Investment Protection and Sovereignty: The Clash of Theories in the Practice of Investment Arbitration

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Abstract:

This article focuses on investment arbitration as a political space where the concepts of national sovereignty and investment protection come into conflict. The goal of this article is twofold. *First*, it aims to situate this conflict within the wider theoretical debate on the role of the nation state in the globalized world. *Second*, it attempts to show in detail how this theoretical conflict is being resolved in practice on the level of investment arbitration. This is achieved by identifying the main legal issues related to the theoretical concepts set up at the beginning, and by analyzing a sample of investor-state dispute settlement cases to illustrate the conflict and show how the arbitration tribunals address these issues in practice.

Keywords: investment; arbitration; sovereignty; investor-state dispute settlement; neoliberalism; neorealism.

JEL Classification: F55; K33.

Introduction

The modern theory of international economic relations can be viewed through the lens of the debate between neoliberal conception based on economic interdependency and transnational globalization on one hand, and the neorealist conception based on political competition between sovereign nation states in an essentially anarchic environment. While the two theoretical frameworks have found a lot common ground in the last three decades, major differences remain, not least in terms of the question to what degree do the new forms of integration and the rise of the transnational corporations limit the sovereign powers of the state as the main actor of international politics (Krasner 1983, Strange 1996). This question resonates in every field of international relations. This article focuses on one particular aspect of this debate; the conflict between investment protection and national sovereignty on the level of investment arbitration.

The theoretical framework of this article is represented by the competing concepts of investment protection and national sovereignty. The aim of the article is twofold: to demonstrate that investment arbitration can also be viewed as an arena where the struggle between the national states and transnational institutions takes place, and to analyze the practice of investment arbitration through the lens of the theoretical conflict between investment protection and national sovereignty, in order to describe the implications of the practice of investment arbitration for the political space that nation states enjoy in the current global investment regime.

1. Current State of Scholarship on Investment Regimes and National Sovereignty

International investment law has been the subject of interdisciplinary research at least since the modern discipline of International Relations has been created. The early IR scholars have all been interested in the way that international law affects the behavior of states, but most of them came to a conclusion that international law is secondary to relations of power (Carr 1939, Morgenthau 1942). A more serious research into the relationship between legal regimes and sovereignty of states begins with the emergence of theoretical frameworks critical to

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the dominant realist paradigm in the 1970s. Among these approaches, the most relevant for the purposes of this paper are the new neoliberal and constructivist theories focused on interdependence, international regimes, transnational relations and the role of norms in the international arena. These approaches attempt to describe how international norms and international regimes constrain the behavior of states. Examples on the part of the IR scholars include the main texts of neoliberal theory of international relations (Krasner 1983), and on the part of legal scholars' analytical texts, such as the 1993 paper by Schreuer on the "waning of the sovereign state" (Schreuer 1993). It is within this framework, where the conflict between international economic and legal regimes and national sovereignty first comes into focus. More recently, the issue has been analyzed on the level of theory by Mitchell (2017).

Scholarship on regimes of investment law has become widespread in the 1990s and early 2000s with the unprecedented proliferation of investment treaties. The original research was mostly focused on the relationship between legal regimes of investment protection and economic growth (Neumayer ans Spess 2005, Hallward and Driemeier 2003, Salacuse and Sullivan 2008). Emergence of the interest in the conflict between investment protection and national sovereignty can be traced to several controversial and publicized investment arbitration awards, which showed in practice how important legal regimes of investment protection really are for the national sovereignty of nation states. The most recent scholarship in this field is focused on two levels of analysis. The level of investment treaties and the level of investment arbitration.

On the level of investment treaties, the scholarship is focused mainly on analysis of the provisions of investment treaties and the way that these provisions either protect foreign investors, or the sovereignty of the state. A good example of this type of research is represented by the UNCTAD publications, which use content analysis to track the evolution of investment treaties in time (UNCTAD 2018), although many scholars engage in this type of analysis (Dolzer 2005, Bird-Pollan 2018, Thaliath 2018). The second level on which the research into the conflict between investment protection and national sovereignty proceeds is the level of investment arbitration and it is this level that this article is focused on. The recent research into the conflict between investment protection and national sovereignty on the level of investment arbitration has been focused mainly on the concept of the "right to regulate", which several authors feel is being threatened by the ability of investors to sue the countries in front of international tribunals. This is often related to the "regulatory chill" hypothesis, which describes a phenomenon where a state fails to enact a regulation in public interest out of fear of being sued by the foreign investor in an investment court (Baetens and Tietjem 2014, Brown 2013). Work has also been done recently on the tracking of changes on the level investment arbitration connected to the changing landscape of investment treaties (UNCTAD 2018).

