Schriften zur Europäischen Integration
und Internationalen Wirtschaftsordnung 24

Rainer Hofmann/Christian J. Tams (Hrsg.)

International Investment Law and General International Law

From Clinical Isolation to Systemic Integration?

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FOREWORD

On 26-28 April 2006, the Wilhelm Merton Centre for European Integration and International Economic Order organized a symposium on current issues of ICSID law (see Hofmann/Tams (eds.), The International Convention on the Settlement of Investment Disputes. Taking Stock after 40 Years, Nomos, Baden-Baden 2007). Contacts made at this symposium eventually resulted in the organization of the Frankfurt Investment Arbitration Moot Competition (www.investmentmoot.org) which annually attracts student teams from universities all over the world. Moreover, in the framework of this event, meetings of internationally known practitioners in investment arbitration have been organized jointly by Dr *Sabine Konrad*, now Partner with the Frankfurt Office of K&L Gates, and the Wilhelm Merton Centre to offer a venue for an exchange of views on salient issues of international investment law while strictly applying Chatham House rules. Against this background, *Christian J. Tams*, Professor of International Law at Glasgow University, proposed to convene a conference which would focus, from a more academic point of view, on current issues of international investment law, in particular on how it approaches fundamental concepts and notions of general international law, such as the law of treaties, State responsibility, diplomatic protection or State immunity.

Indeed, this conference was held on 12-13 March 2010 and brought together a considerable number of investment law experts, both academics and practitioners. It was opened with a keynote address by Professor Dr *James Crawford SC*, University of Cambridge, who gave a general and quite personal view on the overarching question: namely whether the relationship between international investment law and general international law could be considered as one of *clinical isolation* or one of *systemic integration*. The actual conference allowed younger scholars to present papers on various aspects of this relationship. The ensuing discussions were initiated by comments from more experienced participants, from both academia and practice. The present volume brings together the keynote address as well as these various papers and comments and, it is hoped, will give readers a good insight into the most prominent issues of the relationship between international investment law and general international law.

The directors of the Wilhelm Merton Centre wish to express their sincere gratitude to Professor Dr *Christian J. Tams* for his initiative and his strong and continuous intellectual input and support throughout the project. Furthermore, the organizers of the conference wish to thank Mr *Philipp Donath* and Mr *Jakob*

Kadelbach for their most valuable assistance before, during and after the conference. Finally, the editors of this volume wish to thank all the contributors for their papers and comments, Mr *Gennadi Rudak* for his editorial skills and Mr *Alek Dumanovic* and Mr *Niko Tsolakidis* for their assistance in the editing process.

Frankfurt am Main, 16 February 2011

Rainer Hofmann Stefan Kadelbach Rainer Klump

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International Investment Law: Situating an Exotic Special Regime within the Framework of General International Law

Rainer Hofmann[*] *and Christian J. Tams*[**]

Over the last decade, international investment law has risen to prominence. This prominence is reflected in the number of investment arbitrations just as in the publication, now on a regular basis, of new investment law textbooks.[1] With prominence comes interest, and interest leads to scrutiny. And so, over the last decade, general international lawyers have taken an interest in, and have scrutinized this curious 'hybrid'[2] – or even (in the words of the ILC's Fragmentation Study) 'exotic'[3] – branch of international law: have begun to read awards and investment treaties on which they were based, have looked at investment dispute settlement from a comparative perspective, and have evaluated how tribunals approached questions of general international law. By the same token, the actors of international investment law – and tribunals in particular – have applied provisions of general international law and have had to determine whether general legal rules influenced provisions of investment law or whether investment law deliberately deviated from the general framework.

