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National Governance and Investment Treaties

Introduction

In 2017, Radek Šnábl, head of the Investment Arbitration Unit at the Czech Ministry of Finance until 2013 and currently a private consultant on foreign investment protection, gave an interview to one of the major Czech economic magazines.[1] In the interview, he claimed that the Czech Republic had not learned from the mishaps in the early investment arbitrations against it. He claimed that the state had become, once again, easy prey for litigious investors in investor–state dispute settlement (ISDS).[2] He adds that the Czech Republic is not a state with the rule of law, and instead of learning from past failures, it continues to act irrationally.

Šnábl's story is fascinating in many ways. For years, he had been considered an *enfant terrible* of the Czech bureaucracy. Although found guilty of tax fraud in 2008, he continued working at the Ministry of Finance as a special advisor to the then Minister of Finance, Miroslav Kalousek. His extensive wealth has often been subjected to the media scrutiny. Due to his stint at the Ministry of Finance, Šnábl is considered, on the one hand, a vital person who boosted the expertise and legal capacity of the public administration responsible for investment treaties and ISDS by bringing state bureaucrats into close and institutionalised interaction with arbitration lawyers from private practice.

On the other hand, when he left the ministry in 2013, he founded his consulting firm that focuses on protecting foreign investors in the Czech Republic from state intervention. In the mentioned interview, he

[1] Hana Filipová, 'The Czech Republic Is Again an Easy Target, Warns the Arbitration Expert Radek Šnábl', *E15* (13 November 2017), available at www.e15.cz/rozhovory/cesko-je-zase-snadna-korist-varuje-odbornik-na-arbitraze-radek-snabl-1339719.

[2] We refer to ISDS as arbitration based on investment treaties. Whenever reference is made to contract-based investment arbitration or other means of investor–state dispute resolution, we specify the fact.

was open about the fact that many of his current clients had turned to him because of the expertise he had developed while working in public administration. Known for having close contacts with important politicians and business people, one of his clients was a businessman-turned-senator, Ivo Valenta. Valenta's Cypriot companies have been suing the Czech Republic for the injury caused to their betting business by the regulation of the use of video lottery terminals (VLTs).[3]

By recounting these events, we do not intend to call attention to the person of Radek Šnábl, specifically, let alone to question, judge, or condemn him as an individual for his acts or motivations. We start our book with his story because it illustrates a set of phenomena relating to investment treaties and national governance that we observed in the states that we discuss in this book. Šnábl's story, while unique in other respects, is illuminating, for it demonstrates how investment treaties and ISDS have contributed to the transformation of the state, institutionally, ideologically, and socially.

First, the content of his interview exemplifies some of the rhetoric tropes typical of the experts versed in the world of ISDS. Among these are the narratives about the importance of investment treaties for the economic development, the idea that their content represents universal values of the rule of law and good governance, and the idea that the state must learn to deal with them and, by doing so, climb up the imaginary ladder of the 'developed states', and that all this is only rational and reasonable. These discursive and ideological frames condition how national governance actors within public administration conceive of national governance, they condition what they see as desirable, detrimental, necessary, and possible.

Second, Šnábl's activities at the ministry are an instance of the realisation of various institutional projects, policies, and practices that have been put into place so that the state can better deal with the exigencies of investment treaties. These policies, practices, and institutional rearrangements are varied. They often have to do with the practices of early assessment of arbitration notices, dispute prevention and compliance reviews, choice of and interaction with external legal counsel, and various readjustments of the investment treaties themselves. These institutional rearrangements have significant consequences on the way national

[3] *WCV Capital Ventures Cyprus Limited and Channel Crossings Limited* v. *the Czech Republic,* PCA Case No. 2016-12.

governance is performed. They impact how policies and laws are made and decided and whose voices get heard.