The contribution of our paper to this discussion is mainly on the level of investment arbitration, where we identify and analyze the main concepts, which come into play in tribunal proceedings in relation to the conflict between investment protection and national sovereignty.

2. Theories of Investment Protection and National Sovereignty

In this part of the paper we will first set up the theoretical conflict by defining and describing the concepts of investment protection and national sovereignty in the context of the discussion between neoliberalism and neorealism. Then, we will proceed to analyze a sample of investor-state dispute settlement (ISDS) cases in order to show how the conflict plays itself out in practice and what are the implications for the space that the nation states enjoy to exercise their sovereign powers. While the existing literature on investment regimes does include various analysis of the relationship between investment protection, investment arbitration and national sovereignty (Henckels 2015), we can observe a distinct lack of interest of these authors to situate the discussion within the larger framework of international relations theory. This is mainly due to the fact, that issues of investment law are mainly, although not exclusively, dealt with by legal experts. This article attempts to rectify this oversight and places investment regimes firmly within the theoretical debate between neoliberalism and neorealism in IR.

Foreign investment protection is one of the key concepts of neoliberal thought. It consists of all measures existing to protect foreign investment from negative impacts of arbitrary or discriminatory government action or other influences. The goal of investment protection is to ensure stable investment environment and consequently stimulate foreign investment, which is seen as a major driver of economic growth and development (Vogiatzoglou 2018). The theory of investment protection is effectively inscribed into the network of international investment treaties and treaties with investment provisions. The origins of this network can be found in USA Treaties on Friendship, Commerce and Navigation, which stipulate the legal principle of protecting the „property of strangers" by „all efforts in his (the sovereign) power" (Dolzer and Schreuer 2012). Since then, a dense network of bilateral and multilateral investment treaties and treaties with investment provisions has been developed. These treaties contain provisions guaranteeing the rights of foreign investors. Until recently, these investment protection provisions were a matter of wide-ranging consensus, and generally include provisions such as: fair and equitable treatment (FET), most favored nation treatment (MFN), national treatment (NT) and full protection and security.

Within the context of global investment regimes, investment protection comes into direct conflict with the theory of state sovereignty. Theory of sovereignty has a long tradition going back to the Peace of Westphalia, when the concept was first codified on the international level. For the purposes of this paper, we will be using the most parsimonious formulation of the so-called Westphalian sovereignty, which Krasner defines as „lack of other authority over state other than the domestic authority" (Krasner 2001, 11-12). It is obvious how this concept of sovereignty clashes with the conception of investment protection, since investment protection provisions codify specifically those situations, where limits are put on the government activity. The conflict set up in this way occurs on the level of theory.

This article is however more interested in how this conflict gets resolved in practice. That is to say, which concept prevails under which circumstances. This is the domain of investment arbitration, which is the mechanism set up to arbitrate this conflict between two established principles of international law through investor-state dispute settlement. Investment arbitration enables foreign investors to litigate against nation states in case of a perceived breach of an investment treaty. The rationale for the regime of investment arbitration is based on the assumption that the foreign investment stimulates development and growth and in order to stimulate foreign investment, the dispute settlement mechanisms need to be transnational in nature to avoid the „home bias" of domestic courts, therefore ensuring stable investment environment. In the context of this article, investment arbitration represents the practice of the conflict between investment protection and national sovereignty. The interpretation of where does the sovereignty of a state end, and the protection of foreign investment begin has developed over the years of ISDS cases and can be found within the case law of investment arbitration.

This article aims to contribute to the growing literature on this topic by identifying three main concepts that can be used to frame this discussion on the level of investment arbitration:

- indirect expropriation,
- legitimate expectations,
- domestic legal sovereignty.

