Editorial: The Workshop 'Pursuing Fairness in Times of Crisis: Reflections on the Future of International Economic Law' Held within the 2023 ESIL Annual Conference

Senior researcher PhD. **Federica CRISTANI**[1]
Senior research fellow **Marina TRUNK-FEDOROVA**[2]
Associate professor **Cristina Elena POPA TACHE**[3]

Abstract

This editorial reflects on the discussions held during the workshop 'Pursuing Fairness in Times of Crisis: Reflections on the Future of International Economic Law', organized by the Interest Group on International Economic Law of the European Society of International Law (ESIL). The workshop highlighted the challenges and ethical dilemmas related to fairness in international investment arbitration. The selection of five contributions for this special edition from a multitude of submissions underscores the diversity and complexity of the topics addressed. The editorial also highlights the decline in new investment treaties in recent years, analyzing factors such as economic nationalism, geopolitical tensions, and the reassessment of existing treaties. In the current context, investment treaties remain crucial but require ongoing reassessment to ensure a fair balance between investor protection and state sovereignty.

Keywords: *European Society of International Law, investment arbitration, treaties, state sovereignty.*

JEL Classification: F21, K33, K41, O10

DOI: 10.62768/IILJ/2024/4/2/01

Please cite this article as:
Cristani, Federica, Marina Trunk-Fedorova and Cristina Elena Popa Tache, 'Editorial: The Workshop 'Pursuing Fairness in Times of Crisis: Reflections on the Future of International Economic Law' Held within the 2023 ESIL Annual Conference', *International Investment Law Journal* 4, no. 2 (July 2024): 131-136.

1. Introduction

The following contributions are based on presentations made at the Workshop

[1] Federica Cristani - Head of the Centre for International Law, Institute of International Relations in Prague, Czech Republic; Co-Chair of the Coordinating Committee of the Interest Group on International Economic Law of the European Society of International Law (ESIL) for the period 2020-2023, ORCID: https://orcid.org/0000-0003-0301-0960, cristani@iir.cz.

[2] Marina Trunk-Fedorova - Christian-Albrecht University of Kiel, KEEL - Kiel Center for Eurasian Economic Law, Germany; Co-Chair of the Coordinating Committee of the Interest Group on International Economic Law of the European Society of International Law (ESIL), ORCID: https://orcid.org/0000-0002-2549-484X, mp_fedorova@law.uni-kiel.de.

[3] Cristina Elena Popa Tache - researcher member of CIRET – Center International de Recherches et Études Transdisciplinaires Paris; Co-Chair for ESIL IG International Business and Human Rights; associate professor at the Faculty of Psychology, Behavioral and Legal Sciences of the 'Andrei Șaguna' University in Constanța, Romania, ORCID: https://orcid.org/0000-0003-1508-7658, cristinapopatache@gmail.com.

on "Pursuing Fairness in Times of Crisis: Reflections on the Future of International Economic Law", organised by the Interest Group on International Economic Law of the European Society of International Law (ESIL) as a side event to the 2023 ESIL Annual Conference, which was hosted by the Faculty of Law and Political Science at Aix-Marseille University between 30 August-2 September 2023.

The workshop theme reflected the general topic of the ESIL Research Forum, 'Is International Law Fair? Le droit international est-il juste?', an ambitious and thought-provoking question about the "values inherent in international law"[4].

2. Discussion

The workshop engaged with the question of fairness in the specific field of international economic law. The relevant call for papers received a large number of submissions (over 50), which testified to the topical relevance of the question at hand. In the end, more than 30 speakers engaged in very stimulating discussions during the two days of the workshop. One of the most recurrent discussions about fairness concerned its definition and understanding as 'equity', and the question of how to concretely 'measure' and evaluate fairness in international economic law issues – for instance, how to assess whether an evaluation of damages carried out by an investment arbitral tribunal is 'fair'.

Five articles based on workshop contributions have been selected for this special publication in the International Investment Law Journal representing different dimensions of the themes discussed at the workshop. The articles tackle different aspects connected to fairness in international investment arbitration.

The first contribution by Paolo Vargiu focuses on the role of arbitrators and ethical dilemmas, with the aim to answer the question to what extent they "should indeed add a certain level of creativity to their interpretation of treaties, or they should stick to the letter of the law in spite of the often problematic consequences". The article calls for a recalibration of the "rules of the game", in order to build up a more equitable system in the international investment regime.

