IMPRS-SDR
International Max Planck Research School for Successful Dispute Resolution in International Law, Heidelberg / Luxembourg

Evaluation Report 2009 - 2014
International dispute resolution is a major, and growing, aspect of international relations in the public, private, and public/private spheres. In the public sphere, for example, tensions between States competing for limited natural resources require dispute settlement institutions to find peaceful solutions they could not achieve through negotiations or other nonviolent means. In the private sphere, globalisation, and political, commercial and technological developments, means parties are increasingly mobile and active internationally. As mobility and activity increase, so do disputes that must be brought before courts or other arbitration bodies. In the public/private sphere, substantial business investment in foreign States is dependent on investment treaties that guarantee judicial protection through arbitral tribunals.

The school was created in 2009 through the Max Planck Institute for Comparative Public Law and International Law in Heidelberg together with the Heidelberg University Law Faculty, Institute for Comparative Law, Conflict of Laws and International Business Law. In 2013 the newly founded Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law assumed a leading position within the IMPRS-SDR and from 2014, the IMPRS-SDR will become integral also with the Max Planck Institute Luxembourg. In the future, the University of Luxembourg, Faculty of Law, Economics and Finance will also partner with the IMPRS-SDR.

The speakers of the school would like to express their gratitude to all who have helped secure and strengthen the school since its foundation: The participating professors, the members of the advisory board, the former coordinator Marcus Mack, the current coordinator Dr. Hannes Wais, and of course all doctoral students of the IMPRS-SDR.

Heidelberg/Luxembourg, April 2014

Foreword

Burkhard Hess  Thomas Pfeiffer  Rüdiger Wolfrum
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Heidelberg University, Faculty of Law

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Participating Institutions

1. Max Planck Institute for Comparative Public Law and International Law, Heidelberg
2. Heidelberg University, Faculty of Law, represented mainly by the Institute for Comparative Law, Conflict of Laws and International Business Law (pictured)

4. University of Luxembourg, Faculty of Law, Economics and Finance (in case of a successful evaluation)
The IMPRS-SDR Activities

The IMPRS-SDR supports its research students in two main ways: by fostering an international research environment focusing on both private and public international law; and by attracting international legal specialists to contribute their guidance and expertise. This support takes various forums including: research school meetings, annual seminars, internships at the Permanent Court of Arbitration in The Hague, and invitations to research or attend conferences abroad.

The research school meetings usually occur every two months and are in English (the IMPRS-SDR working language). Students present on a topic such as their research progress, a recent decision, a new law or law-making initiative or other important research topic, and an open discussion follows. School faculty, supervisors of the students presenting, visiting professors and other legal experts also regularly contribute. The different legal backgrounds and shared perspectives of all participants generate a significant appreciation and understanding of the complexity and nuances of international legal issues.

International Perspective

The core educational concept of the IMPRS-SDR is recognising that international legal research extends beyond any national legal approach. Every domestic legal culture has developed perspectives, objectives and rationales in a particular context. In the wider international context, however, researchers require shifted perceptions to insightfully analyse problems and conceive feasible solutions.

A mainspring of the IMPRS-SDR international research environment is the student body with, currently, 14 different nationalities (Belgian, Chilean, Chinese, Colombian, German, Greek, Icelandic, Italian, Mexican, Norwegian, Russian, Serbian, Spanish and Ukrainian). More than 50% of students are from countries other than Germany. All German students have a solid international background as well, with many holding masters degrees from respected English and American law schools in addition to their German law degrees. Such a range of experience perfectly positions the IMPRS-SDR to realise a genuinely international comparative approach, while the depth and variety of experience allows the IMPRS-SDR to bridge the public-private divide in international law.
Meetings take place in Heidelberg; either at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg University, or the Max Planck Foundation for International Peace and the Rule of Law. As the IMPRS-SDR will be mainly situated within the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law by the end of 2014, when the doctoral students admitted in 2012 are expected to have finished their projects, meetings will then take place in Luxembourg.

At the annual seminar all doctoral students present and report on the progress of their research projects. The seminar also provides a comprehensive review of the overall IMPRS-SDR research position. This stocktaking allows the school’s future agenda to be thoughtfully and successfully structured according to student requirements with little need for ad hoc adjustment.

Advisory board members take part at the annual seminar, and external speakers – scholars and practitioners alike – are also regularly invited to speak on topics that relate to the IMPRS-SDR research agenda. For instance, presentations have been given by Brooks W. Daly, addressing current trends at the PCA, by Professor Christoph Schreuer on ICSID arbitration and by Professor Mark Villiger on proceedings before the ECHR. These presentations give students first-hand access to the latest thinking in dispute settlement in international law.

The Internships at the Permanent Court of Arbitration in The Hague, organised by the IMPRS-SDR, are an exceptional opportunity for students to substantially augment their international arbitration research. During six months, interns are fully integrated into the working processes of the Permanent Court of Arbitration. School faculty ensures that each internship closely relates to an individual student’s research. As of April 2014, three IMPRS-SDR doctoral students have completed internships (Ms. Annabelle Möckesch, Ms. Astrid Wiik, Ms. Ina Gätzschmann) that have had a major positive impact on their research projects. A fourth student, Mr. Raymundo Treves, is currently an intern at the court.

In Heidelberg and Luxembourg, IMPRS-SDR doctoral students are provided with working places within the participating institutions and have access to some of the most extensive legal libraries in Germany. They may also attend lectures on their research topics at the Heidelberg University, in particular on international commercial arbitration and transnational commercial law. Students are invited to pursue part of their research abroad, as visiting researchers at universities and other research institutions, or to do field work of special interest. Apart from Germany, students...
have also pursued their research in Australia (Mr. Levent Sabanogullari), Uganda (Mr. Patrick Wegner) and at Cambridge University (Ms. Astrid Wiik).

**IMPRS-SDR Candidates**

The IMPRS-SDR is looking for highly qualified candidates with a strong international focus as regards both their experience and their research, as well as an excellent level of English. When research positions became available in 2009, 2010 and 2011, calls for applications were posted on the homepages of the participating institutions. Calls were publicised most effectively by informing renowned colleagues at German universities and abroad, who then recommended qualified applicants.

IMPRS-SDR doctoral students are accepted through a two-stage process. The first stage is determined based on written materials submitted by applicants. Selected applicants, in the second stage, are invited to a personal interview. IMPRS-SDR doctoral students are initially expected to complete their thesis within three years. Due to the extensive focus on practice, however, some projects may be extended.

The research school strives (so far successfully) to maintain a level of at least 50% foreign students and 50% female students for its research positions and scholarships. Out of 20 IMPRS-SDR doctoral students, 12 students have a Nationality other than German. 13 students are female.
The IMPRS-SDR programme researches the institutional and procedural conditions that best lead to successful international dispute resolution. This includes international court, tribunal and arbitration proceedings (especially investor-state and commercial arbitration), WTO adjudicatory bodies, international insolvency proceedings, and alternative dispute resolution methods. In addition, the IMPRS-SDR investigates the structures and deontology of dispute resolution bodies and their stakeholders.

Underpinning this research is the core premise that comparing different institutions from public international law, international business law and criminal law perspectives will yield insights into effective conflict resolution through more suitable institutions and procedures. This reflects the reality of transnational litigation that is not confined to domestic borders or boundaries between private and public international law.

