The Trend from Standards to Rules in International Investment Law and Its Impact upon the Interpretive Power of Arbitral Tribunals

By Friedrich Rosenfeld[*]

Introduction

My remarks are on the trend from standards to rules in international investment law and its impact upon the interpretive power of arbitral tribunals. I will limit myself to making three observations. First, I will explain that investment guarantees are becoming increasingly refined. I will proceed by showing that the trend from standards to rules has limits. Finally, I will draw some conclusions regarding the interpretive power of arbitral tribunals.

The Trend from Standards to Rules in International Investment Law

I would like to begin with a terminological clarification. Both standards and rules are categories of legal norms. The difference between the two lies in the degree to which the norm creator specifies their normative content in advance.[1] To put it in other terms: a standard sets a broad frame that needs to be specified by adjudicators *ex post*. Rules, in contrast, specify the content of legal norms in greater detail in advance. They are thus more refined norms.

Standards were already prevalent in the first bilateral investment treaty (BIT) that was concluded between Germany and Pakistan in 1959 (which was only six pages long). The majority of substantive standards were contained in nothing more than a couple of sentences. There are other examples of these early-generation BITs where one can find two, three, or even more standards in just a few words.

The situation has changed with recent investment agreements, model BITs, and draft investment agreements. One may find examples like the U.S. Model BIT that covers more than forty pages and has various appendices with explanations. Apart from the volume of documents, the actual content of investment guarantees also reflects the trend from standards to rules. Examples include the following:

— Instead of a mere reference to the obligation to accord fair and equitable treatment, one may find a list of specific measures that indicate a violation of this obligation or a clarification to which extent this obligation reflects customary international law.

— Instead of a mere reference to the protection against unlawful expropriation, one may find criteria for distinguishing direct from indirect expropriations or guidelines for valuation and the conversion of fair market value.

— Instead of a mere reference to the obligation to accord most-favored-nation treatment, one may find a clarification that treatment shall not include investor-state dispute settlement procedures or that the obligation to accord most-favored-nation treatment does not oblige to extend certain benefits granted under economic integration processes.

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[1] Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557, 560 (1992).

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The prevalence of more refined norms is proof of the trend from standards to rules in international investment law.

Limits of the Trend

My second observation is that this trend has limits. I consider that there has been no change to the traditional paradigm that international investment law has an open texture, which means that it is at least to some extent indeterminate. This indeterminacy results from various limitations that norm creators face when agreeing on investment guarantees.

H.L.A. Hart has described one of these limitations as a ''human handicap,'' namely the ''relative ignorance of fact'' and the ''relative indeterminacy of aim.''[2] These terms refer to the dilemma that human beings—and hence also norm creators—cannot anticipate all future circumstances and developments in which a norm will be applied in practice. As a consequence, they are often unable to formulate precise and detailed norms. Admittedly, norm creators may make the deliberate decision to confirm or counter jurisprudence. For example, if norm creators do not endorse the jurisprudence of the tribunal in *Emilio Augustín Maffezini v. Spain*, they may decide that the obligation to accord most-favored-nation treatment shall not cover investor-state dispute settlement procedures. The European Union is reportedly taking this approach in current negotiations of investment agreements. Yet the ability to enter into progressive development and to anticipate the multitude of regulatory action that may be taken in the future remains limited.

Another constraint that norm creators face when agreeing on investment guarantees is the limitation of human language. The ability to formulate detailed rules of investment protection is limited, because ordinary language is open. As has been famously argued by Wittgenstein in his *Philosophical Investigations*, the meaning of words is defined by their use in practice.[3] Arbitral tribunals may contribute to this practice and hence to defining the meaning of investment guarantees. The limitations of human language also account for the fact that norm creators must reduce complexity when drafting a norm that covers a multitude of factual constellations. This typically results in a certain degree of abstraction and indeterminacy.

Even assuming hypothetically that it would be possible to create a perfectly detailed rule of investment protection that could account for all possible contingencies, it would create significant transaction costs to design such a rule, let alone to reach consensus on it. Arguably, the mere attempt to do so would be a waste of resources—even more so given the likelihood of change in the factual settings where the norm would be applied.

Interpretation Involves Elements of Choice

This brings me to my third and final thesis. I consider that due to the persisting indeterminacy of international investment law, interpretation still involves what Kelsen has called an ''act of will.''[4] To put it in simple terms: interpretation is not always a mere mechanical, cognitive exercise—there are certain choices to be made in determining the meaning of investment law.

This is not to suggest that arbitrators decide purely on the basis of non-legal considerations and that arbitration equals arbitrariness. On the contrary, judicial freedom needs to be

[2] H.L.A. Hart, The Concept of Law 128 (3d ed. 2012).
[3] Ludwig Wittgenstein, Philosophical Investigations 20 (Basil Blackwell 1967).
[4] Hans Kelsen, Pure Theory of Law 354 (Lawbook Exchange ed. 2009).

conceptualized as freedom within the limits of the law.[5] As norm creators and masters of treaties, states assume an important role in controlling the normative development of international investment law—not only when creating it, but also at later points in time when more information is available. Yet one should realistically acknowledge that there will always remain some freedom for arbitrators in interpreting investment law and in applying it to the facts of a given case.

International investment law will therefore remain a regime that is on the one hand shaped by public actors (i.e., states, which create and control more or less refined norms in a rather centralized system based on the cornerstone of consent), while on the other hand shaped by private actors (i.e., arbitrators, who enjoy interpretive powers for the resolution of concrete disputes in a decentralized system, which apart from jurisdictional consent does not require the agreement of those who are affected by a concrete decision). One of the core challenges facing the international arbitration regime today is to overcome the tensions that may result from these two different paradigms of decisionmaking.

Possible Paradigmatic Changes in the Settlement of International Investment Disputes

By Jeremy K. Sharpe[*]

In considering the question of a possible paradigm shift, I want to address a significant but underused tool in investment arbitration: non-disputing party submissions. That is, submissions by a treaty party that is not the respondent state.

This practice raises at least three important questions. First, is it legitimate for a state to seek to influence treaty interpretation in a case in which the state is not a party, given that the state itself also may act as a respondent in arbitrations under that same treaty? I believe that it is entirely legitimate for treaty parties to do so, whether or not the treaty expressly contemplates non-disputing party submissions. As Professor Crawford recently stated:

> In the context of investment treaty arbitration there is a certain tendency to believe that investors own bilateral investment treaties, not the states parties to them. . . . That is not what international law says. International law says that the parties to a treaty own the treaty and can interpret it. One might say within reason, but one might not question their application of reason as they see fit.[1]

The second question is whether this development is necessary. I believe that non-disputing party submissions are essential to maintaining interpretive coherence. Investment arbitration is inherently asymmetrical. States and investors have different interests and play different roles.[2]

[5] *Cf.* Hersch Lauterpacht, The Function of Law in the International Community 88 (Oxford University Press 2011).

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[1] James Crawford, *A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties*, *in* Treaties and Subsequent Practice 29, 31 (Georg Nolte ed., 2013).

[2] *See* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AJIL 179 (2010).

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