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Introduction: Symposium on the Law and Politics of Foreign Investment

David Sloss*

On February 1-2, 2013, Santa Clara University School of Law hosted a conference on the law and politics of foreign investment. The conference included a keynote address by Rudolf Dolzer; four main papers by Roger Alford, August Reinisch, Catherine Rogers, and Jason Yackee; and commentaries on those four papers by a distinguished group of scholars and practitioners. This symposium issue of the Journal includes revised versions of the papers presented at that conference.

Professor Dolzer's paper presents a masterful summary of the current state of the fair and equitable treatment (FET) standard in international investment law.¹ He focuses on the question whether application of the FET standard by arbitral tribunals "has matured enough to make it manageable on the operational level so that it is justified to speak of a legally distinct, manageable rule available for practical purposes of investment arbitration."² He answers this question in the affirmative, showing that arbitral jurisprudence has identified "groups and clusters of subgroups with more defined contours" that help to operationalize the FET standard.³ His analysis focuses primarily on the concept of legitimate expectations. While acknowledging that the FET standard encompasses more than just legitimate expectations, he argues that "[t]he protection of legitimate expectations [of investors] . . . [is] the central pillar in the understanding and application of the FET standard."⁴ Professor Dolzer identifies seven distinct elements of

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1. Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. OF INT'L L. 7 (2013).

2. *Id.* at 11.

3. *Id.* at 15.

4. *Id.* at 17.

the concept of legitimate expectations that tribunals have applied to put flesh on the skeleton of the FET standard. He contends that arbitral practice, by identifying “a number of rationally manageable subcategories,” has confirmed “the usefulness and the operational manageability of the” FET standard.⁵

Roger Alford’s insightful and thought-provoking paper identifies five key areas where international trade and investment law are converging.⁶ First, he discusses the trend toward incorporating trade and investment provisions into a single treaty.⁷ Second, he analyzes “the converging commitments in trade and investment arbitration against protectionism and discrimination.”⁸ Third, he addresses situations where a single underlying dispute gives rise to dispute settlement procedures in both the World Trade Organization (WTO) and investment treaty arbitration.⁹ Fourth, he discusses the use of trade remedies to enforce arbitration awards.¹⁰ Finally, he addresses the potential future use of investment treaty arbitration to enforce international trade rules.¹¹ The overall picture is one of increasing overlap between two distinct bodies of international economic law.

Andrea Bjorklund’s commentary largely accepts Professor Alford’s descriptive account of the convergence between trade and investment law.¹² Her paper offers some tentative thoughts about the potential costs and benefits of convergence. Ideally, she hopes, “one might see the development of complementary regimes such that each works to provide redress for the matters that it is most suited to handle.”¹³ However, she cautions, “[t]here is some danger that convergence in the trade and investment regimes simply exacerbates the already existing imbalance between powerful and less powerful actors in the international regime.”¹⁴

Todd Weiler’s commentary on Alford’s paper takes a different approach.¹⁵ Weiler contends that Alford’s analysis of anti-discrimination norms overlooks the nineteenth century roots of modern international economic law. Weiler’s fascinating historical analysis contends that rules governing most-favored-nation treatment (MFN) and national treatment (NT) converged in the middle of the nineteenth century into a single

5. *Id.* at 32-33.

6. Roger P. Alford, *The Convergence of International Trade and Investment Arbitration*, 12 SANTA CLARA J. OF INT’L L. 35 (2013).

7. *Id.* at 38.

8. *Id.* at 37.

9. *Id.* at 44.

10. *Id.* at 50.

11. *Id.* at 55.

12. Andrea K. Bjorklund, *Convergence or Complementarity?*, 12 SANTA CLARA J. OF INT’L L. 65 (2013).

13. *Id.* at 67.

14. *Id.* at 75.

15. Todd J. Weiler, *Treatment No Less Favorable Provisions within the Context of International Investment Law: “Kindly Please Check Your International Trade Law Conceptions at the Door,”* 12 SANTA CLARA J. OF INT’L L. 77 (2013).