Also, the contribution by Marina-Elissavet Konstantinidi deals with the role of arbitrators, especially with the one of party-appointed arbitrators in international investment and commercial arbitration, enquiring whether they can be considered "truly impartial".

Moving to the procedural aspects of international investment arbitration, the contribution by Erik W. Brouwer offers an insight on the ongoing discussion that is taking place in the context of the ISDS reform process at UNCITRAL's Working Group III, especially when it comes to awards on damages and valuation methodologies.

Going to the substantive part of international investment treaties, on the other hand, the contribution by Klara Polackova Van der Ploeg resonates on the "normative asymmetry between the rights and obligations of investors and host states".

This special issue concludes with the contribution by Cristina Elena Popa Tache and Cătălin Silviu Săraru focusing on state contracts, bringing into the debate the "dynamic intersection between administrative law and public international law".

---

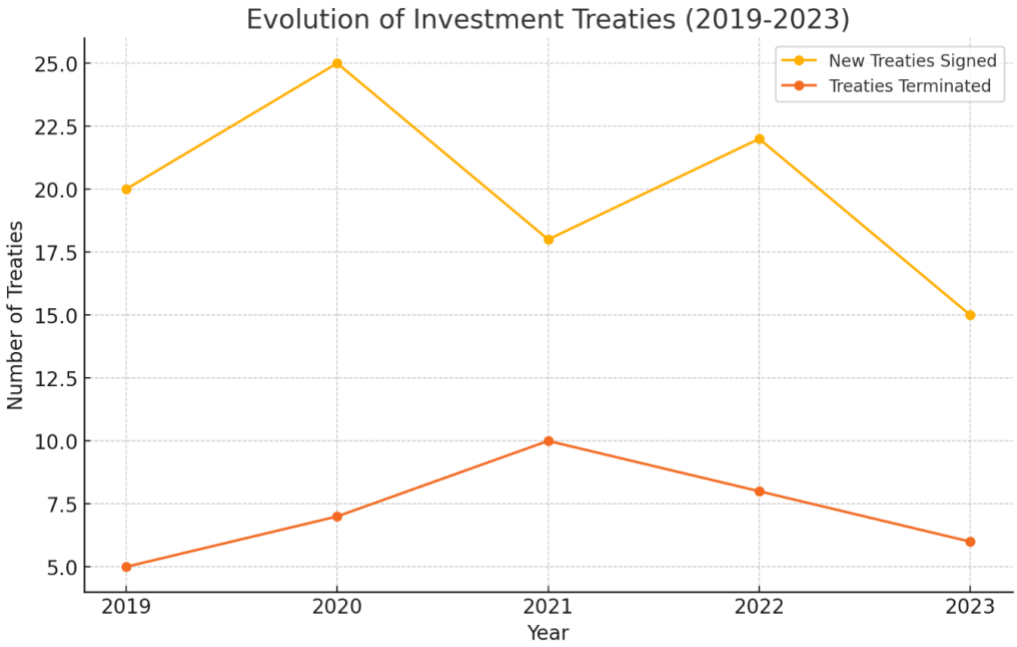
[4] 2023 ESIL Annual Conference, Conference Theme, available at the official website https://www.esilaix2023.fr/conference-theme.

3. Some general observations on international investment law

The matters addressed in the articles of this issue highlight the importance of treaties as primary instruments of international investment law, playing a high role in international investment arbitration[5].

Investment treaties are international agreements that establish rules and standards for protecting foreign investments and promoting capital flows between countries. Within such a treaty, there are primarily provisions regarding the fair and non-discriminatory treatment of investors, protection against expropriation without fair compensation, freedom to transfer capital, and mechanisms for resolving disputes between investors and states. Their main purpose is to create a stable and predictable environment for foreign investments, thereby encouraging economic growth and development among signatory parties. In recent years, they have often been criticized for potentially limiting governments' ability to regulate in the public interest and for generating costly litigation. However, even considering these arguments, we would observe that treaties remain "a necessary evil."

Here is a graph showing the evolution of investment treaties over the last five years, based on sample data. The graph illustrates the number of new treaties signed and the number of treaties terminated each year from 2019 to 2023[6].



[5] See some consideration in Qurbani, Indah Dwi, Mieke Yustia Ayu Ratna Sari, Andri Yanto and Faidatul Hikmah, *About an Oil and Natural Gas Mining Treaty in the High Seas of the North Natuna Region with Economic, Legal and Environmental Aspects*, Juridical Tribune – Review of Comparative and International Law 14, no. 2 (June 2024), pp. 301–320.

