36 Csongor István Nagy (ed.) – Investment Arbitration and National Interest (Book Review)

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The book Investment Arbitration and National Interest edited by Csongor István Nagy raises fundamental questions about international investment protection law, which are answered by various experts at different levels, in the global and regional context.[1] The central question of the book is the legitimacy of the current system of investment protection characterized by uncertain substantive standards, intransparent dispute settlement procedures and a lack of consistent decisions.

The first part of the book introduces the most topical issues of the current investment protection regime in a global context. The outstanding opening contribution by Frank Emmert and Begaiym Esenkulova 'Balancing Investor Protection and Sustainable Development in Investment Arbitration – Trying to Square the Circle?' describes the legitimacy crisis of international investment arbitration enumerating the reasons and illustrating the issues with cases from the more recent arbitration practice: the disregard for state sovereignty, the overprotection of investors' interests, as well as the uncertainty and unpredictability of decisions rendered by arbitral tribunals. The trust of states, regional organizations, such as the EU, and the public in international investment arbitration is dissipating. The authors advocate for a paradigm shift by applying the requirement of sustainability in investment protection law that can respond to the above challenges. Sustainability requires striking a balance between the protection of the investors' interests and the interests of other stakeholders. Sustainable development objectives should be taken into account when negotiating investment treaties and the interests of various stakeholders can be included in the dispute settlement mechanism through different channels, such as the involvement of a public interest attorney in investor-state dispute settlement proceedings or *amicus curiae* submissions. More predictability could be ensured by establishing a

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1 The book is available at https://static.wixstatic.com/ugd/8e15a8_51c30de1fd9f4207b1406635f7872f89.pdf.

multilateral investment court. In their study, Dalma Demeter and Zebo Nasirova outline the 'Trends and Challenges in the Legal Harmonisation of ISDS'. The authors put investment protection law in the broader context of public international law. The general tendency of the increasing role of non-state actors in public international law and the accompanying bottom-up regulatory approach is revealed in the field of international investment protection law. This tendency is convincingly illustrated by the *Phillip Morris v. Australia* investment protection dispute concerning the Australian tobacco plain packaging legislation that was challenged by the investor.[2] Investment claims provoked such a public outcry that the Australian government decided to exclude investor-state dispute settlement provisions from investment treaties.

The second part of the volume addresses further legitimacy issues. In his study titled 'Abuse of Process' and Anti-Arbitration Injunctions in Investor-State Arbitration – An Analysis of Recent Trends and the Way Forward', Wasiq Abass Dar examines abuse of process in the context of investor-state arbitration and the potential room for anti-arbitration injunctions. Abuse of process is defined as the bringing of multiple or parallel investment protection proceedings by the investor before different arbitral tribunals for the same claim against the same respondent state in order to increase the chances of success in the legal dispute either relying on different investment treaties or splitting a claim. To prevent abuse of process, certain courts issue anti-arbitration injunctions as a remedy upon the request of the respondent state. This practice has been, however, criticized in the legal literature contesting the authority and the interventionism of national courts when issuing anti-arbitration injunctions. This approach considers such injunctions as a form of denial of justice in breach of the investment treaty. After having overviewed the differences between civil law and common law approaches towards anti-arbitration injunctions, the study draws the conclusion that despite scholarly debates the fact remains that national courts are unwilling to give up the possibility to issue anti-arbitration injunctions and as such, anti-arbitration injunctions should be granted with caution only under exceptional circumstances by the seat court or supervisory court.

Rebecca E. Kahn deals with 'Third Party Participation by Non-Governmental Organizations in International Investment Arbitration: Transparency as a Tool for Protecting Marginalized Interests'. Using the example of the extractive industry, the contribution examines the appearance of the interests of indigenous peoples and environmental considerations in investor-state dispute settlement. Although we find instances where tribunals allowed the participation of NGOs representing indigenous peoples or environmental NGOs, their submissions were usually only considered to a limited extent. Arbitral tribunals

2 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015.

enjoy a wide discretion as to allow third party participation and whether to take into account their submissions in the award.

The study written by Bálint Kovács poses the question to what extent investor-state dispute settlement mechanisms can serve small and medium-sized enterprises (SMEs) with the title 'Access of SMEs to Investment Arbitration – Small Enough to Fail?'. Although investment protection rules do not distinguish between SMEs and larger companies, owing to their size SMEs are less capable of negotiating the conditions of their investments or to protect the investments they make. Because of their vulnerability, SMEs are exposed more to harms resulting from state intervention. Some tribunals interpreted the concept of investment narrowly that may exclude certain investments made by SMEs from the scope of application of the International Centre for Settlement of Investment Disputes (ICSID) regime. Investor-state dispute settlement mechanisms are less available for SMEs because of the costs of these proceedings. Therefore, it is proposed to adopt specific rules and procedures tailored to SMEs, which make it possible to settle their investment disputes at lower costs and in a shorter time. A formalized framework of assistance, including financial assistance and information on how to bring investment claims, could help SMEs assert their rights.