Relatedly, Šnábl's professional trajectory reveals the social dynamics that constitute the field of ISDS. More specifically, they show the porous boundary between the sphere of public administration and the private sector. Social interactions at the crossroads of the state and private sector reconfigure and transform the state socially. These transformations go beyond individuals seeking to capitalise on their expertise and professional experience. They are about how the state itself is being changed through continuous interaction with a specific group of 'private' experts that hold particular views and propound particular policies.

This book shows how states' experiences with investment treaties produce these social, ideological, and institutional effects in the four states in our extended comparative case study: Argentina, the Czech Republic, India, and Mexico. The types of impact on the investment treaties of the participation of the states are analytically distinct from one another but are interconnected empirically. What and how governance actors think is influenced by the information that they have and the loci in which they seek the information. The intellectual and discursive frames influence the policies and practices that the actors bring into their decision-making. The social composition of the field of practice that the actors inhabit will shape the policies that they adopt and influence the actors' moves within the field, just as the existing legal and institutional arrangement will impact who decides and how they decide.

1.1 The Argument in a Nutshell: Investment Treaties between Constraint and Empowerment

Good governance and the rule of law have been staples in the discourses on international law in the last three decades.[4] International economic

[4] N. Boswell, 'The Impact of International Law on Domestic Governance' (2003) 97 *Proceedings of the ASIL Annual Meeting* 133–7; J. Crawford, 'International Law and the Rule of Law' (2003) 24 *Adelaide Law Review* 3–12; M. Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003) 44 *Virginia Journal of International Law* 19–32; J. Wouters and C. Ryngaert, 'Good Governance: Lessons from International Organizations' (2004) Working Paper No. 54 *K.U. Leuven Institute for International Law* 36; D. Bach-Golecka, 'The Emerging Right to Good Governance' (2018) 112 *AJIL Unbound* 89–93; E. Brown Weiss and A. Sornarajah, 'Good Governance' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2021).

law generally and international investment law specifically have been no outliers in this respect. An ensemble of treaties commonly referred to as international investment agreements (IIAs), including bilateral and multilateral investment treaties (BITs and MITs), were historically justified, especially by their Global North promoters, in functional terms as relatively straightforward deals about economic policy.[5] The proposition was simple: a state provides international legal protection through IIAs to foreign investment in exchange for the hope of more foreign investment and economic development.[6] A related rationale was that, given the past, sometimes violent, clashes between foreign – generally Global North – investors and their governments and the investors' host states, a form of resolution of investment disputes through legalised adjudication in the form of investor–state treaty arbitration would depoliticise not only the disputes but also the foreign investor–host state relations more broadly.[7] These arguments have been voiced in varying shapes and forms, and pushed forwards with varying conviction and intensity at different fora since the 1950s. They were voiced not only as an argument for IIAs but as an argument for a particular version of international law on foreign investment.[8] It was only in the late 1990s and early 2000s that a third justification for the conclusion of IIAs came to the fore: the promotion of good governance and the rule of law rationale.

[5] E.g., A. Broches, 'Conciliation and Arbitration of Investment Disputes', Address to World Conference on World Peace through Law (30 June 1963), Athens, available at https://pubdocs.worldbank.org/en/162881399487976375/World-Bank-Group-Archives-Folder-1651418.pdf?redirect=no; J. E. Alvarez and K. J. Vandevelde, 'The BIT Program: A Fifteen-Year Appraisal' (1992) 86 *Proceedings of the ASIL Annual Meeting* 532–40.

[6] J. W. Salacuse and N. P. Sullivan, 'Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 *Harvard International Law Journal* 67; J. Bonnitcha, L. N. S. Poulsen, and M. Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017).

[7] I. F. I. Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 *ICSID Review: Foreign Investment Law Journal* 1–25; G. Gertz, S. Jandhyala, and L. N. S. Poulsen, 'Legalization, Diplomacy, and Development: Do Investment Treaties De-politicize Investment Disputes?' (2018) 107 *World Development* 239–52; U. Kriebaum, 'Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes' (2018) 33 *ICSID Review: Foreign Investment Law Journal* 14–28.