[6] Source based on UNCTAD Investment Policy Hub available here: https://investmentpolicy.unctad.org/, accessed on 29.06.2024.

The dramatic decline in the emergence of foreign investment treaties can be attributed to a series of factors such as increasing economic nationalism, geopolitical tensions, reassessment of existing treaties, the COVID-19 pandemic, shifts in sustainable development policies, and the rise in investor-state disputes.

Some states are adopting protectionist policies and are less willing to sign treaties that could limit their economic sovereignty. These factors are compounded by strained relations between major powers, such as the United States and China, which impact the global investment environment and lead to a decrease in bilateral investment treaties[7].

We are at a moment when states are showing a tendency to reassess and even terminate existing treaties, considering them no longer serving their current economic and social interests.

Following the pandemic, which disrupted the global economy and reduced the negotiation and signing of new investment treaties, many governments are now more concerned about the social and environmental impact of foreign investments. This complicates negotiations and the signing of new treaties, with a stronger focus on climate change.

Numerous disputes and international arbitrations have led to reluctance in signing new investment treaties, as states become more aware of the so-called legal risks associated[8]: costly and lengthy arbitrations, substantial compensations that states may be obligated to pay to investors, and the limitation of governments' sovereignty in regulating public interest are current concerns. States consider that these treaties can create legal uncertainty due to varied interpretations by arbitral tribunals and may deter governments from implementing necessary regulations for environmental protection, public health, and workers' rights, for fear of costly litigation. All these factors lead states to reassess the benefits and potential drawbacks of new investment treaties. These observations indicate the continued existence of a state immunity issue that still lacks robust responses. Clear distinctions must be made between acts of sovereign authority (*acta jure imperii*), i.e., governmental activities of the state, and acts of commercial authority (*acta jure gestionis*), i.e., commercial activities of the state[9]. For the second category of acts, of course, the state can also do what a private individual would do[10]. In this regard, it has been noted that conflicts often arise between representatives of the state and individuals when the state engages in such acts, raising questions about the jurisdiction of foreign courts to adjudicate such cases. While some parts of the doctrine still do not admit this possibility, considering the equality of states, others argue that if

---

[7] See Cristina Elena Popa Tache, *The EU-China road to the Comprehensive Agreement on Investment*, „Juridical Tribune - Tribuna Juridica", volume 12, issue 4, December 2022, pp. 476-494.

[8] These risks are actually immunity issues. See Cristina Elena Popa Tache**,** *State Immunity, Between Past and Future*, „AJEE (Access to Justice in Eastern Europe)", Issue 1 (18) February 2023, pp. 97-110, available here: https://ajee-journal.com/upload/attaches/att_1676384405.pdf, accessed on 29.06.2024.

[9] See Fox, H., *Privileges and immunities of the head of a foreign state and ministers,* in I. Roberts (Ed.), *Satow's diplomatic practice*, Oxford University Press, 2009, pp. 171-192; Ernest Toochi Aniche and John Martyn Chamberlain, *A critical examination of the British municipal court rulings on cases of international immunity: Revisiting the imperatives of politics of international law*, Cogent Social Sciences, 2:1 online, 2016, DOI: 10.1080/23311886.2016.1198523.

[10] George Meitani, *Curs de drept internațional public/ Public Iinternational Law Course,* Ed. Al. T. Doicescu, Bucharest, 1930, p. 93.

in the first case the interference of foreign courts in the administration and policies of another state was not recognized, when it comes to acts that the state performs as an ordinary individual, there is no danger for foreign courts to intervene and examine the processes that arise between the state and individuals[11].

The analyses have been in the direction that in these cases, states do not exercise an act of authority but act obligingly towards the other parties as an ordinary individual, and its independence cannot be lifted as a shield behind which it should not take into account the complaints of its creditors[12]. The remark is exceptional and holds significance for the terminology of state immunity. Here, it is observed that this was referred to as "independence" and used by states as a shield when their liability was triggered. These differences were seen as restrictions on state independence and were treated as such at that time, meaning they were substantial exceptions to the rule of state immunity. Without delving into the issues of state immunity at this point, we leave the debates open with hopes for future workshops. Ultimately, state immunity is a characteristic of legal personality that continues to evolve.

These combined factors have led to a decline in the number of new treaties on foreign investments in recent years.