For example, arbitration, now accepted as a reliable alternative to court litigation, means national jurisdictions and international institutions often compete for the most liberal regime. In the field of investment protection, public and private international laws uneasily interact in a disparate and fragmented framework.

Within the IMPRS-SDR, the coordinated research projects of doctoral candidates and professors all have an international and comparative or interdisciplinary approach. This provides a fresh perspective in legal science that was previously non-existent due to the strict separation between private international law, public international law and international criminal law.
Dispute Resolution

‘Dispute Resolution’ refers to institutions and proceedings in which, on a legal basis, impartial third parties decide a dispute or conciliate a controversy and help to achieve a mutual agreement. This includes courts, arbitral tribunals, and other comparable institution such as WTO-panels or international claims commissions. Conciliation procedures and mediation proceedings (that have only recently become internationally significant) can also be regarded as dispute resolution methods.

International Dispute Resolution

‘International’, in the school’s research programme, comprises mechanisms of dispute resolution based on both public international and private law when parties are domiciled in different states. Purely national institutions, such as state courts are, in principle, excluded from the research programme. State courts rely on the state’s monopoly of power and its fully developed political society – which are not characteristics of international institutions. However, state institutions possessing strong international components, for example, a multinational bench or the application of international law may be included in the research programme.

International institutions and proceedings to be examined include: the International Court of Justice; International Chamber of Commerce arbitration proceedings; WTO dispute settlements; the International Tribunal for the Law of the Sea; ICSID and its institutions for investor-state arbitration; international tax law arbitration established by the OECD and the European Council; the European Court of Human Rights; the ECJ to the extent that it functions as an arbitral tribunal for disputes between member states and third states; the International Criminal Court; and other tribunals, mediation, and numerous means of conciliation as provided for by international law. Additionally, the research programme will examine classic and alternative techniques of dispute resolution such as mass claim processing, negotiation, mediation, arbitration and choice of court agreement.

The research programme focusses on the development of elements that are commonly found in all of the aforementioned proceedings and that will eventually lead to the forming of a truly international procedural law.

Alternative Dispute Resolution and collective redress raises the recurrent but central question of the objectives of litigation. At first sight, the aims of civil litigation seem well settled. To protect and enforce private rights, civil litigation is supposed to leave no room for a genuine public interest in its outcome. Whether this perception is true or not, the issue has become crucial in the growing field of ADR. The objective of ADR is to simply re-
solve disputes, often without resorting to applicable law. To the extent ADR schemes are based on the party autonomy, such an approach may be viable. However, applied to civil court mediation or consumer dispute resolution the purely private approach inadequate – mandatory legal provisions need to be applied. Nevertheless, an increased self-understanding of dispute resolution (including adjudication) as a service in the interests of the parties may entail further privatisation in this field.

The economic dimension also requires research as an increasing number of dispute settlement providers compete for the most attractive cases. With parallel litigation of related disputes in different courts and arbitration tribunals, forum shopping has become widespread – not only between national courts, but between arbitration and litigation, as well as between overlapping international dispute resolution bodies. Such competition may facilitate efficiency but can lead to a problematic delineation between proceedings. In practice almost all available devices for the delineation of conflicting proceedings have been applied, ranging from simply allowing parallel proceedings, conflicting judgments and anti-suit injunctions, to judicial abstention, comity, forum non conveniens, estoppel, abuse of procedure, lis pendens, and res judicata. Research into coherent solutions for the delimitation of parallel and overlapping litigation is clearly an area the IMPRS-SDR is well placed to advance.

Successful Dispute Resolution

While the IMPRS-SDR programme does not prescribe what success means for individual research projects, study into successful dispute resolution might address at least five aspects:

Firstly, what conditions must be met by an institution offering dispute resolution for it to be accepted and used by parties? So far, some courts have had limited, or even no, cases and could not be regarded as successful. This question may be examined from a sociological, legal-political or even legal-doctrinal perspective.

Next, how consistent and reasoned are the decisions of any dispute resolution institution? Parties will be unlikely to appear before an institution that decides unpredictably, or does not develop an authoritative body of case law. This aspect may be researched empirically or ideologically.

Thirdly, when and under what conditions are the decisions of an institution well accepted and enforced? While international institutions lack a state’s monopoly power and developed political society that compels compliance with a decision, an indicator of success is if a decision is implemented with the assistance of international organisations or adopted by national legislatures.

Fourthly, how impartial, independent and efficient are various dispute resolution institutions? These issues are raised as dispute
resolution, particularly international arbitration, becomes increas-ingly privatised with a small and highly specialised cadre acting interchangeably as advisers, lawyers or arbitrators.

Finally and more broadly, how is successful international dispute resolution affected by the relationship between professional rules (codes of conduct) and procedural law rules on impartiality, as well as the general qualifications of stakeholders in various fields of dispute resolution (mediation, insolvency, enforcement)?

Research Environment

The research topic ‘Successful Dispute Resolution’ is firmly rooted within the ideological tradition of German legal sciences. With this international recognition, and having a public-, private- and criminal-law dimension, the topic stimulates interdisciplinary exchange. It also offers interdisciplinary approaches for political and sociological sciences and questions of globalisation.

The IMPRS-SDR’s beginnings were in the Heidelberg Max Planck Institute for Comparative Public Law and International Law – widely respected for public international law research competence, and the Heidelberg University, Institute for Comparative Law, Conflict of Laws and International Business Law – well recognised for its expertise in private international law and procedure. Now expanded to the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, the IMPRS-SDR is, in addition, integrated into one of the most promising new research institutions in Europe.

Embedded Research

By offering extensive six month internships at the Permanent Court of Arbitration in The Hague, which form an integral part of the research Programme, the school also provides for a comprehensive and invaluable insight into practice. The doctoral students are fully integrated in the working processes of the Permanent Court of Arbitration to develop their understanding of international dispute resolution from academic and practical perspectives. However, school faculty scrutinise each application to ensure the research project is relevant to the work done at the PCA.

Publication

The IMPRS-SDR has its own book series with well-known publisher Nomos. Finished doctoral theses will be published in this book series. However, theses written by students who are not part of the IMPRS-SDR may also be published, provided their topic complements the research focus of the school. Publication in the IMPRS-SDR book series requires, at the minimum, a magna cum laude. Publications by research school members are financially subsidised by the school.
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Land and maritime delimitation processes are commonly believed to belong to entirely different areas of law. The International Court of Justice (the ICJ) has stated in the Case Concerning the Frontier Dispute (Burkina Faso v. Mali) that “a process by which a Court determines the line of a land boundary between two States can be clearly distinguished from the process by which it identifies the principles and rules applicable to the delimitation of the continental shelf”. Almost two decades later, it made a similar finding with respect to the rules on land and maritime delimitation. The ICJ affirmed that “these are two distinct areas of the law, to which different factors and considerations apply” [Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria; Equatorial Guinea intervening (Cameroon v. Nigeria; Equatorial Guinea intervening)].