International investment law is by no means the first sub-area of international law that has been 'detected' in this way and whose actors have had to define the relationship between 'their' field and general international law. It shares this fate with many other specialized sub-areas, including some that today are seen as its rivals such as human rights, international environmental law, and international economic law. Just as investment law today, these at some point became rele-

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1 Such as Dolzer/Schreuer, Principles of International Investment Law (2008); Newcombe/Paradell, Law and Practice of Investment Treaties: Standards of Treatment (2009); Griebel, Internationales Investitionsrecht (2008); Subedi, International Investment Law: Reconciling Policy and Principle (2009); Sornarajah, The International Law on Foreign Investment (3rd edn., 2010); see also Douglas, The International Law of Investment Claims (2009).

2 Cf. Douglas, The Hybrid Foundations of Investment Treaty Arbitration, BYIL 74 (2003), 151.

3 Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, at para. 8.

vant, and began to be of concern for mainstream international lawyers. Just as investment lawyers today, those specializing in human rights, international environmental law or international economic law were provided with opportunities to comment on the relevance (if any) of general legal concepts within their specialized sub-area. Over time, debates between generalists and specialists have helped bring about a clearer understanding of whether, and how, the curious new sub-areas fitted within the landscape of general international law. And of course, over time, the special sub-areas themselves have begun to influence the mainstream, have to some extent become part of the general legal framework. Consequently, instead of merely positioning them on the map of general international law, it became necessary to analyze how the special sub-areas influenced the discipline as a whole – hence debates (to give just some examples) about the humanization of international law,[4] or about the radiance of the precautionary principle outside the field of environmental law.[5]

That international law as a system should have to define the role of specialized sub-areas within a general legal framework is not surprising. The international legal system has undergone a process of 'functional differentiation' similar to that identified by sociologists as a key feature of modern societies.[6] Functional differentiation brings risks and opportunities: it can be disruptive and destructive; but it can also be a force for professionalization and specialization that enhance knowledge and understanding. International legal debates have typically stressed the first of these aspects: tellingly, they are often conducted within a framework of 'fragmentation', inviting concerns about the loss of unity.[7] And yet, international law accepts functional differentiation to a large extent. Most of its general rules are dispositive and can be contracted out. In fact, the concept of *jus cogens,* which introduces a normative hierarchy and restricts the scope for contracting-out of the general framework, took decades to become accepted and has a rather narrow field of application: there are but few agreed *leges superi-*

4 Cf. Simma, International Human Rights and General International Law: A Comparative Analysis, in: Collected Courses of the Academy of European Law, Vol. IV/2 (1993), p. 153; Meron, The Humanization of International Law (2006).

5 Cf. Zander, The Application of the Precautionary Principle in Practice (2010) for a comparative account.

6 For a brief and helpful summary see the ILC's Fragmentation Study (note 3), paras. 5-20.

7 Pierre-Marie Dupuy's general course contains a particularly emphatic plea for unity: see Dupuy, L'unité de l'ordre juridique internationale. Cours général de droit international public, Recueil des Cours 297 (2002), p. 9. Cf. also Koskenniemi/Leino, Fragmentation of International Law. Postmodern Anxieties?, Leiden Journal of International Law 15 (2002), p. 553.

ores.[8] Typically, the possibility of contracting-out is accepted, and the *lex specialis* maxim provides the conceptual tool for recognizing functional differentiation.[9]

Of course, not every special rule contracts out of the general legal framework. Contracting-out cannot be presumed; it must be assessed whether special rules derogate from, or disapply, general rules. Even where special rules do derogate, international law provides the tools to minimize disruption, by favoring mutually supportive readings that seek to 'harmonize ... apparently conflicting norms by interpreting them so as to render them compatible'.[10] That a special sub-system should modify the general legal framework, in other words, is usually permitted, but not specifically encouraged, and different specialized systems have taken different approaches; some are more special than others.

'Clinical isolation' and 'systemic integration' are terms used to describe possible relationships between general international law and special sub-areas. Clearly, however, both denote extremes that will rarely be matched by reality. Tellingly, the former of them, 'clinical isolation', was first used to describe how a special sub-area (WTO law) should not be viewed.[11] In fact, the closer we look, the more obvious it becomes that very few sub-areas are clinically (or hermetically) isolated in any comprehensive sense, let alone form self-contained regimes (however popular the term may be).[12] However, special they remain – in some ways, we can expect them to contract out of aspects of the general legal frame-

8 For nuanced assessments see Paulus, Die internationale Gemeinschaft im Völkerrecht (2001), pp. 330 et seq.; Kadelbach, Zwingendes Völkerrecht (1992); and the ILC's Fragmentation Study (note 3), at paras. 324 et seq.