4. Conclusions

In conclusion, the workshop "Pursuing Fairness in Times of Crisis" has brought to light the complex ethical dilemmas in international investment arbitration, highlighting intense exchanges of ideas that underscore the continuously dynamic nature of global economic law, particularly international investment law. The diverse selection of contributions for this special edition underscores the variety of perspectives on fairness in international investments, providing insights that enrich our understanding of norms and legal practices.

The significant decline in new investment treaties reflects a period of reflection and adaptation among nations, influenced by economic nationalism, technologies, geopolitical shifts, and an increasing focus on sustainable development goals. This introspection paves the way for more balanced and forward-looking approaches in future treaty negotiations[13].

Despite the challenges, the discussions during the workshop underline a shared commitment to promoting fairness in international economic relations. By acknowledging the intricacies of disputes between investors and states and by adapting the international legal framework, key stakeholders can chart paths towards more equitable and sustainable investment practices. These ongoing dialogues and academic exchanges promise continued progress, contributing to shaping policies that promote both economic prosperity and social well-being, while recognizing that investment

---

[11] G. Meitani, *Străini în fața tribunalelor/Strangers Before the Courts,* Bucharest, 1908, p. 94, note 2.

[12] Piédelièvre R., *Précis De Droit International Public, Ou, Droit Des Gens, Volume 1*, 1894, F. Pichon, Paris, p. 266. The manuscript has been reconstructed and republished following serious damage. It was republished by Nabu Press on February 22, 2012, although there have been other editions republished by other publishers.

[13] Popa Tache, Cristina Elena and Cătălin Silviu Săraru. 2024. *Evaluating Today's Multi-Dependencies in Digital Transformation, Corporate Governance and Public International Law Triad*. Cogent Social Sciences 10 (1) online open access. DOI:10.1080/23311886.2024.2370945.

treaties remain effective instruments for global cooperation and development.

Acknowledgements

We would like to thank the editors of the International Investment Law Journal for their fruitful cooperation and we wish the readers an interesting and thought-provoking reading!

Prague, Kiel and Bucharest
June 2024

Bibliography

1. 2023 ESIL Annual Conference, Conference Theme, available at the official website https://www.esilaix20 23.fr/conference-theme.
2. Aniche, Ernest Toochi and John Martyn Chamberlain, *A critical examination of the British municipal court rulings on cases of international immunity: Revisiting the imperatives of politics of international law*, Cogent Social Sciences, 2:1 online, 2016, DOI: 10.1080/23311886.2016.1198523.
3. Fox, H., *Privileges and immunities of the head of a foreign state and ministers,* in I. Roberts (Ed.), *Satow's diplomatic practice*, Oxford University Press, 2009, pp. 171-192.
4. Meitani, George, *Curs de drept internațional public/ Public Iinternational Law Course,* Ed. Al. T. Doicescu, Bucharest, 1930.
5. Meitani, George, *Străini în fața tribunalelor/Strangers Before the Courts,* Bucharest, 1908.
6. Piédelièvre, R., *Précis De Droit International Public, Ou, Droit Des Gens,* Volume 1, 1894, F. Pichon, Paris.
7. Popa Tache, Cristina Elena and Cătălin Silviu Săraru. 2024. *Evaluating Today's Multi-Dependencies in Digital Transformation, Corporate Governance and Public International Law Triad*. Cogent Social Sciences 10 (1) online open access. DOI:10.1080/23311886.2024.2370945.
8. Popa Tache**,** Cristina Elena, *State Immunity, Between Past and Future*, „AJEE (Access to Justice in Eastern Europe)", Issue 1 (18) February 2023, pp. 97-110, available here: https://ajee-journal.com/upload/attaches/att_1676384405.pdf, accessed on 29.06.2024.
9. Popa Tache, Cristina Elena, *The EU-China road to the Comprehensive Agreement on Investment*, „Juridical Tribune - Tribuna Juridica", volume 12, issue 4, December 2022, pp. 476-494.
10. Qurbani, Indah Dwi, Mieke Yustia Ayu Ratna Sari, Andri Yanto and Faidatul Hikmah, *About an Oil and Natural Gas Mining Treaty in the High Seas of the North Natuna Region with Economic, Legal and Environmental Aspects*, Juridical Tribune – Review of Comparative and International Law 14, no. 2 (June 2024), pp. 301–320.
11. UNCTAD Investment Policy Hub available here: https://investmentpolicy.unctad.org/, accessed on 29.06.2024.