In relation to each of these concepts, I will be analyzing two things:

- the limits that are put on the state sovereignty by the practice of investment arbitration through interpretation of investment protection provisions of investment treaties by the investment tribunals;
- the protections that are afforded to national sovereignty by the investment tribunals.

3. Investment Arbitration Tribunals and Their Interpretation of the Conflict Between Sovereignty and Investment Protection

Investment arbitration tribunals represent institutional spaces, where the theoretical conflict presented in the previous chapter is resolved. This happens mainly through interpretation of investment treaty provisions within the context of a specific ISDS case. Case law therefore represents a major source for investment arbitration. In this chapter, we will take a closer look at selected ISDS cases, which will help determine where the limits for government action within the context of investment protection are. These limits are set through several key concepts that will be analyzed here. The concepts are: indirect expropriation, legitimate expectations, sub ordinance of domestic law.

3.1. Indirect Expropriation

Indirect expropriation is a concept used to describe a measure of a state which substantially deprives investor of the value of his investment, without seizing the property outright (direct expropriation). The most typical cases of indirect expropriation relate to a revocation or a non-renewal of a license, a permit, or a contract, but can also include erosion of investor´s ability to make profit on an investment over time through a series of measures (creeping expropriation). Within the theoretical context presented previously, the conflict is related to determination of where the line is between a sovereign regulatory measure for legitimate public purpose and a regulatory measure that amounts to indirect expropriation and requires compensation to the investor affected by it. In other words, the question is how, and to what degree does the doctrine of indirect expropriation limit the sovereign space of the states to enact regulation. It is worth reiterating that we are not interested in what the investment treaties tell us about indirect expropriation, but what has been established in the case law of investment arbitration.

The issue is recognized at the scholarly level, at the level of international organizations and also at the level of the investment tribunals themselves. Dolzer and Stephens (1995) point out that: "For the host State, the definition (of the line of demarcation between measures for which no compensation is due and actions qualifying as indirect expropriations) determines the scope of the State's power to enact legislation that regulates the rights and obligations of owners in instances where compensation may fall due. It may be argued that the State is prevented from taking any such measures where these cannot be covered by public financial resources" (98). More recently, the issue has been analyzed in relation to environmental regulation by Zhu (2019). OECD paper claims that "the question that arises is to what extent a government may affect the value of property by regulation, either general in nature or by specific actions in the context of general regulations, for a legitimate public purpose without effecting a "taking" and having to compensate for this act" (OECD 2004, 2). Even investment tribunals have previously recognized the difficulty of ruling on the matter of indirect expropriation v. legitimate regulation, such as in Feldman v. Mexico (1999), where the tribunal stated that "It is much less clear (than defining direct expropriation) when governmental action that interferes with broadly-defined property rights – an "investment" under NAFTA, Article 1139 – crosses the line from valid regulation to a compensable taking, and it is fair to say that no one has come up with a fully satisfactory means of drawing this line" (98).

In the same case, the tribunal also stated that "Reasonable governmental regulation of this type (in public interest) cannot be achieved if any business that is adversely affected may seek compensation" (103). The issue therefore rests on determination whether indirect expropriation occurs every time a government interferes substantially with the value of a foreign investment ("sole effect" doctrine) or the motivation and the aims of the particular government measure are taken into account in determination of whether indirect expropriation occurs. The key concepts for this issue are "sole effect doctrine", "police powers doctrine", and "proportionality".

Illustrative case of the effects that indirect expropriation doctrine can have on sovereignty of the states include Tippets, Metalclad v. Mexico and Biwater v. Tanzania, as cases demonstrating the limits that the practice of investment arbitration puts on sovereignty, and Methanex v. USA as a case which demonstrates the trend to protect the sovereignty of the state by arbitration tribunals.

Metalclad was an American company that obtained a permit to operate a landfill in Mexico in the 1990s. The local municipality denied a construction permit to the corporation, which the tribunal deemed to be in violation of both the fair and equitable treatment and expropriation provisions of the NAFTA. Of interest for this paper, however, is the decision of the tribunal on the Ecological Degree issued by the governor of the municipality, which prohibited construction in the relevant areas. The Metalclad tribunal decided that this measure also amounted to indirect expropriation, since it substantially deprived the investor of the value of its investment. The award stated that the "Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree..." (Metalclad v. Mexico 2000, 85) It added that indirect expropriation could occur "even if not necessarily to the obvious benefit of the host State" (86). This formulation of the tribunal implies that any measure that the government of Mexico might take, even one demonstrably related to public interest is unlawful under the international law, unless compensated for.

