Guest Editorial on the ISDS Papers

ELTE Law School and the Representation of the European Commission have hosted a conference on the 'The Reform of ISDS and the Newly Forming EU Investment Policy: Other Claims Against States Based on Violations of Property Rights' on September 26, 2014, in the Aula Magna of the Law School. Miklós Király, the dean of the law school, spoke about the history of investment protection, while other speakers, who included academic professors (August Reinisch, Ursula Kriebaum, Peter-Tobias Stoll and Tamás Kende) and French, American and Hungarian attorneys (Anna Joubin-Bret, Jean Kalicki, Dmitri Evseev and Alex de Gramont, János Katona and György Molnár-Bíró) spoke about different current issues of ISDS. Jonathan Faust, Anthony Paccione, Petra Jeney, Renáta Uitz and Pál Sonnevend spoke about various other claims against the states. Leopoldo Rubinacci, a senior official of the European Commission, spoke about the views of the European Union.

Investment protection and investor-state dispute settlement mechanisms have evolved over the past five decades from a niche subject for devoted research assistants into prime time news items with multi-billion dollar awards, and have revolutionised international law by generating nearly ten times as many arbitral awards in five decades as judgements by the International Court of Justice in seven decades. Investment arbitration practice and decisions by arbitral tribunals has become prevalent outside of the narrow scope of investment protection for the larger international legal community on matters of fair and equitable treatment, non-discrimination, legal certainty and legitimate expectations.

Investment protection mechanisms have steadily changed over the years. As best summarised by Jean Kalicki, one of the key speakers at the conference, the traditional European BITs were fairly short, and generally employed basic principles without detailed definitions or instructions on how the European BITs should be applied. Several earlier BITs were only a few pages in length, and the substantive obligations simply stated core principals, but with relatively minimal guidance for interpretation of those principles by tribunals. By contrast, the United States' approach to the North America Free Trade Agreement (NAFTA) has been to define substantive obligations with far greater precision and clarity, which exceeded too many number of pages with footnotes and definitional annexes. Despite this approach, there was ample room for tribunal discretion than the NAFTA States anticipated, and the early NAFTA decisions (along with the decisions of tribunals interpreting OECD model treaties) carved out certain interpretative standards, which led to a dramatic re-examination exercise by State negotiators in recent years.

The latest round of treaties and models are the outcome of that reactive exercise. Another speaker, Anna Joubin-Bret, spoke about newer texts that are being adopted in both the United States and the European Union, and elsewhere around the world. Additionally, these new texts

may be perceived as expressly rejecting some tribunal-developed doctrines that were viewed as limiting regulatory discretion (e.g., in the FET/FPS/procedural MFN area) too broadly, while expressly adopting some tribunal-developed doctrines that were seen as useful (e.g., characteristics of investment, in addition to an open-ended asset-type list). Jean Kalicki has emphasised the outcome of such reactive exercises resulting in the Canada-EU Free Trade Agreement (CETA), the US Model BIT (released in 2012), and the draft investment chapter of the Transpacific Partnership (TPP), which were negotiated between the three NAFTA countries along with nine Asian and South American countries.

In both the CETA and TPP texts, we see an explicit adoption of definitions that first arose in the jurisprudence in the *Salini* case,[1] when arbitrators struggled to define what type of characteristics did and did not exemplify an 'investment.' The US Model BIT and the TPP accomplish the same basic objective as the CETA (focusing on the protection of entities with substantial activities in the home State), but with a slightly different structural solution. Whereas the CETA imposes this requirement in the definition of an investor – to regulate the question of who is qualified for treaty protection in the first place – the US Model BIT and TPPs address this issue in the denial of benefits context. Specifically, this requirement in CETA provides a respondent state with an option to deny benefits that would otherwise presumably apply. The CETA, having dealt with the 'substantial business activity' requirement at the outset, reserves denial of benefits for a much more limited context, essentially to avoid circumvention of sanction regimes. In the discrimination area, all three of the recent models incorporate a concept that is drawn from the NAFTA jurisprudence – the requirement that discrimination be judged only against entities that are in 'like circumstances' with the claimants. In the NAFTA jurisprudence, this concept is frequently defined in terms of economic competitors but jurisprudence also ingresses on the notion that differential treatment are only barred based on rational basis (other than nationality) can be seen as the second 'like circumstances' test meaning that if there are justifiable reasons for treating the discrimination differently, then they must not be 'like circumstances.' With respect to the use of most favoured nation clauses as a potential tool to weight dispute settlement mechanisms from other investment treaties, to expand the scope of jurisdiction – as discussed by Jean Kalicki and also by August Reinisch in the context of the TTIP draft texts – we see a clear reaction against the so-called *Maffezini Doctrine*[2] in the modern generation of treaty texts. By contrast, the treaties are generally silent on whether MFN (most favoured nations) clauses may be used to import or borrow substantive provisions from investment treaties signed between the host State and third States. Some tribunals have allowed this in cases such as *EDF v. Argentina*[3] and *MTD v. Chile*[4].