Scholarly writings on public international law and international practice also reproduce by and large this distinction between land and maritime regimes. As explained by Brilmayer, “rights to land territory are acquired by the fact of physical possession while rights to maritime areas are acquired by operation of law in accordance with ‘equitable’ rules”. However, the case law regarding boundary disputes shows that both areas do interact and influence each other. Indeed, when the arguments of the parties to these types of disputes are analysed, a similar argumentation can be distinguished. States dealing with a dispute over land or sea areas tend to base their claims on their general practice and their acts as sovereigns over the disputed area, as well as on the general recognition of their sovereignty by third States. The similarities in the underlying discourse of States faced with territorial or maritime disputes reveal that they consider their maritime entitlements to be just as much a part of their territorial integrity as an area of land.

Thus the purpose of this thesis will be finding the commonalities underlying land and maritime disputes, together with their relevant differences. The hypothesis is that land and maritime disputes belong to the same area of the law, that is, they are disputes regarding the question of who has the right to exercise sovereignty (or sovereign rights) in a determined area of the globe. In both cases there is an intrinsic idea of “attribution” of sovereignty or jurisdiction over a delimited area. This unifying perspective clarifies that both processes of delimitation are governed by overarching principles that require a uniform interpretation and application.

This thesis seeks to show that by emphasizing the differences between the two regimes and by treating them as completely distinctive systems, the commonalities they share are missed. Consequently, there is a risk of inconsistency when two highly similar situations are treated differently just because they take place on land or at sea. Moreover, the treatment of both regimes as utterly distinctive complicates dealing with situations where both land and sea are involved. This is the case, for instance, when the last point of the land boundary is the starting point of the maritime boundary. By highlighting the commonalities between the two regimes this thesis will try to offer a solution to these situations that often create jurisdictional problems for international tribunals.
The arbitral institutions have no legal power to make decisions, but they support and administrate arbitration and arbitral proceedings. A research on arbitral institution is therefore very important and necessary.

The German DIS and the Chinese CIETAC are the most well-known arbitral institutions in the field of international commercial arbitration of the two countries, and both of them are deeply influenced by the legal culture of the country where they are founded: this similarity makes the comparison between these two institutions more meaningful.

CIETAC has experienced a strong growth in international arbitration. However, despite the steady increase of its receiving requests the major worry of the foreign parties about its independence has not been reduced. DIS has adopted its new arbitration rules in order to keep pace with the new German arbitration law, which aims to make Germany a more favourable place of arbitration. But unfortunately DIS has received fewer requests than many other leading international arbitral institutions in recent years. The answers to these problems can be found in the work and organisational management of arbitral institutions.

This research deals with the problems of these two main arbitral institutions, DIS and CIETAC, in Germany and China and proposes suitable solutions.

The methods of this study are functional comparison, organisation theories and field survey. The study is primarily based upon the arbitration laws of these two countries. In some parts a further study on company law and tax law will also be made.

Chinese arbitral institutions are experiencing dramatic reform. This reform aims to change the legal nature of the Chinese arbitral institutions and, further, makes institutions finally independent from local government. But there are 215 arbitral institutions (2011 statistic) in China, which can deal with international commercial arbitration in theory. They are at different independence levels. CIETAC relies on its high reputation to attract more requests than other local institutions; therefore it has no financial problems after its total independence from 2010 and pays corporate tax without tax preference. But other local arbitral institutions might have to struggle to survive, once they lose financial support from the government. The arbitral institutions in China are indeed facing fierce competition not only from domestic local institutions but also from well-known foreign arbitral institutions such as the ICC.

DIS is a registered association under German company law. Because of its non-profit status it enjoys tax preference. DIS is supported partly by its own earnings from administrating arbitral processes and partly by membership fees or donations. In comparison to Chinese arbitral institutions DIS faces little competition from domestic local institutions, but there is strong international competition from other foreign institutions because of the central location of Germany in Europe.

The arrangement of arbitration association in Germany and the legal forms of German arbitral institutions would enlighten Chinese institutions on their reform. However, learning from other countries should always be taken very carefully because those arrangements are based on different legal cultures.

Ms. Sisi Chen comes from Beijing, China. In September 2011, she was admitted to the IMPRS-SDR. Sisi obtained B.A. in Law and M.A. in Economic Law at Xiamen University, China. The German Academic Exchange Service (DAAD) funds her research. Sisi is enrolled as a doctoral candidate at the faculty of law at Heidelberg University. Prof. Dr. Burkhard Hess is her supervisor.

Publications


“Legal Mechanism Research on China’s Technology Development and Innovation Promotion”, Chinese governmental research project paper (co-author)
The research project assesses the potential of fast-track arbitration in German arbitration law by investigating party autonomy in arbitration in general and the parties’ freedom to shape procedural rules in particular.

By extending res judicata to arbitration awards, German legislation demonstrates profound advance confidence in arbitration as a means of dispute resolution. To support this forward acknowledgement, a certain minimum level of due process needs to be ensured. Fast-track arbitration rules appear to exist right on a fine line between valid exercise of party autonomy and disregard of a party’s right to be heard in over-accelerated arbitration.

Put differently, if the ‘playing field’ for arbitration were to be regarded as a three-dimensional system based on a balancing between time, truth and resources, fast-track arbitration serves as a device to examine the tensions between the former two, i.e. timeliness and quality of judgments.

This research project firstly scrutinises the hierarchy of procedural rules in German arbitration law and its system of party agreements on procedural matters. It then explores and juxtaposes the due process limits to these agreements as set in both German constitutional law and European law, led by the question of how far parties can waive their constitutional right to be heard in arbitration proceedings.

Its third part consists of a close analysis of fast-track arbitration rules from ten major international arbitration institutions; this first-of-its-kind systematic comparison of fast-track arbitration rules extracts, systemises and compares respective mechanisms employed to achieve accelerated arbitration.

Combining and relating all three approaches to each other subsequently allows for evaluating the efficiency of the aforementioned mechanisms as well as for testing their validity.

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The research project addresses the issue of inconsistency in international investment jurisprudence and chooses ICSID arbitration, i.e. arbitral proceedings conducted under the auspices of the International Centre for the Settlement of Investment Disputes, Washington D.C., as an exemplary object of investigation.

As elaborated in the first chapter of the thesis, ICSID deserves this particular attention in view of its position as the leading system for the settlement of investor-State disputes within the rapidly growing field of international investment law and arbitration and due to the fact that it has been specifically tailored for the needs and singularities of the said sort of conflicts. ICSID appears to be the preferable forum for investment arbitration in terms of both qualitative and quantitative legal aspects and in particular in comparison with ad hoc arbitrations under the UNCITRAL regime. It is therefore worthy of special support.

Yet, promotional measures should not only tackle system-specific, mainly procedural weaknesses, but – beyond that and most importantly – address the currently strongly criticised inconsistencies of ICSID case law. While this shortcoming is not a unique problem of the ICSID regime, it is more intensely apparent due to particular ICSID-specific features as e.g. its comparably high level of post-award transparency and the lack of a substantial review mechanism.

Before a detailed examination of the issue of jurisprudential inconsistency in the second chapter, the work looks into the fundamental question of “if”, which asks for the general appropriateness of this criticism in view of the particular characteristics of investment law and arbitration. Thereafter, it discusses the question of “how”, i.e. the different forms of inconsistencies, the question “why”, i.e. the systemic and methodological causes of inconsistencies, and the question of “where”, i.e. selected case law examples of inconsistencies. The latter question is answered on the basis of a qualitative-empirical analysis of past ICSID practice. The selection of examples to be examined in depth within this framework was driven by considerations of their representativeness with regard to the forms and causes of inconsistencies identified beforehand.