Biwater v Tanzania is a case where the investor claimed expropriation on the basis of termination of contract and seizure of property in the domain of water and sewage infrastructure and services. Although the tribunal did not award any damages to the investor, it decided that expropriation did occur, also effectively excluding consideration of sovereign regulatory powers of the state by recognizing "that many tribunals in other cases have tested governmental conduct in the context of indirect expropriation claims by reference to the effect of relevant acts, rather than the intention behind them" (Biwater v. Tanzania 2008, 463). Similar reasoning can also be found in the Tippets case from the Iran-US Claims Tribunal, with the tribunal stating that expropriation occurs "whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral" (Iran-US Claims Tribunal 1984, 12).

These cases represent one of the spectrum of approaches of tribunals to indirect expropriation, one that puts clear limits of sovereign regulatory powers of the state. This is done by not taking into consideration the motivation of the government measure in question, therefore requiring compensation even for legitimate public interest measures in case these measures affect the value of foreign investment. This is sometimes called the "sole effect" doctrine.

On the other side of the spectrum of investment arbitration practice, we can find the doctrine of "police powers" of the state, which excludes the liability of the state for measures tantamount to expropriation in cases where the measures are a part of the exercise of the state´s police powers. While we can found a large amount of cases, where the police powers doctrine is invoked in defense of the states, the tribunals are generally not keen in taking the police powers into their consideration, mainly due to the fact, that the concept is not well established and defined in the practice of investment arbitration. In theory, the measures that fall under the police powers of the state are bona fide, non-discriminatory measures that are taken for a legitimate public interest purpose, mainly to protect health, safety or welfare of citizens. One often cited example of a tribunal seemingly adopting the broad definition of "police powers" is the Methanex case. Methanex is a Canadian producer of methanol. After the state of California banned the use of MTBE as a gasoline additive due to environmental concerns, Methanex filed a case against the US alleging a breach of NAFTA provision on expropriation among other things.

In direct opposition to the Metalclad tribunal´s assessment, tribunal in Methanex v. USA rejected implicitly the "sole effects" doctrine and put forward the doctrine of "police powers" as the most important concept when deciding whether expropriation occurred or not. The tribunal stated that "a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensable…" (Methanex v. USA 1999: Part IV - Chapter D, 4).

Finally, the concept of "proportionality" provides a certain middle ground in the practice of investment arbitration between the sole effect doctrine and the police powers doctrine. It consists of adding a proportionality criterion into consideration of whether expropriation occurred or not. For a measure of a state to be considered lawful under the most common investment treaties, it needs to be (among other things) proportional to the legitimate public interest purpose that the government is pursuing by adopting this measure. To see this concept applied in practice, see for example Occidental v. Ecuador or Feldman v. Mexico. It is also important to point out that most of the new investment treaties contain a clarification of the expropriation clause, which specifies that legitimate public interest measures do not constitute indirect expropriation, although the manner in which this clarification will be interpreted by investment tribunals is not yet clear.

This analyses clearly demonstrates the existence of a conflict between investment protection and national sovereignty on the level of investment arbitration in relation to the concept of indirect expropriation. The key concept of investment protection here is the "sole effects" doctrine, while the sovereignty is protected by the doctrine of "police powers", with the practice of investment arbitration showing that tribunals usually try to balance these polar opposites, sometimes through applying the proportionality criterion.

3.2. Legitimate Expectations

Within the current interpretation of the FET standard of investment protection, the states are required to conform their policies to the legitimate expectations of the investor. The goal is to provide the investors with a stable investment environment where they are able to calculate their profits, which encourages investment in general. The controversy of this concept rests on the interpretation of which expectations can be seen as legitimate, and which are not. Within the theoretical framework of this article, the conflict rests on the interpretation of where the line is between a sovereign change in policy of a state (for example after elections), and a breach of investor´s legitimate expectations about the investment environment and their ability to make profit (Vicuna 2003, Zeil 2011).

