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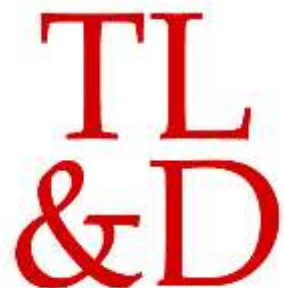
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Faris Nasrallah, *International Challenges in Investment Arbitration (Mesut Akbaba & Giancarlo Capurro eds., Routledge 2019): Book Review*

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BOOK REVIEW: INTERNATIONAL CHALLENGES IN
INVESTMENT ARBITRATION (MESUT AKBABA &
GIANCARLO CAPURRO EDS., ROUTLEDGE 2019)

FARIS NASRALLAH*

As investment arbitration prepares to face a period of seismic change (if not outright reconstitution in one form or another) never has it been so pertinent for those people, both within and outside of the practice, to reflect on its underlying principles and practical effectiveness in achieving desired outcomes for stakeholders in the system. During high-tides of economic nationalism the challenges to investment treaty arbitration become ever more apparent, giving added significance to this collection of conference contributions.

The stated intention being to illustrate the “continuous evolution of investment arbitration in view of its challenges”,¹ it is suggested that these challenges constitute driving factors in the continual growth of this field of law. Spanning 266 pages, the book draws together contributions of fourteen authors from nine jurisdictions, and combines perspectives of both academics and practitioners, with specific attention paid to investment arbitration in Europe. Addressing various procedural, substantive, and technical matters, the chapters focus on issues of nationality, annexation of territory, exception clauses, regulatory frameworks, bifurcation, mass claims, compensation, and damages, and third-party funding in investment arbitration.

The title is divided into three schematic sections. The numbering of chapters restarts in each section, meaning for example that “Chapter 1” appears three times, which readers should take cautionary note of for citation purposes.

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¹INTERNATIONAL CHALLENGES IN INVESTMENT ARBITRATION xi (Mesut Akbaba & Giancarlo Capurro eds., 2019) [hereinafter Akbaba].

Part I, “The State in International and Investment Law”, comprises of five chapters.

Chapter 1, authored by Javier García Olmedo, analyses the application of customary international law in relation to the principle of nationality. The author “attempts to show that diplomatic protection and investor-state arbitration share certain fundamental elements that integrate the rules established under both systems”, thereby sharing a similar legal status.² It is noted that, “investment treaties enable states to bring diplomatic protection claims on behalf of investors”.³ Charting the contiguous nature of the nationality principle referenced to by various BITs and investment cases, Olmedo implores arbitral tribunals to take a “more realistic approach”, ensuring “...that the customary law of diplomatic protection co-exists in parallel with international investment law”.⁴ Readers interested in the broader principle of nationality in international law, might benefit from recent reflections on citizenship in colonial customary law contexts,⁵ and a study on the growing trend of dual citizenship rapidly shifting the citizenship principle from a sacred national identity to a utilitarian, strategically acquired status.⁶

Chapter 2 addresses the annexation of territory under international investment claims, focusing on the spate of Crimea related investment claims filed against Russia after 2014. In so far as awards rendered in the Crimea claims arbitrations remain unpublished, the author, Sebastian Wuschka, relies in part on reported information from in camera hearings. Characterising the obligation of non-recognition in terms of treaty interpretation and the *Monetary Gold* doctrine (indispensable third-party rule) as potential obstacles to effective protection of investments and individual rights in annexed territories, the author bluntly notes that “international investment law and general international law collide”.⁷ As such, it is suggested to arbitral tribunals that “...accepting jurisdiction over a claim with regard to investments on illegally annexed territories would serve the obligation of non-recognition better than to leave the claimants with the option to seek recourse in local courts”.⁸

² Javier Garcia Olmedo, *Rethinking the Relevance of Customary International Law to Issues of Nationality in Investment Treaty Arbitration*, in Akbaba, *supra* note 1, at 5.

³*Id.*

⁴*Id.* at 19.