“treatment no less favorable” (TNLF) standard.¹⁶ Later, in the twentieth century, international trade and international investment law diverged into two separate legal regimes. Thus, he contends, in the modern era “we are not dealing with convergence, but rather re-convergence.”¹⁷ He closes with a plea not to “confuse our understanding of how NT works in the [trade] context for how TNLF works (or ought to work) in the” context of international investment law.¹⁸

August Reinisch’s paper presents a detailed assessment of various issues related to the future of European investment law.¹⁹ His starting point is the Treaty of Lisbon, concluded in 2007, which transferred at least partial responsibility for negotiating and implementing international investment treaties from individual Member States to the European Union (EU).²⁰ The treaty has sparked a lively debate within Europe concerning the division of competence between the EU and its Member States. It has also sparked a debate among the main EU organs – the European Parliament, the Commission, and the Council – regarding the preferred future direction of EU investment policy.²¹ Professor Reinisch’s task is complicated by the fact that he takes aim at a rapidly moving target. Even so, he does a masterful job of mapping out the complex substantive and organizational issues at stake, and offers some tentative predictions about the likely future resolution of key issues.

Mark Clodfelter’s commentary takes a provocative stand on three discrete issues raised in Professor Reinisch’s paper.²² First, Clodfelter contends that recent evidence points to “standards emerging from EU action that will diverge greatly from the more open-ended language of contemporary Member State BITs, and more closely resemble those adopted by the North American states.”²³ Second, he argues that the European Parliament “has strongly signaled that ISDS [investor-state dispute settlement] is not to be considered an indispensable element of investment protection . . . the US-Australia solution of dispensing with ISDS altogether is a real option for the EU.”²⁴ Third, he claims there are “compelling” arguments for the European Court of Justice (ECJ) to invalidate existing bilateral investment treaties (BITs) between EU Member States on the ground that they violate fundamental provisions of EU law.²⁵

16. *Id.* at 79.

17. *Id.* at 109.

18. *Id.*

19. August Reinisch, *The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements*, 12 SANTA CLARA J. OF INT’L L. 111 (2013).

20. *See id.* at 113.

21. *See id.* at 119.

22. Mark A. Clodfelter, *The Future Direction of Investment Agreements in the European Union*, 12 SANTA CLARA J. OF INT’L L. 159 (2013).

23. *Id.* at 163.

24. *Id.* at 176.

25. *Id.* at 178.

Julie Maupin's commentary raises two fundamental questions about the future of EU investment law.²⁶ First, she asks, "where should European investment policy go next?"²⁷ She recommends "a robust normative debate to clarify the end goals of a shared EU international investment policy,"²⁸ and continued dialogue "that generates some mutually agreed means of either balancing or prioritizing among . . . competing policy visions."²⁹ Second, she presents an insightful analysis of the comparative institutional strengths and weaknesses of the European Parliament, the Council, the European Commission, and the European Court of Justice in shaping the future direction of European investment law and policy. She claims that "[t]he structural checks and balances which the Lisbon Treaty imposes upon each institution's competencies in the investment arena effectively prohibits any one institution from moving forward without getting the others on board."³⁰ Praising the system of checks and balances, she concludes by speculating that "the Lisbon Treaty may one day be regarded as the dawn . . . of a more democratic international investment law system."³¹

Catherine Rogers' paper evaluates the current state of empirical research on the arbitrators who decide international investment disputes.³² Part One of her paper acknowledges the value of empirical research, but warns that such research "must be read, interpreted, and relied on only with a full understanding of its limitations."³³ She then presents an insightful analysis of those limitations, focusing on four primary methodological challenges for empirical research on investment treaty arbitrators.³⁴ Part Two addresses two specific reform proposals that are based, at least partly, on empirical research. Rogers' analysis highlights "the risks of linking empirical research to specific reform proposals."³⁵ Part Three offers several recommendations for improving future empirical research about investment treaty arbitrators.³⁶

Chiara Giorgetti's commentary on Professor Rogers' paper contends that empirical research is most useful "when a question that can only have a yes/no answer is posited and objective criteria are evaluated."³⁷ She evaluates available data on diversity to show

26. Julie A. Maupin, *Where Should Europe's Investment Path Lead? Reflections on August Reinisch, "Quo Vadis Europe?"*, 12 SANTA CLARA J. OF INT'L L. 183 (2013).