Legitimate expectations were first introduced in investment arbitration practice in 2003 by the tribunal in Tecmed v. Mexico, which based the concept on good faith practices. It has since become an integral part of the FET standard. As a matter of fact, it is now rare to see a claim of FET breach without claiming a breach of legitimate expectations. The basic definition comes from Tecmed, where the tribunal stated that in view of the good faith principle, the relevant treaty "requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment" (Tecmed v. Mexico 2003, 61). In terms of the theoretical framework of this article, legitimate expectations fall firmly under the concept of investment protection. The issue is therefore under which circumstances do investment tribunals rule that the legitimate expectations of the investor are breached. This can lead to inconsistencies, as there is no explicit rule as to what consists legitimate expectations. More recently, the tribunals have been more explicit in their determinations, often providing a more restrictive conceptualization of legitimate expectations, such as the Antaris tribunal, which stated that an investor "must establish that (a) clear and explicit (or implicit) representations were made by or attributable to the state in order to induce the investment, (b) such representations were reasonably relied upon by the Claimants, and (c) these representations were subsequently repudiated by the state" (2014, 97). However, even within this framework, inconsistencies seem to be abundant. The limits that the concept of legitimate expectations put on state sovereignty will be illustrated by Eiser and Energia Solar v. Spain., SW Solar and Wirtgen v. Czech Republic, Blusum v. Italy.

The most cited cases in the matter of legitimate expectations are the so-called "Argentinian cases", which relate to arbitrations initiated as a response to measures enacted by Argentina in the wake of their financial crisis from the turn of the century. The cases are often used as a demonstration of inconsistencies of the investment arbitration regimes when it comes to legitimate expectations. As these cases have been analyzed extensively (Lavopa 2015, Brockova 2016), I will illustrate the issue on some of the more recent cases. For reference, the most important of the "Argentinian cases" include LG&E v. Argentina, CMS v. Argentina, Total v. Argentina and other.

In one of the most recently resolved cases, Eiser and Energía Solar v. Spain (2017), the tribunal decided that the change in the government policy after the Spanish election of 2011 in the energy sector amounted to the breach of the investor´s legitimate expectations and therefore constituted the breach of FET. More specifically, the government changed the subsidy scheme for the solar energy sector in order to address the issue of government deficit and public dept. An added complication to the story is the fact that Spain in fact has international obligations to keep its deficit in line with the prescribed levels under the EU pact. This case raises the question of where the line is between a change in policy after a political change brought on by elections, which is also based on international obligations, and the legitimate expectations of the investor to have the same regulatory framework applied no matter what government is in force. The case also highlights that the problems are exacerbated in domains where the investment has a slow return rate (the investor needs a stable environment for a long time) and in combination with a Western type democracy, where the right wing and left wing government change periodically.

To make the matter even more confusing, a similar case involving tariffs for renewable energy sector occurred in Italy: Blusun v. Italy. In this case however, the tribunal decided that the legitimate expectations of the investor were not breached, since the government measure was proportionate to the public policy goal it was pursuing (Blusun v. Italy 2017). The same way, once again in the solar power business, the claim in SW Solar and Wirtgen v. Czech Republic, was dismissed on similar grounds (SW Solar and Wirtgen v. Czech Republic 2017).

The practice of investment arbitration therefore shows that legitimate expectations represent a problematic concept. The state sovereignty is protected by argumentation on the legitimacy of a change in policy as part of the political (democratic) process. The investors are protected by the doctrine of legitimate expectations, which is set up to ensure stable investment environment. The most recent developments in investment treaty-making point to a possible elimination of the legitimate expectations concept as part of the FET standard. However, as the ISDS cases are always brought under the "older" treaties, and we can therefore assume that legitimate expectations will continue to be relevant to the practice of investment arbitration for the foreseeable future.

3.3. Domestic Law on the Level of International Investment Arbitration

Within the theoretical framework of this article, the issue of domestic law in investment arbitration refers to the conflict between sovereign judicial powers of a state within its own territory and the ability of investors to challenge the decisions of a domestic court through investment arbitration. The issue usually arises when the investor first seeks to challenge a regulatory measure on the level of domestic courts. In cases where the investor loses in the domestic courts, he can challenge the measure on the level of an investment arbitration tribunal, which is than required to decide whether it will take into question the decision of the domestic court and order compensation despite its verdict. Alternatively, the investor might directly seek remedy at the level of an investment tribunal, which might then be required to interpret domestic legal framework without the necessary expertise.