Having assessed the legitimacy of the inconsistency criticism, the third and last chapter presents an overview on possible reform approaches. Following an evaluation of the different possibilities, the preferable reform model – a preliminary rulings system to be oriented in large parts at the successful model in EU law – is outlined in further detail. While its draft addresses several essential aspects, as e.g. its implementation, its practical conception and arrangement, the modalities of submission of referral questions, its course of procedure and not least the temporal and legal effects of any rulings rendered, the reform proposal is explicitly left open for constructive discussions and improvements as well as for supplementations by further reform measures.
The dissertation focuses on the question of how the mechanisms of provisional protection available under Art. 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) can contribute to successful dispute resolution in international law. Art. 47 ICSID reads:

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

In the early decades of the Convention’s operation, provisional measures were rarely requested and if so, tribunals acted remarkably prudently in granting those measures. The development of a de facto jurisprudence on provisional measures only gained momentum in the early 1990s. While there were only five (publicly known) requests for provisional measures during 1966 and 1990, nine were made between 1991 and 2001, and 39 between 2002 and 2012. The number of confidentially treated requests is certainly higher. As requests have increased, so too has the range of questions surrounding the concept of provisional measures: Under which circumstances does a tribunal have jurisdiction to consider a request? Does the requesting party have to show that there is a danger of irreparable or just significant harm? How is the notion of urgency defined? Is it possible to bring a request for provisional measures during the post award phase? Another important and frequently discussed question concerns the (non-) binding effect of provisional measures since Art. 47 ICSID describes the powers of the tribunal as a mere ‘recommendation’.

The purpose of the thesis is, hence, to give guidance on these questions by identifying the structure, prerequisites and legal effects of provisional measures from both a normative and a case law perspective. It examines, on the one hand, possible scenarios which require an order on the basis of Art. 47 ICSID and, on the other hand, protective mechanisms available to ICSID tribunals to avoid undue interferences in sovereign rights of host states. Orders on the basis of Art. 47 ICSID have been justified when there were possible risks which may have endangered the rights of one of the parties or the proper functioning of arbitration proceedings, for example, loss of an investor’s factory, witnesses being intimidated, destruction of evidence or its probative value, coercion of an investor to withdraw from ICSID proceedings, or enforcement of judgments of national courts against an investor while arbitration proceedings were under way. By contrast, if an order on provisional measures is directed against a host state, it will necessarily confine the state’s sovereignty, mostly in form of temporary constraints vis-à-vis the judicial or executive branches. Even if such an order is of a ‘mere’ temporary nature, it constitutes an interference in sovereign rights which must be properly justified.

Another critical question is the availability of provisional measures protection prior to the constitution of ICSID tribunals. The dissertation reveals that the ICSID Convention contains a structural lacuna and endeavours to find solutions which are feasible without formally amending the Convention. In doing so, the dissertation will put a special focus on the Emergency Arbitration Procedure introduced into the Arbitration Rules of the International Chamber of Commerce in 2012 and the Arbitration Rules of the Stockholm Chamber of Commerce in 2010.

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Provisional Measures Protection in Arbitration Proceedings under the ICSID Convention

Ina Gätzschmann is a German citizen. In April 2010, she was admitted to the IMPRS SDR. Ina obtained her law degree from Heidelberg University in Heidelberg in 2009, and has been employed as research fellow at the MPI for Comparative Public Law and International Law since then. In October 2012, she joined the Permanent Court of Arbitration in The Hague (the Netherlands) as Assistant Legal Counsel, funded by the Max Planck Fellowship Programme. Currently, Ina is a legal trainee at the highest court of Berlin, the Kammgericht.

Prof. Dr. Dr. h.c. Rüdiger Wolfrum and Prof. Dr. Burkhard Hess supervised her thesis, which was submitted to the Law Faculty of Heidelberg University in October 2013.

Publications

“International Dispute Settlement: Room for Innovations?”, (eds. with R. Wolfrum), Springer Heidelberg 2013


“Group of Eight (G8)” in: R. Wolfrum (eds.), Max Planck Encyclopedia of Public International Law, OUP Oxford


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Energy is the key for all economic activity and general social wellbeing. Nothing runs without adequate energy supply. Projects in the field are long term, capital intensive and have adverse impact on the environment. Due to this nature of the activity the energy sector is continuously being exposed to political risk. The fundamental importance of energy makes it very important to strike a balance between economic stability and regulatory flexibility, i.e. the legal protection afforded to foreign private economic interests and the sovereign regulatory powers of host States to pursue the public interest and welfare.

Recently the Energy Charter Treaty has seen the proliferation of investment disputes being initiated under its investor dispute settlement mechanism. The case Vattenfall v. Germany, currently pending before ICSID, is an example of a type of cases more frequently coming up, where there is a tension between investor rights and the host State’s right to regulate. This problem is however not confined to the ECT but relevant in a larger context. It is a part of the so called “legitimacy crisis” that the international investment law regime has been going through lately. To respond to this there has been a call for regimes that provide a more balanced approach in this regard. Current trends in investment and free trade treaty negotiations show that there is a tendency towards implementing principles of sustainable development into the treaties, imposing duties upon the investors and giving the host states more leeway to regulate in the public interest.

The ECT is a multilateral sector specific treaty with a wide material scope. It covers all aspects of commercial energy activities (trade, transit, investments and energy efficiency) and entails provisions on competition aspects, environmental protection, a general exceptions clause and provides for both binding and non-binding dispute settlement mechanisms. In practice the treaty is however primarily oriented towards investment protection in the energy sector and the settlement of investment disputes.

The objective of this research is twofold. The first is to evaluate the ECT as a holistic regime for the energy industry. For this purpose the research takes a broad approach to analysing the treaty and situating it in the global energy governance context. It discusses the treaty in relation to international energy law and the law on sustainable development, with the aim of demonstrating the broad and balanced regulatory approach that it takes in the energy sector, at least in theory. The second objective is to find out if and then how the specificities of the treaty are mirrored in practice. Therefore the research entails an analysis of the investment disputes that have been initiated under the treaty. The purpose is to search for a pattern in the arbitral awards and see whether the tribunals have applied the balanced approach that the treaty offers. Those cases will then be put in a larger context and compared to energy investment disputes under other investment law regimes, with the aim of finding out whether energy disputes are in any way different from other general investment law disputes. The outcomes are then discussed in the light of the aforementioned criticism on the international investment law regime.
This dissertation focuses on the issue of transparency in international investment arbitration, in particular on the matter of public hearings as one of its aspects. Often invoked yet rarely defined, transparency is a concept that has long been recognised in domestic law. It has, however, been transposed over recent years onto the international legal system and has not, as such, been subject to an in-depth exploration. The area of international investment law is not an exception to this. At the outset, a clear line will be drawn between commercial and investment arbitration. Such a distinction is crucial as the former principally involves contract claims whose resolution has little, if any, impact on non-parties, whereas the latter very often involves matters of public interest (human rights, environmental issues, corruptive behaviour, etc.) calling for a more effective scrutiny and for wider participation. Consequently, it is precisely the investment dispute resolution mechanisms that merit attention, as there have been attempts within these frameworks to balance the traditional need for confidentiality in arbitration with the new demand for transparency. This quest for transparency is not new: NAFTA parties, faced with requests for information and participation, opened their proceedings to public, including the hearings, in 2001. This experience was reflected in the 2006 reform of the ICSID rules; public hearings, however, still required consent by both parties to the dispute [Rule 32(2) ICSID Arbitration Rules].