1 *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco* (ICSID Arbitral Tribunal Case No. ARB/00/4 – See more at: <http://www.italaw.com/cases/958#sthash.9foHHtjX.dpuf>).

2 *Emilio Agustín Maffezini v The Kingdom of Spain* (ICSID Arbitral Tribunal Case No. ARB/97/7).

3 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic* (ICSID Arbitral Tribunal Case No. ARB/03/23).

4 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile* (ICSID Arbitral Tribunal Case No. ARB/01/7).

Nevertheless, investment protection needs to change as a result of the numerous factors. It appears that investment protection became too vast (in the number of investors to state lawsuits, in the number of issues affected, in the amounts involved, in the interests hurt) and investors, in many cases, became too successful. Furthermore, States feel that investment litigation and the rights of investors clearly have a constitutional dimension, as explained by Peter-Tobias Stoll. As news articles may suggest, politicians feel that they are held prisoner by greedy investors who seek to influence and limit domestic policies pursued by elected government officials. Therefore, there is a political momentum to limit the scope of investment protections based on these arguments.

As Leopoldo Rubinacci explained on behalf of the European Commission, the new Transatlantic Trade and Investment Partnership negotiations coupling the flow of goods, services and investment is new concept in itself. The fact that the European Commission is trying to move towards a more rule-based, permanent and institutionalised system is a sign that, based on its new Lisbon competencies, the Commission evidently wishes to manage investment protection alongside other competencies that the Commission has been exercising for decades. Additionally, Rubinacci explained the firm view of the European Commission, which was further discussed in detail by Ulrike Kriebaum, that intra-EU BITs have become inapplicable for a number of reasons and should be annulled and/or replaced by European-wide investment protection mechanisms. Peter-Tobias Stoll, August Reinisch and Tamás Kende have all discussed the fate of intra-EU BITs in the scope of their presentations.

Professor Reinisch has presented in detail on his views of European investment policy after the implementation of the Lisbon Treaty, the latest drafts of the TTIP investment chapter and discussed how such a draft, if it became a treaty text, would affect investment arbitration.

János Katona discussed the effects of the *Electrabel* case[5] on the jurisprudence and the conceptual issue of whether EU law is a form of international or domestic law and whether it – or at least part of it - may be considered as lex posterior in the sense of the Vienna Convention on the Law of Treaties.

Tamás Kende presented the hot topic of the clash between international law and EU law prior to arbitral awards and such awards being qualified as state aid, as in the *Micula* case[6] of 2013, in order to block the enforcement of arbitral awards. Anthony Paccione also talked about the enforcement and problems of enforcement of ISDS decisions in the United States. Alex de Gramont spoke about the single largest investment award so far distributed in the recent *Yukos* case,[7] and whether the decision was or could ever become enforceable and be enforced against Russia. Pal Sonnevend also discussed the *Yukos* case,[8] as the European Court of Human Rights has also recently furnished a substantial award against Russia in that case. In Professor Sonnevend's view, the ECHR is not a real alternative to investment protection fora. Dmitri Evseev discussed investment treaty arbitration cases against Hungary in detail and how they – especially

[5] *Electrabel S.A. v Republic of Hungary* (ICSID Arbitral Tribunal Case No. ARB/07/19).

[6] *Ioan Micula, Viorel Micula and others v Romania* (ICSID Arbitral Tribunal Case No. ARB/14/29).

[7] *Yukos Universal Limited (Isle of Man) v The* Russian *Federation* (UNCITRAL, PCA Case No. AA 227).

[8] *Case of OAO Neftyanaya Kompaniya Yukos v Russia* (Application no. 14902/04).

the *Electrabel* case – contributed to international treaty arbitration law and to European policies on investment protection. Jonathan Faust spoke about recent Holocaust-related property claims in the US and the way US federal courts dealt with such claims. György Molnár-Bíró talked about discriminatory taxation rules as a violation of property rights and discussed how affected investors could sue in both the EU and in front of the ECHR. Professor Renata Uitz also talked about how, according to recent experience, rights to property and entitlements of various churches could be enforced in front of the ECHR.

This volume of ELTE Law Journal – besides other valuable contributions – is dedicated to the lectures made at the conference having taken a full day. We hope the readers of this volume will also be able to appreciate the diversity of views on many salient issues of international investment law and understand that, because of clashes between international investment law and European law (as well as clashes between state interests and important impending changes to the structures of world commerce), ISDS has been at an important turning point. Leopoldo Rubinacci was able to demonstrate this to the participants by referring in his presentation to a new draft chapter in the TTIP dealing with a new model of ISDS with a permanent tribunal instead of ad hoc arbitrations. Quite a seismic shift in investor-state arbitrations.

Budapest, 15 November 2015.

Tamás Kende
Guest editor