The issue generally comes down to whether the tribunal applies the so-called Azinian principle. As cited the most recently in Fouad v. Jordan (2017), the Azinian principle states that "a governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level" (86). Cases invoked during Fouad v. Jordan include Mondev v. USA and Helnan v. Egypt, further refining the principle by citing: "Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal" (Mondev v. USA 2002, 126), and "when a tribunal is considering an issue of domestic law previously ruled upon by a domestic court, the tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice"(Helnan v. Egypt 2008, 106). Therefore, investment tribunals generally do not put into question the decisions of domestic courts. Despite this fact, in many pending cases, the investors are asking the investment tribunals to revisit the rulings of domestic courts, including constitutional courts. Examples include: Cosigo v. Colombia, Chevron v. Ecuador. Previously, investment tribunals did take on jurisdiction in cases where interpretation of domestic law was necessary, since there was no ruling of domestic courts on the matter, such as Metalclad v. Mexico, where the tribunal accepted the interpretation of the investor, which relied on the assertion that the domestic legal framework did not enable the municipality to revoke the permit for operation of a waste landfill (Metalclad v. Mexico 2000).

The second issue of investment arbitration related to judicial sovereignty is systemic, and refers to the fact that the arbitration takes place outside the sovereign system of domestic courts. Of course, this is part of the core rationalization for the system of international investment arbitration. It nevertheless represents a voluntary concession of sovereignty on the part of the state, justified by the expected inflow of foreign investment resulting from the increased protection against arbitrary use of legal system against the investors by the state. The current efforts at reform of investment arbitration have also addressed this issue, by focusing on the possibility of introducing exhaustion of local remedies provisions into international investment agreements (IIAs). This would require the investors to first file their case in the domestic courts before seeking compensation on the international level. These provisions are already being used in several of the more recent IIAs, such as the Albania-Lithuania Bilateral Investment Treaty and the Romania-Sri Lanka Bilateral Investment Treaty.

Other option is to completely do away with ISDS and simply rely on domestic courts for arbitration. This requires a high level of confidence towards domestic courts, and a certain level of balance between imported and exported capital between two partners. While this seems unrealistic in many contexts, such as bilateral treaties between highly developed and developing countries, it might become reality in the "new NAFTA" between Canada and USA, pending ratification of the United States-Mexico-Canada Agreement, which completely eliminates ISDS mechanisms in the relationship between the USA and Canada.

The conflict shown in this part of the paper between the national sovereignty and investment protection rests on the application of the Azinian principle. The practice of investment arbitration shows that the tribunals usually apply this principle. It means that apart from the systemic framework, which clearly limits national sovereignty by definition, the tribunals are mostly willing to protect judicial sovereignty of domestic courts.

Conclusion

This article analyses the competing concepts of investment protection and national sovereignty on the level of investment arbitration. Firstly, we set this conflict firmly within the wider theoretical framework by situating the concept of national sovereignty within the neorealist conception of global political order with its focus on nation state as the main actor, and placing the concept of investment protection within the neoliberal conception of a globalized economic order with foreign investment as the major driver of economic growth.

The article then analyses the practice of investment arbitration to come to relevant conclusion regarding the aforementioned conflict. Through this analysis, I came to 3 conclusions:

- there is a definite conflict between investment protection and national sovereignty on the level of investment arbitration, which enables us to situate investment law within the theoretical framework of international relations;
- the conflict rests mostly on the way that the tribunal approaches three key concepts: indirect expropriation, legitimate expectations and domestic judicial sovereignty;
- With the exception of the domestic judicial sovereignty, the conflict has not been resolved consistently by the investment tribunal.

These conclusions set up new research opportunities and questions, such as: How does the way that investment tribunals resolve the conflict change in time? Are the tribunals tending toward national sovereignty or investment protection over time? Do the new investment treaties resolve the conflict set up in this paper? Answering these questions would contribute significantly to the general theory of international relations.

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