In this respect the most significant and recent development is the adoption of the 2013 UNCITRAL Rules on Transparency in investor-State treaty-based arbitration. These Rules push the limits even further and shift the, so far, underlying presumption of confidentiality towards transparency of the whole arbitral process – from the beginning till the end, including open hearings: these are not seen as an exception anymore but a rule that is to be deviated from only under exceptional circumstances.

The idea of the dissertation, based on the abovementioned example, is to take the issue of public hearings as one element of transparency and examine it mainly within settings of investment arbitration, but also by taking into account approaches adopted in other arenas (domestic public law systems, WTO dispute settlement system, ICJ and alike). It is necessary to go back to basics and explore the idea behind the principle of public hearings in general in order to understand its purpose in today’s settings, as well as to give an overview of how it has been introduced into arbitration over time. Further, on a more technical note, the issue of logistics ought to be discussed as these differ from one framework to another (online-broadcast of proceedings, attending the hearings in the actual hearing room, the limitations to access, etc.).

Another question that requires an analysis is the one of practical significance: is the introduction of public hearings more symbolic, aimed at emphasizing the nature of the issues involved and thereby changing the mindset of participants in investment arbitration, or will public hearings also change proceedings in a more practical sense, e.g. by altering the way of pleadings and the palette of documents submitted?

Finally, the dissertation will try to answer the question of whether transparency in general can cure deficiencies that persist in the fragmented arbitral system: lack of legitimacy, inconsistency and issues of conflicts of interests, or whether an entirely different approach is needed.
This dissertation investigates both private international law and procedural aspects of set-off and netting agreements in the EU Judicial Area. Set-off and netting are designed to facilitate the discharge of reciprocal obligations to the extent of the smaller obligation. They aim at simplifying the transactions and reducing the transaction costs, while granting the debtor quasi security interests, particularly in case of insolvency. Netting agreements are of paramount importance for common banking transactions as well as for the interbank lending market (payment and securities clearing systems). At the same time, netting agreements reduce bank capital adequacy costs (cf. the Basle II Accord).

The resolution of the major interpretive and practical questions in connection with the EU rules on set-off and netting requires the adoption of a comparative perspective. Thus, this doctoral project undertakes a comparative analysis of the relevant provisions under the most representative national legal systems. The provisions of the draft European Common Frame of Reference (ECFR) on set-off rights are taken into account as well.

The Rome I Regulation, which establishes a harmonised Private International Law Regime in the EU Judicial Area, contains special provisions on set-off, in order to resolve the uncertainty as to the law governing set-off rights under the 1980 Rome Convention. The relevant provisions, in particular Article 17 of the Rome I Regulation, raise a considerable number of interpretive issues.

The paramount practical relevance of set-off and netting in cross-border insolvencies is reflected in the relevant comprehensive regulatory framework. In this respect, the doctoral thesis examines the scope of set-off rights under the European Insolvency Regulation. Attention is also paid to the 2012 EU Commission’s Proposal for a Reform of the European Insolvency Regulation, which suggests the introduction of a new conflict of laws provision on netting agreements. Additionally, the existing rules on netting with regard to cross-border insolvencies of financial institutions, insurance undertakings and payment and securities clearing systems are considered.

Procedural issues related to set-off shall be equally taken into account. Given that set-off is a shield and not a sword, it is highly controversial whether under the Brussels I Regulation the court before which set-off rights are asserted must have jurisdiction over the claim brought by way of set-off. Furthermore, it has to be examined whether a set-off defence can give rise to lis pendens in accordance with Article 27 et seq. of the Brussels I Regulation with regard to the counterclaim asserted by way of set-off. This is crucial in case of parallel proceedings, especially where a negative declaratory action is initiated in another Member State. Finally, this dissertation project addresses the question whether a set-off defence can be brought before the Courts of the Member State where execution is sought on the basis of a decision or another enforceable title issued in another Member State under the Brussels I Regulation, the Regulation for a European Payment Order or the Regulation creating a European Enforcement Order for uncontested claims.
Commercial partners around Europe, who are involved in a pending arbitral dispute in one Member State of the European Union, are sometimes faced with the problem that one party is declared insolvent by the national courts of another Member State during that arbitration.

In such an eventuality, many different interests are at stake. The debtor has been declared insolvent so that it can protect itself against any potential enforcement measures of its creditors, including the creditor against whom it is defending its interests in the pending arbitration. The claiming creditor wishes to pursue its claim, but is unsure as to whether or not continuing the arbitration is the best way to achieve a beneficial outcome. All other creditors are fearful that if the creditor pursues and wins the pending arbitration, it will walk away with (some of) the debtor’s assets, and leave the rest potentially empty-handed. The bankruptcy trustee is concerned with organising the restructuring or liquidation of the debtor’s estate and does not wish to keep the arbitral case open, incurring further costs. The arbitrators will question whether or not they should continue the arbitration or stay it indefinitely.

The aim of the study is to adopt the mindset of an arbitral tribunal and to set out normative limits as to what it can and should do in order not to jeopardize the future enforcement of its arbitral award. Unlike national courts, arbitration tribunals are in principle not bound by mandatory legal provisions applicable in the country where the arbitration takes place. Arbitral tribunals are only subject to an implied duty to render awards which are enforceable in the country of the seat of arbitration as well as any other country in which enforcement is likely to be sought.

The laws of such countries might refuse enforcement if, for example, the insolvency dispute renders the arbitration agreement invalid and leaves the arbitral tribunal bereft of jurisdiction. The enforcement of an award might also be refused on grounds that the insolvency dispute in question is not capable of being arbitrated; the arbitral tribunal has exceeded the limits of the tasks set by the parties; the award violates public policy; or the insolvency representative (who should replace the insolvent debtor during the course of the arbitration) is simply not bound by the arbitration agreement concluded by the debtor prior to its insolvency.

To limit the risk of unenforceability, the arbitral tribunal should mirror the way in which the national courts of the countries in which enforcement is sought deal with awards that are rendered by arbitral tribunals faced with a party’s insolvency during the arbitration. The study will consist of case studies setting out a range of potential disputes which could arise between a creditor and a debtor in front of an arbitral tribunal in one EU Member State whereby the debtor enters insolvency during that arbitration in another Member State. German, French, English and Belgian law criteria for enforcing arbitral awards will be put to the test. The ultimate aim of these case studies is to find out which Member State has the most lenient requirements for the enforcement of an arbitral award rendered in an insolvency dispute in the particular circumstances of the relevant case study.