9 See the ILC's Fragmentation Study (note 3), at para. 108: 'Most of general international law may be derogated from by lex specialis.' On lex specialis see notably Article 55 of the ILC's Articles on State Responsibility (2001) and commentary thereto.

10 ILC Fragmentation Study (note 3), at para. 411. Article 31(3)(c) VCLT most clearly expresses this desire for 'systemically integrated' interpretation of norms: cf. Combacau/Sur, Droit international public (8th edn., 2008), at p. 179; McLachlan, The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention, ICLQ 54 (2005), p. 279.

11 Cf. WTO Appellate Body, United States – Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R (1996), at p. 17 (noting that the GATT 'is not to be read in clinical isolation from [general] public international law').

12 Special sub-systems of international law are never complete: they typically regulate specific aspects (primary rules, remedies, enforcement mechanisms, etc.), but as they do not exist outside the international legal framework, they fall back on general international law to address issues such as attribution, remedies, succession, treaty interpretation, etc. In the words of the ILC's Fragmentation Study, '[n]o legal regime is isolated from general international law', and 'no regime is self-contained' (note 3, at paras. 193 and 192 respectively). Since its unfortunate launch, in the ICJ's Tehran judgment (ICJ Reports 1980, 3, at para. 86), the term 'self-contained regime' has confused, rather than elucidated, debates.

work, to be not fully systemically integrated; otherwise they would not be necessary. Contracting-out is a question of degree, with '(systemic) integration' and '(clinical) isolation' describing two ends of the specter.

It should be noted – if only in passing – that there is an important 'cultural' dimension to debates about the isolation and integration. Even if special sub-areas of international law are unlikely to be sealed off substantively from the general legal framework, the people applying and interpreting the law may very well work in 'clinical isolation' from general international lawyers, and any encounter between the two groups may well lead to 'clashes of culture'. Some of this may at present be felt in exchanges about whether international investment law takes due account of non-investment concepts – State sovereignty, transparency, public values enshrined by human rights treaties, etc. Again, it is important to note that investment law is by no means the first special sub-area to be witnessing such 'clashes of culture': in fact, the fault lines are not that different from those separating WTO or human rights specialists on the one hand, and generalists on the other. What may be different is the presence of a different group of 'generalists' – those experienced in commercial litigation who view investment arbitration as private dispute resolution to which commercial arbitration rules applied by analogy. However, the premise underlying this approach is now being questioned more openly. While commercial arbitration has shaped arbitration techniques to a surprising extent, investment law has begun to more openly embrace its 'public' character: if anything, the new trend seems to be for investment lawyers to acknowledge the influence of domestic public law on investment law concepts.[13] This 'public turn' indeed would seem an overdue correction, which reflects the relevance of international treaties for investment law in its current 'BIT generation'[14]. It may take time to be fully reflected in the choice of counsel and arbitrators (and in fact, the move into the market by major international law firms may signal a setback[15]), but if we look at the broader societal debate, the public and international dimensions of international investment law now seem to be more fully appreciated than ever before.

13 See notably the contributions to Schill (ed.), International Investment Law and Comparative Public Law (2010).

14 Cf. Reisman/Sloan, Indirect Expropriation and Its Valuation in the BIT Generation, BYIL 74 (2003), p. 115.

15 This point is made by Crawford, International Protection of Foreign Direct Investments – Between Clinical Isolation and Systematic Integration: in this volume, at pp. 20 - 22.