27. *Id.* at 189.

28. *Id.* at 193.

29. *Id.* at 196.

30. *Id.* at 222.

31. *Id.*

32. Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 SANTA CLARA J. OF INT'L L. 223 (2013).

33. *Id.* at 232.

34. *Id.* at 232-38.

35. *Id.* at 240.

36. *Id.* at 252.

37. Chiara Giorgetti, *Is the Truth in the Eyes of the Beholder? The Perils and Benefits of Empirical Research in International Investment Arbitration*, 12 SANTA CLARA J. OF INT'L L. 263, 269 (2013).

that the group of people who serve as arbitrators in investment disputes manifests a troubling lack of geographical and gender diversity.³⁸ Based on that data, she offers several proposals for enhancing the geographical and gender diversity of investment treaty arbitrators.³⁹

Jason Yackee's paper contends that social scientists engaged in empirical analysis of bilateral investment treaties (BITs) have much to gain by collaborating with legal academics.⁴⁰ He acknowledges that the plea for greater collaboration between lawyers and social scientists is nothing new. However, he notes, others have assumed that "the benefits of collaboration . . . flow in a single direction – from the methodologically well-trained social scientist to the methodologically naïve or illiterate legal scholar."⁴¹ He argues that benefits can flow in the other direction also. He supports this claim by presenting a critique of a particular empirical study of BITs performed by two political scientists, showing how the study would have benefited from greater legal expertise.⁴² He then presents an alternative model for analyzing investor-state dispute settlement clauses in BITs that incorporates a lawyer's perspective.⁴³

In her commentary on Professor Yackee's paper, Catherine Amirfar offers the perspective of a practitioner with extensive experience in investor-state arbitration.⁴⁴ She endorses Yackee's claim that empirical studies "can be much improved through greater interdisciplinary collaboration between lawyers and social scientists."⁴⁵ However, she adds, "the search for expertise should not be limited to the legal academy . . . it should encompass practitioners as well."⁴⁶ Drawing on her own experience, she challenges Yackee's rank ordering of different types of investor-state dispute settlement clauses and presents an alternative ordering that, in her view, better reflects the reality of investor-state arbitration.⁴⁷

Sergio Puig's commentary on Professor Yackee's paper approaches the topic from a different angle.⁴⁸ Like Amirfar, he endorses Yackee's "call for more empirical and

38. *See id.* at 269-71.

39. *Id.* at 272-75.

40. Jason Webb Yackee, *Do States Bargain over Investor-State Dispute Settlement? Or, Toward Greater Collaboration in the Study of Bilateral Investment Treaties*, 12 SANTA CLARA J. OF INT'L L. 277 (2013).

41. *Id.* at 280.

42. *Id.* at 283-87.

43. *Id.* at 287-94.

44. Catherine M. Amirfar, *Dispute Settlement Clauses in Investor-State Arbitration: An Informed Approach to Empirical Studies About Law: A Response to Professor Yackee*, 12 SANTA CLARA J. OF INT'L L. 303 (2013).

45. *Id.* at 306.

46. *Id.*

47. *Id.* at 307-15.

48. Sergio Puig, *Does Bureaucratic Inertia Matter in Treaty Bargaining? Or, Toward Greater use of Qualitative Data in Empirical Legal Inquiries*, 12 SANTA CLARA J. OF INT'L L. 317 (2013).

interdisciplinary research in the field of international investment law.”⁴⁹ However, he gently criticizes Yackee’s exclusive focus on quantitative analysis. “Quants are only part of the empirical legal community . . . Qualitative empirical research is as valuable as quantitative research, and provides possibilities for giving rich context to legal behavior.”⁵⁰

Overall, the papers in this symposium make a valuable contribution to the burgeoning body of scholarship on international investment law. Hopefully, this brief introduction has whetted the reader’s appetite for more. Both novices and experts stand to learn a good deal by reading the entire volume.

49. *Id.* at 318.

50. *Id.* at 320.