Mr. Dennis Lievens is a Belgian citizen. In September 2010, he was admitted to the IMPRS-SDR. Dennis has obtained a Master’s degree in Law from the Catholic University of Leuven, Belgium in 2009 as well as a Master’s degree in Law from the London School of Economics in 2010. Dennis is a doctoral candidate at the Faculty of Law at Heidelberg University. Prof. Dr. Burkhard Hess is his supervisor.
Transboundary environmental damage has become a major and widespread concern throughout the world. What options are available for resorting to legal remedies for transboundary environmental damage? In fact, the options available for resorting to legal remedies are at the choice of defendant. If a state is sued at the international level, the remedy track will be in the international regime of liability under public international law; if a private business is sued at the domestic level, the remedy track will be in the domestic regime of liability under private international law. Traditionally, we can resort to public international law by bringing interstate claims based on the principle of state responsibility before international judicial institutions. However, reliance on a state responsibility approach has serious deficiencies. In practice, it is preferred to bring such environmental claims by non-state or private actors against foreign polluters under national laws and to seek redress in the framework of civil liability. Therefore, this research focuses on such emergence.

Before the discussion and evaluation of the successful claims for transboundary environmental damage in international law, it is pertinent to consider a preliminary question: What is considered ‘environmental damage’? ‘Environmental damage’ usually refers to damage to the environment itself, and damage to a person or damage to property is generally excluded from the scope of this legal subject.

Who is eligible to initiate litigation for environmental damage before domestic court? As a general rule, a legal interest is required for a plaintiff to have legal standing in litigation before a domestic court. Thus, an individual lacks legal standing in relation to environmental damage because it is difficult for him to prove a legal interest and thus he is not recognised as an ‘owner’ of the environment suffering direct damage.

In response to this difficulty regarding legal standing concerning the environment per se, several legal solutions can be found in domestic legal regimes. In the United States, there is considerable experience with the recovery of damages for injuries to public natural resources, such as the Public Trust Doctrine. In some socialist jurisdictions, such as China, most natural resources are regarded as state-owned property. Thus, compensation claims for damage to the environment itself are mostly initiated by the government. A further legal solution is to grant private organisations, such as NGOs, a right to act. Recent cases tend to admit more generous opportunities for NGOs to bring cases to obtain indemnification for damages caused to the public interest they represent. From the viewpoint of European Court of Justice, environmental NGOs are allowed access to courts.

Finally, this research concerns some matters of private international law. The rights of equal access to transboundary remedies and procedures, based on the principle of non-discrimination, can be accorded to foreign NGOs and public authorities. The question of choice of law in transboundary environmental cases, is determined by national legal systems where there are various possibilities to determine the applicable law. Also, there is no consensus on whether jurisdiction is mandatory in transboundary environmental cases, and thus the problem of ‘forum shopping’ may arise.
The PhD project questions the practice of investment arbitration tribunals with respect to the remedies awarded by them in arbitral awards. It aims to demonstrate the controversies arising out of this practice, to propose possible ways of improvement and to investigate alternative remedies which could be available in Investor-State Arbitration.

The first part of the study is dedicated to pecuniary remedies, which to date are dominant in investment arbitration, despite the fact that the primacy of non-pecuniary remedies is recognized in international law. What is problematic here is the manner in which the arbitrators use their discretion to award pecuniary remedies. Some of the awards amount to hundreds of millions of dollars and at the same time lack well explained reasoning with regard to the assessment of damages. This practice is often justified with a long-standing refrain for determination of damages, namely that it is not an exact science. However, inaccurate, inconsistent, unpredictable valuations make parties lose confidence in arbitration proceedings and could result in a loss of legitimacy of investment arbitration. An empirical analysis of investment arbitration awards, used in the research, aims to demonstrate the weakness of the quantum reasoning of arbitral tribunals and serves the purpose of identifying the most appropriate assessment methods in international investment arbitration. Moreover, comparative review of the practice of selected courts and tribunals on the issue of assessment of compensation will be used to identify the principles which form customary international law on reparation and to examine whether investment arbitration tribunals follow those principles in practice.

The second part of the study will be dedicated to non-pecuniary remedies in Investor-State arbitration. Despite the fact that payment of monetary compensation has been the remedy awarded by almost all tribunals, an arbitral tribunal arguably could exercise discretion to grant remedies other than an award of monetary compensation. The study will investigate the legal basis, design and requirements for granting such non-pecuniary remedies in investment arbitration. For this purpose the question will be examined as to how early international tribunals have dealt with non-pecuniary remedies and whether particular types of non-pecuniary remedies may in some cases constitute a more appropriate relief in investment arbitration and should therefore be granted.

The study will also strive to find an answer to the question of which remedies a state could request in investment arbitration and which of them could be granted by an arbitral tribunal in case it files a counter-claim against the investor.

Finally, the research will examine the suggestions with regard to potential remedies, contained in a recent UNCTAD’s Investment Policy Framework for Sustainable Development in relation to the possibilities for new or renegotiated international investment agreements (IIAs). UNCTAD suggests that Parties to the IIAs may consider limiting available remedies to monetary compensation and restitution of property (or compensation only), explicitly ruling out in their IIAs certain types of damages (for example moral damages) or restricting recoverability of future profits. However, such rules may be seen as undermining the protective quality of the IIAs. Therefore the study will propose alternatives to the UNCTAD’s initiative and try to find better solutions with regard to the design of the remedies clause in future investment treaties.
The primary goal of this doctoral thesis is to provide guidance on how to determine the applicable attorney-client privilege standard in international commercial arbitration.

The concept of attorney-client privilege is recognized all over the world. However, the nature and scope of the privilege vary significantly from jurisdiction to jurisdiction. One of the most striking differences is the question of whether communications with in-house counsel are protected by attorney-client privilege. Under U.S. and English law, they are. Conversely, in certain civil law countries, such as France, such communications are not privileged. Further differences include, inter alia, who may invoke the privilege, whether the privilege is lost because the communications have been disclosed to third persons, and whether the inadvertent disclosure of documents results in waiver.

In international commercial arbitration, document production is a daily occurrence. For this reason, attorney-client privilege as a defense to document production requests also plays an important role in this form of dispute resolution. As international commercial arbitration proceedings inevitably take place in a multinational environment, the parties often have divergent views on the applicable attorney-client privilege standard and, as a consequence, arbitral tribunals are relatively frequently confronted with the question of how to determine the applicable privilege standard.

The legal framework governing arbitration proceedings – consisting of the national arbitration legislation at the seat of arbitration and possibly institutional arbitration rules, the UNCITRAL Arbitration Rules, or other soft law instruments – does not provide detailed rules regarding the conduct of the proceedings, including the taking of evidence. In particular, these instruments do not contain provisions on the scope of attorney-client privilege, nor do they outline conflict-of-laws rules determining the applicable national privilege law. Rather, they leave the conduct of the proceedings, including the determination of the applicable privilege standard, to the discretion of the arbitral tribunal.

It appears that arbitral tribunals have not found a uniform solution yet to resolve the question of how the applicable attorney-client privilege standard should be determined. They choose from four possible options. These include the application of general principles of law, the application of a single national law determined through a choice-of-law approach, the cumulative application of several national laws, and the creation of an autonomous standard defining the scope of attorney-client privilege. Moreover, many practitioners argue that the taking of evidence is different in every arbitration and that therefore there is not one solution to the issue that can be determined in the abstract. They are of the opinion that arbitral tribunals should stay flexible to be able to tailor the rules to the particular circumstances of the case.

