic laws or regulations, a "manifest lack of reasons" for such legislation, or conduct that specifically targets an investor with the intention to cause damage. Dumberry's analysis contributes to an increasingly refined understanding of the prohibition of arbitrariness, which is a core component of the rule of law, a concept the realization of which investment law should strive for.

Next, Leon E. Trakman turns to the topical issue of Australia's position on investor-state arbitration. Indeed, the announcement of the Australian government in April 2011 that it would discontinue its practice of including investor-state dispute resolution in trade and investment agreements[7] has generated much debate about the future of investment arbitration. Critics of investment treaty arbitration felt vindicated, given that Australia was the first developed country to take an outright negative stance on the issue. Trakman criticizes the

7 Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity, at 14 <www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf> (11 January 2014).

absoluteness of the government's position and points out that alternative fora for investor-state dispute resolution, in particular domestic courts, come with their own problems. In addition, rejecting investment arbitration may, as Trakman argues, compromise Australia's ability to participate in major projects of international economic cooperation, such as the Trans-Pacific Partnership currently under negotiation. It is therefore perhaps no surprise that Australia's new government has retreated from its predecessor's position and signed a free trade agreement with South-Korea on 5 December 2013 that includes investor-state arbitration.[8] As the case of Australia shows, the policy debate about investor-state arbitration will surely continue.

The fifth article by Ahmed M. Almutawa and A.F.M. Maniruzzaman has us focus on another important development in the world of global commerce and dispute settlement. The authors analyze the rise of one of the new global hubs of international business: Dubai. It comes with two features that should spark the interest of those interested in international dispute resolution: the Dubai International Arbitration Centre (DIAC) –the leading arbitration institution in the United Arab Emirates– and the Dubai International Financial Centre (DIFC), a free zone within Dubai with its own sets of laws and its own court system that is separate from the Emirate's judicial system. Both institutions are a reaction to dealing with political risk and aim at reinforcing the trust in this new business hub. Yet, both institutions also play a role in the global competition for adjudicatory authority and dispute resolution services and have us reconsider the role of the state and the interaction between public and private in international dispute resolution.

Finally, Avidan Kent and Vyoma Jha provide an in-depth analysis of a recent ruling by the WTO Dispute Settlement Body in *Canada - Certain Measures Affecting the Renewable Energy Sector* that touches on the compatibility of feed-in tariffs for renewable energy production with WTO law. Their analysis shows that international economic law and climate change are not anymore two different universes, but interact closely with each other. Above all, climate change mitigation may require trade law to develop innovative solutions if one does not want economic interests to trump the environment and the global climate. Arguably, when the negotiation of global rules does not proceed apace, international dispute settlement institutions, and their at times creative interpretations, can –and perhaps need to– play a crucial role in adapting international law so as to permit governments to act unilaterally in order to meet the challenge of combatting climate change.

8 For more information on the agreement see the website of the Australian Government's Department of Foreign Affairs and Trade <www.dfat.gov.au/fta/kafta/> (22 February 2014).

To round up these articles, the case comment section deals with five investment treaty arbitrations that partly consolidate existing jurisprudence and partly innovate. They touch upon a broad range of issues, including the role of good faith and domestic law in corporate restructuring (*Vannessa v. Venezuela*), the interaction of international investment law and EU law (*Electrabel v. Hungary*), the role of local remedies and MFN clauses (*Urbaser v. Argentina*, *Teinver v. Argentina*), and the application of investment treaties to sovereign bonds (*Ambiente Ufficio v. Argentina*). In addition, a decision by the Caribbean Court of Justice on anti-arbitration injunctions in investment treaty arbitration is discussed.

Finally, this issue features a number of book reviews that deal with a wide range of issues and illustrate different perspectives on international economic law. The section includes reviews on EU foreign investment law, regionalism in international investment law, treaty interpretation, arbitrator challenges in investment arbitration, and sustainable development in international investment agreements. All case comments and book reviews are intellectual food in their own right. Welcome again to the new JWIT and enjoy reading.

Stephan W. Schill