⁵See MAHMOOD MAMDANI, *Customary Law: The Theory of Decentralized Despotism*, in CITIZEN AND SUBJECT: CONTEMPORARY AFRICA & THE LEGACY OF LATE COLONIALISM 109-137 (2018).

⁶See YOSSI HARPAZ, *CITIZENSHIP 2.0: DUAL NATIONALITY AS A GLOBAL ASSET* (2019).

⁷Sebastian Wuschka, *Investment Claims and Annexation of Territory: Where General International Law and Investment Law Collide?*, in Akbaba, *supra* note 1, at 27.

⁸*Id.* at 36.

Chapter 3 considers the inclusion of exception clauses in international investment agreements, which at times of increasing public pressure over investment instruments, might offer States a simplified alternative to unpicking a vast sea of bilateral and plurilateral treaties. Relying on empirical groundwork to sample eighty two BITs and twenty five other treaties, the author, Tobias Ackermann finds that 68.2% of all treaties reviewed use overall exception clauses, while only 45.1% of the BITs include such exceptions.⁹ The various results on “all-encompassing”, “security”, and “general” exceptions are represented for readers in accessible pie chart figures. With around three thousand completed BITs in circulation, there are certainly grounds for broader empirical research of this nature.

Chapter 4 on international norms, works on the assumption that a state’s right to regulate investment arbitration at a national level ‘is relevant for both home and host states’.¹⁰ Focusing on the conceptual framework and role of investment tribunals in applying extraneous norms in investment arbitration, the author, Dafina Atanasova argues that there is a firm basis for panels to expansively apply “all international norms in force between the home state of the investor and the host state of the investment that are part of the international law applicable to the investment dispute”.¹¹

Chapter 5 on regulatory regimes contained under newly proposed free trade agreements, illustrates the pursuit of a delicate balance between “...the public nature of the interests at stake in international investment disputes and the private character of the contractual relationships between the parties to investor-state arbitrations”.¹² Through comparative clause tables, the author, Elsa Sardinha displays the different approaches under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Comprehensive Economic and Trade Agreement, and the EU-Singapore Free Trade Agreement. Readers might benefit from further comparative analysis of similar provisions in other treaties such as the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China,¹³ and the Free Trade Agreement between the EFTA States and the Gulf Cooperation Council.¹⁴

⁹Tobias Ackermann, *Exception Clauses in International Investment Agreements: A Case for Systemic Integration?*, in Akbaba, *supra* note 1, at 39-41.

¹⁰Dafina Atanasova, *International Norms: A Defence in Investment Treaty Arbitration?*, in Akbaba, *supra* note 1, at 56.

¹¹*Id.* at 60.

¹²Elsa Sardinha, *The Right to Regulate: Towards A (Not Entirely) New Regulatory Paradigm under Recent FTA Investment Chapters*, in Akbaba, *supra* note 1, at 72.

¹³Framework Agreement on Comprehensive Economic Co-Operation Between ASEAN and the People's Republic of China Phnom Penh, ASEAN-China, Nov. 4, 2002,

Part II of the book on ‘Investment Arbitration and the European Legal Order’, includes four chapters.

Reflecting on solving conflicts between EU Law and Investment Arbitration, the author, Blerina Xheraj, invites arbitral tribunals to “transpose satisfactory existing solutions from ECHR jurisprudence on the relationship between European Union Law (EU law) and the ECHR”¹⁵ when determining parameters of the relationship between EU law and investment arbitration.

The chapter on the Energy Charter Treaty (ECT) and EU Law focuses on *Electrabel v. Hungary*,¹⁶ an arbitration which involved the introduction of a fixed price regime for electricity tariffs by the Hungarian State. By reference to other arbitral awards and doctrinal legal arguments,¹⁷ the author, Cees Versburg, strongly departs from the position taken by the tribunal in *Electrabel*, namely that EU law prevails over the ECT in case of any material inconsistency.