[8] M. Sornarajah, 'Power and Justice: Third World Resistance in International Law' (2006) 10 *Singapore Year Book of International Law* 19–58; N. M. Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules*, first edition (Oxford University Press, 2021).

While the first and, to a lesser extent, the second rationales have been subject to various empirical, econometric, and statistical analyses, the last rationale – the rule of law and good governance promotion (good governance rationale) – has drawn much less attention from scholars. Regarding this rationale, literature suggests that IIAs may indirectly impact governance, domestic institutions, and governmental decision-making processes. In theory, IIAs may, through their substantive obligations and dispute settlement mechanisms, induce domestic reform.[9] This way, the argument goes, the impact of IIAs will eventually spill over from the area of governance relating only to foreign investors to the improved governance for everyone in the host countries (the spillover argument). However, there has been a dearth of empirical studies attempting to analyse this theoretical claim and socio-legal studies problematising and contextualising some of the theoretical assumptions behind this claim. In other words, this claim has only been postulated.

The reasons for the scarcity of studies exploring this rationale are diverse. First, the good governance rationale has emerged comparatively later than the first two. Second, assessing this rationale's soundness and validity presents methodological issues that make it less amenable to the more prevalent methods of empirical studies in international law, such as economic analysis of law, quantitative studies, and studies using international relations and political science methods.

This book aims to fill this gap by presenting outcomes of a long-term comparative project that used socio-legal methods inspired by legal anthropology and sociology. First, using an extended comparative case method and multi-sited fieldwork allowed us to explore the spillover argument from the ground up. Second, it allowed us to capture the uses and effects of investment treaties at the official governance sites that the

[9] For an overview of these claims, see M. Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart Publishing, 2018) 1–9. For a typical argument along these lines, see e.g., S. W. Schill, 'International Investment Law and Comparative Public Law: An Introduction' in S. W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 3–38; R. Echandi, 'What Do Developing Countries Expect from the International Investment Regime?' in J. E. Alvarez, K. P. Sauvant (eds), *The Evolving International Investment Regime* (Oxford University Press, 2011) 3–21; S. W. Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' (2011) 12 *German Law Journal* 1083–110; A. Reinisch, 'The Rule of Law in International Investment Arbitration' in P. Pazartzis, M. Gavouneli, A. Gourgourinis, and M. Papadaki (eds), *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (Bloomsbury Publishing, 2016) 291–308.

conventional spillover argument and its critiques obscure. This book shows that the uses and effects of IIAs are much more ambiguous, variegated, and highly dependent on the institutional, political, and social contexts in which they intervene.

Despite significant differences among the studied countries, we have identified that IIAs operate as both a constraining and empowering force in various governmental and social processes, practices, and policies. The picture revealed in this study exposes hitherto unexplored functions of investment treaties in national governance settings. The use of novel methods in this area of international law allowed us to develop new conceptualisations of the interactions between IIAs and national governance, which may serve as a template for thinking about interactions between international law and national governance broadly. In a similar vein, our study highlights that some of the fundamental conceptual categories used in international law discourses about the effects of international law on national governance are inadequate to capture the varied social reality in which investment treaties intervenes.

On a theoretical level, the book problematises some of the assumptions undergirding the common good governance rationale, such as the idea of the unitary and rational state and public administration. Our understanding of official state apparatuses as sites of cooperation and contestation among various actors within and without public administration allows us to create new conceptualisations of the modes of internalisation of IIAs to which states have resorted.

The common assumption in the good governance literature in investment law is that states consciously react and adjust to international law requirements. To the extent that treaties are concerned, states consider whether a treaty is beneficial to the state based on the considerations of 'national interest'. Consequently, they remain bound by the treaty, modify it, or terminate it. While there is some grain of truth in these propositions, they ignore the social practices of how decisions are made within public administration.