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The subsequent contributions address aspects of the complex interrelationship between international investment law and general international law. James Crawford keynote speech, with which the volume opens, provides an impressive *tour d'horizon*[16]: it might best be read as a witness account – by one who has seen the sub-area gain in relevance, and who has always appreciated that as it deals with State behavior, investment law 'requires a refined understanding of the way in which the law of obligations is in general applied to states'.[17] The following chapters deal with specific aspects of the interrelation largely within the general spirit of the opening address, but from a specific angle: the focus throughout is on how investment law approaches the general legal framework. Does it accept it as a given, or does it provide its own set of rules? Does it confirm general international law, or does it contract out? And has the specific investment law approach (if any) perhaps even led to a modification of the general legal framework?

These questions are addressed with respect to what are believed to be representative fields of general international law. The law of treaties and the law of State responsibility – as the two areas of general international law in which the international community has agreed on widely recognized sets of 'meta rules'[18] – feature prominently. These indeed seemed obvious candidates, as they are regularly addressed in investment treaty arbitration – based, as it is, on international treaties and involving allegations of wrongful State conduct. More specifically, the pieces and comments by Michael Waibel,[19] Christoph Schreuer,[20] Lars Markert[21] and Antonios Tzanakopoulos[22] address interactions between investment law and the law of treaties, notably questions of treaty interpretation and treaty denunciation. Aspects of State responsibility are addressed in the contributions by Christina Knahr[23] and Pavel Šturma[24] (dealing primarily with issues of attri-

16 Crawford (note 15).
17 Crawford (note 15), at pp. 28 - 29.
18 The 1969 Vienna Convention on the Law of Treaties and the 2001 Articles on State Responsibility, respectively.
19 Waibel, International Investment Law and Treaty Interpretation: in this volume, p. 29.
20 Schreuer, International Investment Law: From Clinical Isolation to Systemic Integration. Comments: in this volume, p. 71.
21 Markert, International Investment Law and Treaty Interpretation – Problems, Particularities and Possible Trends: in this volume, p. 53.
22 Tzanakopoulos, Denunciation of the ICSID Convention under the General International Law of Treaties: in this volume, p. 75.
23 Knahr, International Investment Law and State Responsibility: Conditions of Responsibility: in this volume, p. 95.
24 Šturma, International Investment Law and State Responsibility: in this volume, p. 111.

bution of conduct), Florian Franke[25] (focusing on necessity), as well as Steffen Hindelang[26] and Ursula Kriebaum[27] (debating consequences of breaches, and notably the alleged primacy of restitution). Kate Parlett[28] and Stephan Schill[29] analyze interrelationships that may be less obvious: those between investment law on the one hand and diplomatic protection and State immunity on the other. That investment law should interact with these fields is not always appreciated; however, the two pieces make very clear that they are not 'merely parallel regimes'.[30]

Taken together, the various contributions illustrate the varied interactions between general international law and one of its most dynamic sub-areas. This is not a simple story of *en banc* affirmation or complete contracting-out; instead, four forms of interaction would seem to stand out:

(i) In many areas, international investment law accepts the legal framework provided by general international law. It does so at times expressly – e.g. through the 'without prejudice' clause of Article 55 of the ICSID Convention preserving immunity from enforcement. But mostly, it does so because (as noted by Pavel Šturma) there simply do not exist 'many special secondary rules',[31] and general international law applies by default: there are few specific investment law rules on attribution of conduct, on treaty interpretation, etc. Contracting-out therefore remains the exception, most importantly with respect to diplomatic protection, which Article 27 of the ICSID Convention expressly disapplies (though not comprehensively), but also in specific areas of treaty law such as termination.

