Special Issue: Towards Better BITs? – Making International Investment Law Responsive to Sustainable Development Objectives

An Introduction

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The field of international investment law has caused a lot of controversy in recent years. In my view, this is first and foremost due to the higher visibility of bilateral investment treaties (BITs) or international investment agreements (IIAs), as they are alternatively called. This increased visibility is itself a result of the high number of investor-state disputes that have become known in recent years and the attempt to negotiate a multilateral agreement on investment (MAI) in the framework of the Organization for Economic Cooperation and Development (OECD) in the late 1990s.¹

Although these multilateral investment negotiations at the OECD came to a standstill in 1998, the parallel increase of bilateral and regional trade negotiations (due to the difficulties in concluding the Doha Round of the World Trade Organization [WTO]) has opened the way for the inclusion of investment chapters in many (if not most) regional trade (and investment) agreements. While the attempted inclusion of investment in the WTO negotiations as one of the so-called Singapore Issues in 1996 failed, bilateral negotiations now normally include a discussion on whether to include investment liberalization and protection rules – and most often these negotiations lead to a respective chapter on investment rules in preferential trade and investment agreements.²

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¹ The United Nations Conference on Trade and Development (UNCTAD) regularly reports on the number of known BITs and related disputes in its annual reports see most recently its World Investment Report (United Nations 2014).

² On the combination of trade and investment rules in this new type of treaty, see also the contributions in Rainer Hofmann, Stephan Schill and Christian Tams (eds.), Preferential Trade and Investment Agreements: From Recalibration to Reintegration (Nomos 2013).
The controversy on international investment law is particularly related to the known disputes that result from the inclusion of investor-State dispute settlement (ISDS) provisions in these IIAs. While the mechanism as such – in particular granting private investors the right to request the establishment of an international arbitration tribunal against a sovereign State – has always caused controversy, the high number of resulting arbitral awards has highlighted for the first time the many challenges that the traditional rules contained in most BITs or IIAs present when States have increased needs for capital from foreign investors and at the same time have to safeguard various public interests in a quickly changing environment. Many of the investment disputes lead to awards that are (partly) in favor of the claimant and thus oblige the respondent State to pay damages to a private party. It seems that in many cases governments and other State entities have problems to fully envisage the consequences of their decisions and are incapable of respecting many of the guarantees – at least as interpreted by the respective arbitrators – contained in IIAs.

The reaction to the increasing amount of damages to be paid as a result of these arbitral awards has been at least threefold:

A first reaction has been to argue that the conclusion of BITs as such is detrimental to a State’s sovereignty and its right to regulate in the public interest. As a result some States have terminated certain agreements or refrained from concluding (new) agreements. In this category belong the recent terminations of certain of their BITs by Venezuela (e.g., with the Netherlands in 2008),3 South Africa (e.g., with Germany, Switzerland and the Netherlands in 2013),4 Ecuador (e.g., with Cuba, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, the Dominican Republic and Uruguay in 2008),5 or the announcement of Indonesia to terminate its investment treaties (e.g., with the Netherlands as of 2015).6 A variation has been the termination of the participation in the ICSID Convention or the negotiations of BITs without