Our research reveals that different governance actors pursue some of the courses of action assumed in the conventional accounts about the internalisation of international law simultaneously, and sometimes in contradiction to each other. More often, they act not as a result of considerations of some abstractly defined national interests or based on their assessment of the legality of their conduct under investment treaties; instead, the internalisation processes are often a function of the

position of a particular governance actor within the actual context of public administration. This position is not static and is co-determined by various power struggles between different state institutions, which are often driven by competing competences and worldviews and personal loyalties and animosities. To put it differently, when governance actors act concerning investment treaties within the broader sphere of national governance, their actions are not informed solely by their assessment of the international investment obligations and the consequences of potential violations to the extent they are aware of them at all. The public debate over the government conduct also plays a role in their decisions and their decisions' justifications. This means that actors other than the actual decision-maker play a vital role in this process. These may be the media, general public, or the private sector, such as the arbitration industry. Equally, the position of a particular official within the broader structure of public administration and the intervening power dynamics within that structure also affect the decision and its justification.

Thus, while states often resort to simultaneous practices of *internalisation through external adjustment* – directed at investment treaty norms – and *internalisation through internal accommodation* – directed at the national laws, processes, and policies – these modes of internalisation always lead to *rearrangements by internalisation* within the public administration. These internal rearrangements frequently have effects not foreseen or captured by the mainstream spillover argument and its critiques. Closely analysing the institutional and political contexts of the studied states when it comes to dealing with IIAs thus reveals a picture in which IIAs can serve as a constraint on national governance actors in one context and be a source of empowerment of the same actors in another.

Regarding the specific effects of investment treaties, our inductive approach to the field led us to reject an approach that looks for the markers of good governance or the rule of law in our data. Instead, we have identified various effects IIAs produce within the sphere of national governance through mixed methods and then categorised and conceptualised them. As it turned out, the specific effects were far from universal and proved contingent upon the social, historical, and politico-economic contexts of the studied states. Sensitivity to these contexts then provided us with the ground for explaining the occurrence of certain phenomena and dynamics in one state and their absence in the others.

As hinted at previously, we categorise the effects of investment treaties on national governance into two broad categories: ideological-discursive

effects, and formal-institutional effects.[10] As far as the ideological and discursive effects go, we identified them in the governance actors' perceptions, justifications, and discourses about IIAs and investment treaty arbitration. The various narratives about IIAs are often attended by contradictions and tensions. The latter can be explained by situating the different conceptions in their proper contexts, such as the internal power dynamics within the public administrations, the intervening media, and public discourses, as well as the broader social and political climate at a given time. By emphasising the contexts, we make sense of the seemingly contradictory stances and narratives surrounding IIAs within the national governance sphere. The focus on contradictions and internal power dynamics thus makes visible the realities of the interactions between the international – represented by IIAs – and the local and national settings that remain obscured in the existing accounts.

The conventional accounts sometimes portray these contradictory interactions as pathologies of the internalisation of IIAs due to the lack of expertise or as haphazard and uninformed reactions of 'underdeveloped' public administrations. Our account removes this normative paternalism and instead puts forwards an image of national governance actors that constantly negotiate and manoeuvre their positions vis-à-vis other actors and forces, all the while attempting to push forwards their agendas with whatever tools they can utilise. International investment agreements then come to be viewed not necessarily as an international legal regime imposing a particular way of governance but also as one tool among many that national governance actors use in their everyday quests.

Attending to the contexts, agendas, and interests does not preclude us from coming up with more general conceptualisations of the interactions between IIAs and national governance. We conceptualise IIAs as operating on the axis of facilitation/empowerment and constraint/marginalisation. Hence, the various IIAs conceptions can be deployed to empower actors to put forwards certain agendas or prevent them from acting/justifying their inability to act. We have identified the following conceptions of IIAs as used in governance actors' narratives and discourses: IIAs as articles of faith; IIAs as tools of economic development; IIAs as a necessary evil; IIAs as benign instruments; IIAs as undesirable/unwanted disciplines; IIAs as a positive cultivating force; IIAs as external impositions; IIAs as symbols of cultural belonging/affinity; and IIAs as natural necessity.