However, predictability and certainty in respect of attorney-client privilege are of the utmost importance because clients will only consult their lawyers openly and candidly if they can be certain that the information communicated in the course of such consultations will not be used against them in litigation and arbitration proceedings. For that, lawyer and client must know the applicable privilege standard in advance. The current situation, which is uncertain and thus unsatisfactory, has prompted me to start writing a doctoral thesis on this topic.
The Origins of Difficulties in Complying with Judgments and Awards of International Courts and Tribunals Given against the Former Soviet Union States

The aim of the current PhD research is to compare experiences of the former Soviet Union states, as states with common legal features and similarities in attitudes towards international law, in adhering to and enforcing the decisions of the international dispute resolution institutions. The research involves the international courts and tribunals operating in both the public and private international law domain. The main purpose of the research is to uncover how these states approach international dispute resolution and how the decisions are being complied with at the domestic level.

The research is focused on substantive legal issues (problems existing at the level of the doctrine and domestic legal system, such as non-acceptance of international judicial decision in form of precedent as a source of law) and issues of procedural importance (lack of relevant domestic regulations allowing enforcement of decisions or excessive formalism and overregulation of issues related to enforcement) that impede enforcement and compliance with international dispute resolution judgments and awards. It will also touch upon issues of international legal history, international relations and international policy as well as issues of compliance with international law. It will answer the questions as to: What are the reasons for which the states fail to comply with judgments and awards of the international courts and tribunals? Are these reasons of legal, political, economic, societal, etc. nature? Is the state’s behaviour in the international arena influenced by non-compliance? Does non-compliance influence the way the states operate domestically and internationally? Is non-compliance with judgments and awards an issue specific for post-Soviet states? How can it be rectified and the states made to comply?

Thus, the proposed subject of my research, as seen from the questions above, relates to practical and legal experiences of adherence to decisions delivered through international dispute resolution involving the former USSR states. It relates to a conflict that exists between a state’s international obligation to enforce a particular decision delivered by an international dispute resolution body, as a part of the general international law obligations of a state, and a state’s inability, incapacity or lack of good faith, to ensure its adequate enforcement.

The research is further focused on establishing the best compliance and enforcement practices, including those successfully implemented in the area of concern. The problematic practices of the former Soviet Union states, mostly the Russian Federation and Ukraine, will be critically assessed. Obstacles in enforcements of judgments and awards, existing at domestic level will be analysed and conclusions drawn as to the main elements impeding effective compliance with international law obligations arising from judgments and awards of the international courts and tribunals. Measures which can be implemented at the international level to improve enforceability of judgments and awards of the international dispute resolution bodies will also be suggested. A conclusion will be drawn as to what could be done domestically and internationally, including with respect to the decision-making of international courts and tribunals, to reinforce systemic compliance with judgments and decision taken by the international dispute resolution bodies.
The PhD project examines the appearance of general exception clauses in a new generation of international investment agreements. Against the background of the current legitimacy crisis of international investment law, the inclusion of general exception provisions for the pursuance of a set of permissible non-economic public policy objectives, such as the protection of public health or the preservation of natural resources, is the means of choice of a growing number of States to more adequately balance foreign investment protection with the regulatory sovereignty of the host State.

The starting point of the study is an empirical research on the prevalence and typology of general exception provisions in the current investment treaty landscape. The study distinguishes between general exception provisions found in classical bilateral investment treaties and general exceptions in bi- and multilateral preferential trade and investment agreements. A further distinction is drawn between provisions modelled on Article XX of the General Agreement on Tariffs and Trade (GATT 1994) and / or Article XIV of the General Agreement on Trade in Services (GATS) respectively and sui generis exception provisions.

On this basis, the study proceeds to investigate the reasons for the discrepancy between the popularity of general exception clauses in the international trade regime and their notable absence in the first generation of investment agreements. To explain this phenomenon, the study sheds light on the historical circumstance surrounding the creation of the modern systems of international trade and investment law and also discusses the divergent underlying economic ideologies of the two legal regimes.

The study then examines the role, rationales and risks of general exception provisions in international investment law. Starting from the observation that general exception provisions enhance the host State’s regulatory flexibility and shift the economic risk of adverse State action in the covered policy areas back to the foreign investor, it is argued that they increase the stability and legitimacy of, as well as legal certainty, in the international investment law regime. Balancing these rationales with the risks associated with the inclusion of general exceptions, such as e.g. the risk of abusive invocation, the study advises States to start or continue including such provisions in their investment treaties.

Thereafter, the study focuses on the interpretation that will likely be accorded to general exception clauses by investment tribunals. Questions that are addressed include: whether a broad or a narrow interpretation of general exceptions is in order; whether and to which extent a cross-regime fertilisation with the law of the World Trade Organisation is appropriate; and what the impact of inconsistent treaty practice is on the interpretive process. In this context, the study also advises investment tribunals on the most appropriate interpretation of a number of selected key terms of investment law general exceptions.

Finally, the study turns to interactions between general exception provisions and classical protection standards in investment agreements. In particular, the relationship between general exceptions and the expropriation standard, the fair and equitable treatment standard and the national treatment standard are be clarified.

LEVENT SABANOGULLARI

General Exception Clauses in International Investment Law – The Recalibration of Investment Agreements via WTO-Based Flexibilities

Mr. Levent Sabanogullari is a German citizen. In September 2010, he was admitted to the IMPRS-SDR. Previously, he passed the German First State Examination at Cologne University in 2009, was awarded a Diploma in English Legal Studies by University College London in 2006, and obtained an LL.M. in International Legal Studies at New York University in 2010. In 2011, he was also admitted as Attorney-at-Law to the New York State Bar. He is enrolled at the faculty of law at Heidelberg University. Prof. Dr. Burkhard Hess and Prof. Dr. Dr. h.c. Rüdiger Wolfrum are his supervisors. In March 2014, he submitted his thesis.

Selected Publications

“The Impact of Most-Favoured-Nation Treatment in International Trade and Investment Law – Comparing Apples with Oranges?” in: Intersections: Dissimilarity or Convergence between International Trade and Investment Law, 8(3) Transnational Dispute Management 2011

Preferential Trade Agreements (PTAs) are an exception to most-favoured-nation treatment for trade in goods under GATT Article XXIV. However, the proliferation of regional commerce agreements has started to shift the foundations of the World Trade outline. Free trade agreements are becoming more frequent every day, and over one third of the global trade takes place between nations with some form of mutual trade agreement. In parallel to this growing tendency, the multilateral World Trade Organization (WTO) regulations continue to evolve. While some academics maintain that regionalism furthers the development of the multilateral system, others have insisted that such a policy only hinders it.

PTAs contain provisions dealing with the procedure followed for resolving a dispute among their signatory members. Parties to PTAs can design their own treaty and the mechanism with which they will deal with dispute settlement or decide that the PTA will have no dispute settlement at all. In practice, almost all PTAs rely on one of the three general types of dispute settlement mechanisms: diplomatic settlement by negotiation; judgments by standing tribunals; or the WTO model, in which an ad hoc panel is convened to hear the dispute.

