

## THE EUROPEAN UNION AND INTERNATIONAL INVESTMENT LAW REFORM

In order to understand the reform of international investment law envisioned by the European Union (EU), the author provides a comprehensive but concise analysis of the EU reform approaches, its constitutional and legal framework, the concepts of the rule of law and legitimacy and the reasons for the reform. In particular, the book exposes tensions between the EU aspiration to enhance the rule of law in international investment law, as a means of legitimising this legal discipline, and the challenges of its reform approaches in practice. The analysis combines substantive and procedural aspects of the EU reform of international investment law in the intra-EU context and EU external relations. This book critically evaluates the EU vision of the rule of law in international law and its contribution to the development of international law in the field of investment.

IVANA DAMJANOVIC is an interdisciplinary researcher and legal scholar. Her research areas include international investment law, EU law and EU external trade and investment relations. She has a PhD from the Australian National University and master's degrees from the University College Dublin and the University of Zagreb. She is a qualified Australian lawyer and since 2016 has taught law at the University of Canberra, where she is a full-time faculty member. From 2004 to 2013 she was a member of the Croatian diplomatic service.

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IVANA DAMJANOVIC

*Lecturer, University of Canberra*

*Visiting Fellow, Australian National University*



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## FOREWORD

International investment law in the form of bilateral investment treaties (BITs) witnessed a boost in the 1960s. What gradually emerged was a web of bilateral commitments involving so-called investor-state dispute settlement (ISDS). A multilateral framework for the settlement of such investment disputes was created above all with the establishment of the International Centre for Settlement of Investment Disputes (ICSID) in 1966.

This development, of course, was enhanced by the decolonisation process, with a considerable number of new States emerging in Africa in particular. The developed world, fearing nationalisations and other measures affecting its investments in the developing countries, sought better guarantees in the form of obligatory and binding ISDS. Many of the developing countries on the other hand were suspicious of investment protection mechanisms that could undermine their ability to control their own natural and other resources.

Thus, the international investment protection system was already in these early days characterised by political discord. Yet, BITs continued to be concluded and the number of arbitral awards continued to rise. Some further multilateral contexts and treaties emerged, such as the UNCITRAL Arbitration Rules (which cover ISDS as well) initially of 1976 and the Energy Charter Treaty (which includes rules on investment protection), signed in 1994.

The international investment protection system has become even more multifaceted with the increased involvement of the European Union (EU) in the conclusion of bilateral agreements with third countries providing for State-to-State arbitration as well as ISDS. As the Lisbon Treaty of 2007 provides for an exclusive Union competence in the field of foreign direct investment and a competence shared with its Member States in the field of so-called portfolio investment, the Union is in the process of partly overtaking the role traditionally held by its Member States in the creation and application of international



investment rules. The European Court of Justice (ECJ) has been called upon to rule on various aspects of international investment law and the Court has established a clear distinction between internal (the relations between the Member States) and external investment dispute settlement, only the latter being covered by the international ISDS rules.

Alongside these developments, public opinion, this time mainly in the developed world, and in Europe in particular, has expressed concerns about ISDS, fearing that arbitration procedures result in a bias in favour of protection of foreign investment, at the expense of societal values such as health and the environment and without due regard to procedural fairness. The EU has tried to take these concerns into account by, *inter alia*, advocating the establishment of investment courts providing for substantive, institutional and procedural guarantees that exceed those offered by *ad hoc* arbitration.

There is no shortage of literature on international investment law. Much of it focusses on specific topics rather than a holistic analysis. The present book by Ivana Damjanovic adds to the existing literature above all by providing a well-written and interesting discussion on the overall role of the EU in the development of investment law, taking into account both the internal and external dimensions and focussing on investment law reform, with a view to strengthening the rule of law. It can be highly recommended both to those who wish to improve their knowledge of international investment law and to experts in the field who seek to deepen their understanding of the reform process as driven by the EU in particular.

**Allan Rosas**

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Pieter van der Borch's allegory on the difficulty of governing, which I discovered at the Prints in the Age of Bruegel exhibition at Bozar in Brussels in February 2019, could be interpreted as depicting the dynamics between the two legal regimes that I have aimed to explain in this book. It is somewhere between divergent interests and legal considerations of the EU's reform (the aspiration, symbolised by the fantasy animal) and the established practice of arbitration (the reality, symbolised by the secular and ecclesiastical princes in the background) that the international investment regime will evolve into its future shape.