[10] See Section 1.6.

Regarding the formal and institutional effects, we identified and analysed what kind of practices, policies, laws, and processes IIAs have helped to put in place. Here, our findings may be considered as providing arguments for both the positive spillover argument and the regulatory chill thesis. However, we make an important qualification to both of these theses. We argue that IIAs cannot be adequately explained or characterised as either chilling regulations or inducing reform. We also challenge the strong normative undertones of both the regulatory chill and positive spillover theses.

We map the institutional effects, starting from formal types of reactions (laws and regulations), moving to policy and process-oriented reactions (informal processes, policies, and practices), and, finally, to more intangible and fleeting yet material and performative practices (interactions with outside experts, lawyers, and journalists).

While presenting the formal and institutional effects, we always situate them within the intervening power dynamics. Among these, we highlight the relations and power struggles between various state agencies and the broader contexts of the media and public debates. Finally, we highlight two important intervening elements that have influenced the way governments react to IIAs. First, the role of particular individuals who historically exerted a significant influence on the government's reactions and policies in some countries. Second, it is the growing interactions between the state actors, on the one hand, and law firms and the international arbitration industry, on the other. The last material aspect of governments' experiences with IIAs deserves particular emphasis, as the common practice of the revolving door between private arbitration practice and government also feeds into the discursive and ideological effects of IIAs. The governance actors' views and perceptions increasingly converge with the ethos and views typically found among arbitration practitioners and scholars.

The current liberal international economic order is under increased pressure in many states around the globe. This order is being challenged by the rise of new powers, such as China, that propose alternative ways of regulating international economic governance, as well as by some of its long-standing champions, such as the USA.[11] In particular, the IIA regime, as one of the most potent international legal regimes of economic

[11] A. Roberts, H. Choer Moraes, and V. Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment' (2019) 22 *Journal of International Economic Law* 655–76; G. Shaffer and H. Gao, 'A New Chinese Economic Order?' (2020) 23 *Journal of International Economic Law* 607–35.

globalisation, is subject to ongoing negotiations and contestations about the reform of its current form. The current process of ISDS reform under the auspices of the United Nations Commission on International Trade Law (UNCITRAL) is significant in its scope in terms of geography but also its relative openness to non-state groups, actors, fractions, communities, and academia.[12] The various proposals to reform the current IIA regime will benefit from a more fine-grained understanding of its effects on the ground.

Our book calls for a re-evaluation of some of the fundamental propositions that delineate the discussion about the effects of IIAs. International investment agreements indeed facilitate or contribute to the adoption of certain policies and induce particular processes. The policies and practices can be considered to be enhancing the rule of law and good governance only if we think of the rule of law and good governance in very narrow terms. Yet, we find that these same policies and processes empower only some actors while marginalising others, which should make one pause before uncritically embracing the good governance narrative. The argument about the regulatory chill resulting from IIAs has some merit. However, similarly to the spillover argument, it warrants re-evaluation. International investment agreements, in some instances, produce chilling effects, while in others, they tend to facilitate the adoption of laws and policies.

Instead of arguing that IIAs either induce good governance reform or cause a regulatory chill, an adequate framework for assessing the effects of IIAs seems to be to consider what interests they boost and what actors they empower or marginalise. This exercise gives us a more substantive view of IIAs' effects on national governance, a view that is historically situated and not abstractly deduced.

Historically, the ideological and material effects of IIAs observed in our book show the transformation of national governance into a particular vision of a neoliberal state and law, which is ridden with contradictions and tensions. While IIAs generally push in one direction, they never quite get there, and simultaneously create unforeseen sites of contestation. In these various sites of contestation and struggle, the goals, objectives, and values that conventional narratives assign to IIAs get transformed and modified through the interaction with local sites and actors. Yet, this ambiguity of IIAs' effects should not lead us to think of

[12] See UNCTRAL Working Group III: Investor–State Dispute Settlement Reform, available at https://uncitral.un.org/en/working_groups/3/investor-state.