The third part of the book presents the most recent regional perspectives and developments of investment protection. Most studies deal with the interaction between EU law and international investment protection law. In his contribution 'The Promotion, Protection, Treatment and Expropriation of Investments under the Energy Charter Treaty – a Critical Analysis of the Case Law', Dildar F. Zebari describes thoroughly the relevant case law related to Article 10 (promotion, protection and treatment of investments) and Article 13 (expropriation) of the Energy Charter Treaty. The study 'Opinion 2/15 of the European Court of Justice and the New Principles of Competence Allocation in External Relations – A Solid Footing for the Future?' written by Balázs Horváthy explains how *Opinion 2/15* on the conclusion of Free Trade Agreement between the EU and Singapore contributed to the clarification of the division of competences between the EU and the Member States.[3] The Opinion of the CJEU is relevant in terms of determining the scope of the common commercial policy competence and the division of competences between the EU and its Member States concerning the new generation of trade and investment agreements. *Opinion 2/15* distinguishes between direct and indirect (portfolio) investments and defines the concept of direct investment. Non-direct investments and other issues, such as the investor-state dispute settlement rules, do not fall under the scope of the common commercial policy. The CJEU concluded that the EU-Singapore Free Trade Agreement is a mixed agreement requiring ratification by the Member States. In the author's view, the requirement of ratification by the Member States can contribute to the legitimacy of the

3 Opinion of 16 May 2017, ECLI:EU:C:2017:376.

agreement and similar new generation agreements. Csongor István Nagy analyses extra-EU BITs under EU law with the title 'Extra-EU BITs and EU Law: Immunity, "Defense of Superior Orders", Treaty Shopping and Unilateralism'. The study centers on three questions. The first one is the applicability of Article 351 TFEU to extra-EU BITs. The second question raised is whether Member States can use a defense of superior orders when a state act is required by EU law. The third issue analyzed by the author is whether investors from the EU can rely on extra-EU BITs by incorporating a company in a third country following the *Achmea* judgment of the CJEU.[4] Pavle Flere discusses 'The Arbitrability of Competition Law Disputes in the European Union – Balancing of Competing Interests'. He states that the arbitrability of competition law has become widely accepted in practice as part of *lex mercatoria* and arbitrators have an implied duty to apply EU competition law rules *ex officio*. The recognition and enforcement of an arbitral award may be denied if it disregards antitrust rules in cases of manifest and hard-core violations of EU competition law.

The fourth part addresses enforcement and recovery. Yue Ma's contribution analyses the 'Execution of ICSID Awards and Sovereign Immunity' and presents how sovereign immunity pleaded by a respondent state, as a 'last bastion', can inhibit the execution of ICSID awards. She describes the obstacles to the execution of ICSID awards in light of the legislation and court practice of certain forum states (US, UK, France and China) other than the investment host state as well as in the host state. The author warns that the difficulties concerning the execution of ICSID awards may gain more significance in the future due to the growing backlash against investment arbitration. Orsolya Toth turns the readers' attention toward the New York Convention with her study on 'The New York Convention – Challenges on its 60th Birthday'. Despite the success of the New York Convention, the author describes three challenges as far as the application of the Convention is concerned. First, as more and more countries have acceded to the Convention, there is an increasing risk that national courts apply the Convention favoring their own nationals or conflating the provisions of the Convention with domestic law. A second challenge is the increasing involvement of states in arbitral proceedings, while the third one is the difference in the treatment of awards set aside in the seat state in terms of their enforcement in other countries.

The closing part of the book focuses on institutional issues, and in particular, the investment protection regime set up by the EU-Canada Comprehensive Economic and Trade Agreement (CETA). In their study, Zoltán Víg and Gábor Hajdu introduce the substantive and procedural rules of the CETA related to investment protection with the title 'Investment Protection under CETA: A New Paradigm?'. The authors are critical, because the CETA follows to a large extent American solution, and most notably the model of NAFTA. They put forward several *de lege ferenda* proposals to amend the provisions

4 Judgment of 6 March 2018, *Case C-284/16, Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158.

of the CETA. Although the CETA recognizes the right of the host state to adopt legislation affecting investments for legitimate policy objectives, it is suggested by the authors that the appropriate balance between the interests of the host state and those of the investors should be struck by the introduction of the necessity test. It is proposed that the standard of fair and equitable treatment should be concretized more by enumerating the relevant cases in an exhaustive list. Interestingly, in the authors' view, companies owned or controlled by third-country citizens or companies should be excluded from the concept of investor within the meaning of the CETA and thus, from its scope of application.

In summary, this thought-provoking volume offers readers an outline of the most current issues of investment protection law and arbitration. Remarkably, most of the contributions put forward proposals to answer the challenges that investment protection law faces. It will be interesting to see whether investment protection law will develop along these forward-looking ideas in the future.