(ii) Investment law's acceptance of the general legal framework does not always mean there was serious engagement. Drawing on Christina Knahr's analysis, one might say that State responsibility rules on attribution are recited in investment practice without much discussion, almost for the sake of convenience.[32] There is debate between Michael Waibel and his commentators (Christoph Schreuer, Lars Markert) on whether investment tribunals have properly applied the general rules of treaty interpretation, or merely paid lip service to them. In the field of immunity, there has to date been the least interaction, but as Stephan

25 Franke, The Custom of Necessity in Investor-State Arbitrations: in this volume, p. 121.
26 Hindelang, Restitution and Compensation – Reconstructing the Relationship in Investment Treaty Law: in this volume, p. 161.
27 Kriebaum, Comments on Restitution in International Investment Law: in this volume, p. 201.
28 Parlett, Diplomatic Protection and Investment Arbitration: in this volume, p. 211.
29 Schill, International Investment Law and the Law of State Immunity: Antagonists or Two Sides of the Same Coin?: in this volume, p. 231.
30 Cf. Parlett (note 28), at p. 227.
31 Šturma (note 24), at p. 115.
32 See also Crawford (note 15), at pp.24 - 25.

Schill argues, this need not remain so; in fact, with enforcement of awards now apparently becoming a more real problem,[33] pressure on immunity rules will increase, and balancing techniques (such as proportionality, on which he relies) may in future inform the application of 'without prejudice' clauses such as that of Article 55 of the ICSID Convention.

(iii) Conversely, even where investment law could be expected to adopt a special approach, general international law is by no means irrelevant. Kate Parlett, Florian Franke and Antonios Tzanakopoulos show how it could inform the interpretation and application of special investment rules – at the micro-level, no doubt, but perhaps crucially, on questions as diverse as continuous nationality, available defences, and the effects of treaty denunciations. Steffen Hindelang seems to go one step further by emphasizing the primacy of restitution over compensation under the general rules on remedies; this in his view (which in turn is criticized by Ursula Kriebaum) should guide investment tribunals as well. All this is evidence for the power of centripetal forces working towards systemic integration.

(iv) By contrast, there is relatively little evidence of investment law modifying general international law. Investment law may have become generally relevant, but at least in the fields analyzed by contributors, its approaches are not easily generalized. As Kate Parlett notes, the ICJ's *Diallo* judgment was cautious to treat investment practice as special, not affecting the general framework of diplomatic protection;[34] by the same token, Michael Waibel and Steffen Hindelang do not argue that the special approach of investment tribunals (adopting, in their view, a particular understanding of treaty interpretation and of remedies) should have a wider impact outside the field of investment law. This reflects a more cautious approach than that informing earlier claims about investment law approaches 'spilling over' into general international law – allegedly overcoming, to take but two prominent examples, restrictive, general rules on standing set out in *Barcelona Traction*[35] or minimalist readings of the minimum standard.[36]

33 See notably the information provided by Schill (note 29), his footnote 65.

34 Cf. ICJ, Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Preliminary Objections, ICJ Reports 2007, p. 579, at paras. 40 - 41.

35 Cf. Orrego Vicuña, International Dispute Settlement in an Evolving Global Society – Constitutionalization, Accessibility, Privatization (2004) 42.

36 Cf. Schwebel, The Reshaping of the International Law on Foreign Investment by Concordant Bilateral Investment Treaties, in: Law in the Service of Human Dignity. Essays in Honour of Florentino Feliciano (Charnovitz et al., 2005), 241.

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From this brief summary, it is clear that the 'exotic' sub-area of international investment law interacts with general international law in manifold ways. In many fields, it does not seek to contract out of the general legal framework in the first place; in others, it provides for special rules that consciously adapt the general legal framework to the specific demands of foreign investment; in still others, the general legal framework influences the interpretation of special rules. On the specter of 'clinical isolation *versus* systemic integration', investment law sits in somewhere the middle, alongside other special sub-areas that over time have had to define their position within the general legal framework. If there is one general message, it would seem to be that those thinking about the interrelationship between investment law and general international law (and writing about it in this volume) are aware of the need for some interaction. General international law allows for contracting out, but special frameworks seeking to disapply the general rules are well advised not to cut off the links completely, to remain open for engagement. This openness does not mean full integration, but implies a common understanding that investment law forms part of the framework provided by general international law. If experience with other special sub-areas is any guide, this common understanding is the best recipe for balancing the competing demands for contracting out and integration.