On the need for intra-EU investment protections, the WTO Appellate Body and the prospective investment court system are reviewed in comparative context. The author, Marcus Weiler draws parallels between the two systems in the composition of permanent members on a rotation basis, the requirement for professional independence, and other overlapping design features.¹⁸ In light of the risk of having non-enforceable awards under the ICSID Convention that would undermine the authority of any first-instance decisions, the author tempers proposals for a two-tier court system, advocating instead for the development of a single permanent body.¹⁹

https://asean.org/?static_post=framework-agreement-on-comprehensive-economic-cooperation-between-asean-and-the-people-s-republic-of-china-phnom-penh-4-november-2002-4 (last visited Jan. 8, 2020).

¹⁴Free Trade Agreement between the EFTA States and the Member States of the Cooperation Council for the Arab States of the Gulf, June 22, 2009, <https://www.efta.int/free-trade/free-trade-agreements/gcc> (last visited Jan. 8, 2020).

¹⁵Blerina Xheraj, *A Comparative Law Approach as a Technique for Solving Conflicts between EU Law and Investment Arbitration: The Case of the ECtHR*, in Akbaba, *supra* note 1, at 123.

¹⁶*Electrabel S.A. v. The Republic of Hung.*, ICSID Case No. ARB/07/19, Award (Nov. 25, 2015), <https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf>.

¹⁷Cees Verburg, *The Energy Charter Treaty and the European Union Law: Mutually Supportive Instruments for Economic Cooperation or Schizophrenia in the ‘Acquis’?*, in Akbaba, *supra* note 1, at 125-28.

¹⁸Marcus Weiler, *Is One Permanent Instance Enough?: A Comparison Between the WTO Appellate Body and the Proposed Investment Court System*, in Akbaba, *supra* note 1, at 161-64.

¹⁹*Id.* at 178.

Part III, ‘Practical Issues in Investor State Proceedings’, comprising three chapters, begins with the analysis of the appropriate uses of bifurcation in investment arbitrations as a means of promoting efficiency and fairness. The bifurcation of preliminary matters in complex arbitral proceedings, most frequently involving the separation of jurisdictional objections, can help to focus the legal and factual issues in dispute thereby saving both time and costs. Reviewing the legal standards applicable to bifurcation requests and the discretionary authority of tribunals to determine such matters, the author, Jola Gjuzi suggests that the procedural mechanism of bifurcation may offer tribunals a means of ensuring fairness and equity between the parties.

On the management of mass claims arbitration, the author, Katarzyna Barbara Szczudlik, draws attention to a “clear and urgent need to write effective rules for mass claims arbitration”,²⁰ in the absence of any comprehensive arbitration rules applicable to such claims. By reference to the tribunal’s experiences in the Iran-US Claims Tribunal, Eritria-Ethiopia Claims Commission, the Housing and Property Claims Commission in Kosovo, and more recently *Abaclat and others v. Argentine Republic*,²¹ readers are offered a lucid summary of certain procedural and substantive legal complexities inherent in mass claims arbitration. As both individuals and institutions face various barriers to making mass claims, particularly where such claims arise out of or in connection with the consequences of war, the author concludes that future developments in this area are a matter of pressing importance for the arbitration community.

Regarding the impact of economic and political circumstances in host states on claims for compensation and damages, the readers are invited to consider the legal frameworks of compensation for legal expropriation, full reparation, and the discounted cash flow valuation method. The author, Sven Lange summarises the discordant positions taken by tribunals in *Gold Reserve v. Venezuela*,²² *Tidewater v. Venezuela*,²³ and *Venezuela Holdings et al. v. Venezuela*,²⁴ on adopting different risk

²⁰Katarzyna Barbara Szczudlik, *Effective Management of Mass Claims Arbitration – What We Could Learn from International Tribunals*, in Akbaba, *supra* note 1, at 198.

²¹*Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), <https://www.italaw.com/sites/default/files/case-documents/ita0236.pdf>.

²²*Gold Reserve v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014), <https://www.italaw.com/sites/default/files/case-documents/italaw4009.pdf>.

