Why Investment Arbitration Contributes to the Rule of Law: Without Knowing Where We Came from We Cannot Know Where We are Heading

Richard Happ

Abstract

This paper argues that investment arbitration plays a vital systemic role in international law. It looks at the past 220 years of legal development and concludes that international law has achieved much which its critics like to downplay or forget. If States now amend the system for it to better suit their needs, this just continues its evolutionary process.

The topic of this short contribution is a look back – but not at individual aspects such as transparency or the international minimum standard, but from a systemic perspective on investment arbitration as such.

With the term “systemic perspective” I mean the idea that international law is the legal order of the international system, and that actors in the system – states – create law because it suits their needs. At issue here is the body of international law which together is what we call “investment arbitration law”.

In applying such a systemic perspective, I want to make three findings as to where we come from, and four observations as to where we are. It is my

---

1 This might be a very German approach to international law, see G. Dahm, J. Delbrück, R. Wolfrum, Völkerrecht, Vol. 1, pp. 1–97. It is, however, not entirely without support from other authors, see, e.g. M.N. Shaw, International Law (2008), pp. 5–11 and J. Crawford, Brownlie’s Principles of Public International Law, Oxford University Press (2012), p. 15.

view that is eminently useful to know this in order to determine where to go. If you do not know where you came from, you can hardly know where you should go to.

1 Findings

The first finding is that investment protection is not a novel issue. It was not created by US American lawyers, as ISDS critics might want us to believe. It also was not created by Germany in 1959 when concluding the first BIT. States for hundreds of years considered it necessary to protect their nationals doing business abroad.

When going back in time, the first predecessor of modern investment protection law is the customary international of protection of aliens. This body of law protected aliens as it was heavily disputed whether aliens could enjoy the same legal rights as citizens. This goes back to Roman times, where the *ius civile* applied only to citizens, while foreigners were subject to the *ius gentium*. Even states which granted their citizens fundamental rights did not automatically apply those to aliens. Even today there are states whose constitution excludes alien legal persons from enjoying basic constitutional rights.

Individual facets of modern investment law can thus be traced back centuries. In 1818, the then US Secretary of State John Quincy Adams stated that no principle of international law was more solid than the protection of

---

3 See the ridiculous allegations in *Corporate Europe Observatory*, Profiting from Injustice (2012), pp. 27–29.


7 The German constitution, the “Grundgesetz” (Basic Law) explicitly assigns certain constitutional rights only to Germans, and limits the application of fundamental rights to domestic legal persons only.