²³*Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/10/5, Award (Mar. 13, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4206_0.pdf.

parameters for determining the calculation of sums owed to investors, which according to the author “...collided head on in the case of *Saint-Gobain v. Venezuela*...”.²⁵ The tribunal in *Saint-Gobain v. Venezuela*²⁶ “...opted not to determine whether the expropriation was lawful or unlawful and instead contended itself with finding that the compensation should reflect the fair market value of the investment”.²⁷ By way of advice, the author alerts tribunals to be aware of these issues “...early on and proactively communicate to the parties and their experts that numbers for different risk assumptions should be provided”.²⁸

On third party funding, the author, Alexander Hoffmann summarises the conceptual issues at play surrounding the applicable rules under the ICSID convention, and the impact of third party funding on security for costs of decisions in recent investment arbitration cases. According to the author “an impecunious claimant’s recourse to third party funding does not meet the high threshold of bad faith or abusive behaviour”.²⁹ In the absence of a uniform test for granting security for costs, it is suggested that ICSID tribunals must apply a “careful balance between the legitimate interests of the claimant investor and the respondent state”,³⁰ without being deterred by the existence of a third party funder or any underlying funding limitations that it may have stipulated.

By way of concluding remarks, the final chapter offers insight into the possibilities for rationalising costs in international arbitration. The author, Neil Kaplan considers the role of tribunals in regard to costs, and ways in which tribunals can streamline case management and appropriate use of tribunal experts to reduce costs. As a parting shot to counsel, the author notes that “the temptation to throw the kitchen sink at the arbitral tribunal (for fear of missing something) is

²⁴Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award (Oct. 9, 2014), <https://www.italaw.com/sites/default/files/case-documents/italaw4011.pdf>.

²⁵Dr. Sven Lange, *The Impact of the Economic and the Political Situation Prevailing in the Host State on Compensation and Damages under International Investment Law*, in Akbaba, *supra* note 1, at 224.

²⁶*Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/12/13, Award (Nov. 30, 2017), <https://www.italaw.com/sites/default/files/case-documents/italaw10244.pdf>.

²⁷*Supra* note 25, at 235.

²⁸*Id.* at 230.

²⁹Dr Alexander Hoffman, *The Impact of Third Party Funding on an ICSID Tribunal’s Decision on Security for Costs*, in Akbaba, *supra* note 1, at 247.

³⁰*Id.*

an unedifying approach”,³¹ indicating that rationalising costs must start well before an arbitral dispute lands before a tribunal.

For many states, arbitration in its different forms remains the dispute resolution technique of choice in matters of bilateral and plurilateral trade and investment. The accepted position of the investment arbitration system, as a by-product of BITs and free trade treaty norms, is however not beyond reflection or reproach. The role of investment treaty arbitrations in various state protected industries, such as natural resources, will continue to present important policy and legal practice questions for stakeholders in the system. It is unclear where these questions are capable of being answered under a single unified international mechanism.

Close attention must be paid to understanding why states such as Ecuador, Indonesia, South Africa, and India have recently cancelled their membership to certain treaties which provide for recourse to international arbitration. With this book having focused on a broad range of technical and substantive issues, and particularly the EU investment law context, future research may wish to contrast these issues against developments in the world of investment arbitration outside of Europe. Further compilations on investment arbitration may also wish to consider, and possibly correlate the challenges and developments in international commercial arbitration, breaching the often paper-thin divide between these two types of arbitration.

The increasing scrutiny over transparency in investment arbitration, and accessibility of arbitral awards, places considerable importance on the proliferation of case jurisprudence in this field. To this end, readers would have benefited from the inclusion of a list of cited case in the frontmatter. The combination of academic and practitioner contributions is insightful for readers, particularly students of international investment law and the law of international arbitration. By design, the book is more a collection of papers than a unified body of work. However, in the absence of any comprehensive introductory or concluding chapters, the volume misses an opportunity to corroborate the diverse approaches and findings offered by these different contributors.

Notwithstanding these observations, the book concisely maps some of the central issues faced by legal practitioners and other stakeholders in the rapidly evolving landscape of investment arbitration. In short, this book is a worthwhile contribution to the already voluminous literature in this field and represents a

³¹Neil Kaplan, *Rationalising Costs in International Arbitration: A Tall Order?*, in Akbaba, *supra* note 1, at 258.

building block for future intellectual production emanating from Bucerius Law School conferences.