Although the number of PTA dispute settlement mechanisms has been increasing rapidly, it seems that the vast majority of these mechanisms have not been used. In many cases countries that are parties to a PTA have brought disputes that could have been brought to the PTA dispute settlement mechanisms to the WTO. The wording of Article 23 of the Dispute Settlement Understanding (DSU) and the quasi-automatic process of the DSU make it evident that a WTO adjudicating body always has the authority and even the obligation to examine claims of violations of WTO obligations. Why do countries give preference to the WTO dispute settlement mechanisms? Is it necessary to strengthen the dispute settlement mechanisms of PTAs? Do the WTO system and PTAs have the same aim and thus need to be interpreted in the same way?

The PhD project will examine the way in which PTAs deal with dispute settlement mechanisms, their design and functioning, at the same time analysing the similarities and differences with the World Trade Organization dispute settlement system.

The dispute settlement mechanism of the WTO will be analysed, then each dispute settlement notified to the WTO, identifying trends and patterns in particular, using a combination of eight legal factors: jurisdiction, institutional features, choice of forum clauses, binding effect and enforcement, standing of non-state actors, enforceability of awards at national courts, remedies provided by the agreement, and transparency of proceedings. These legal factors can provide alternatives to construct an effective Dispute Settlement Mechanism. In the dispute settlement mechanisms examination, the PhD thesis will focus exclusively on State-to-State dispute settlement mechanisms although in many PTAs an investor-State dispute settlement mechanism is also included. Issues of jurisdictional conflict between dispute settlement mechanisms of PTAs and the dispute settlement mechanisms of the WTO will also be analysed, dealing at the end with a systemic approach to PTAs dispute settlement mechanisms.

Mr. Yira Segreera is a Colombian citizen. In March 2010, she was admitted to the IMPRS-SDR. Previously, she obtained a LLM in International Legal Studies at American University Washington College of Law, USA, in 2009. Since 2008 she has been working as an Assistant Professor in Universidad del Norte in Barranquilla, Colombia. Prof. Dr. Dr. h.c. Rüdiger Wolfrum is her supervisor.
The final and binding effect of arbitration awards is one of the main characteristics and reasons for the success of international commercial arbitration as a means of international dispute resolution. Under the current regime, arbitration awards are only to a very limited degree being reviewed by the state courts. Neither the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) nor the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) generally allow for a review on the merits (révision au fond).

Arbitration awards can, however, be annulled and their recognition and enforcement can be denied by the state courts on the basis that their enforcement would be contrary to the relevant ordre public (Art. 34(2)(b)(ii) UNCITRAL Model Law; Art. V(2)(b) New York Convention).

This raises the questions (i) to what extent the courts in different Member States of the European Union review international arbitration awards for their compatibility with the relevant ordre public in annulment and enforcement proceedings for their compatibility with the relevant ordre public, and (ii) whether the standard of review is consistent within the European Union.

This PhD project analyses and compares the standard of review applied by the German, English, and French state courts when reviewing international arbitration awards in annulment and enforcement proceedings for their compliance with the relevant ordre public. This PhD project further discusses which standard of review should be applied by the courts, in particular, within the European Union in order to balance the interests of the parties in the finality of arbitration awards and the interests of the states in ensuring the compliance with the fundamental principles being part of the ordre public. It also emphasises the importance of a consistent standard of review within the European Union.
This project investigates dispute resolution in International Tax Law. Double tax treaties (DTTs) are international treaties that concern taxation in cross-border cases. Their objective is the avoidance of double taxation. To avoid this scenario DTTs mostly demand either the state of residence or the source state to exempt the specific income from its taxation.

Each DTT includes a mutual agreement procedure (MAP) – a clause for the settlement of conflicts concerning the interpretation or application of a DTT that arises between the contracting states. Most MAPs correspond to Art. 25 OECD Model Tax Convention (OECD-MC). Although the MAP is a proven instrument for the settlement of international tax disputes, practical experience still indicates potential for improvement. As the competent authorities of the contracting states are not obliged to settle disputes in the foreseen two-year-period, the long duration of the MAPs is criticized. Besides several procedural aspects that are to be improved, the permissibility to both initiate a MAP and a national court proceeding is regarded as debatable, as well as the possibility to pursue national court proceedings in both states without the obligation to reciprocally implement the court decision rendered in the other state. Notwithstanding that more and more DTTs provide clauses that lead to arbitration proceedings after failed MAPs, the foreseen procedure has not matured enough and is only applied rarely.

The study initially surveys available options of dispute resolution or prevention and evaluates their efficiency in International Tax Law. Subsequently, in a second step the thesis analyses the different characteristics of conflicts of interpretation or application on the one hand and of transfer pricing conflicts on the other hand to develop well-suited dispute resolution measures for these conflict in its last chapter.

As DTTs establish their own treaty law they are primarily to be interpreted independently, i.e. the national tax law of the contracting states is only applicable as an ultima ratio (unless DTTs contain direct references to one or both state laws). As the OECD-MC and its commentary serve as a model for many states – not only for OECD member states – the tendency towards harmonization is emerging. Therefore the settlement of international tax disputes concerning the interpretation of DTTs does not only have to be in line with a specific DTT. The “international tax language” in development plays a decisive role as well. Consequently for this type of conflict this study suggests the setting up an international tax court which can be appealed to by national courts.

For transfer pricing conflicts there classically exist ranges of reasonable solutions for the adjustment of the disputed transfer prices of the concerned group. As conflict resolution in this respect does not focus on the determination of a predominant law practice, the work defends the view that arbitration has the most suitability to settle transfer pricing conflicts. Other procedural questions are elaborated, and the implementation of a tailored final offer arbitration clause is suggested.

In its annex the work provides a draft agreement of a multilateral tax treaty for dispute resolution to which DTTs could refer to in future. By intertwining international means of dispute resolution with national court proceedings the phenomenon of not corresponding court decisions in both states can be avoided and desired tax planning security can be strengthened.
Equality of arms is a principle that has developed primarily in the Human Rights and International Criminal Law contexts. In particular, such a principle has been widely defined by the jurisprudence of the European Court of Human Rights. According to that Court, equality of arms is one of the principles that composes the right to a fair trial as enshrined in Art. 6 of the European Convention on Human Rights.

My research, however, will not focus on Human Rights Courts and Tribunals nor on International Criminal Courts and Tribunals. The definition and the vast case law of the ECtHR furnishes only a starting point and a very useful working definition for what will be the focus of this study. This thesis analyses equality of arms in state-to-state dispute settlement, international commercial arbitration and international investment arbitration. In this context, the aim of my research is twofold: on the one hand, to verify whether equality of arms is a general principle of international procedural law; and on the other hand to define the concept by tracing its contours and identifying the consequences of its violation.

The research will be conducted following an inductive method. Thus, first of all equality of arms will be researched within the proceedings. The structure of the analysis will follow the development of a proceeding. It starts from the initiation of the proceedings, passing to the formation of the Court or Tribunal, to the modification of the initial claim, to the introduction of counterclaims, to intervention, joinder and consolidation, to the conduct of the proceedings, to the taking of evidence and finally to the decision, the final outcome of the proceeding and to the enforcement of such a decision. The aim of this section will be to verify, by analysing the rules that govern the different forms of dispute settlement and the practice in the conduct of the different proceedings, if equality of arms is a principle governing the proceedings and to define its contours.

Having found that equality of arms is a general principle of international procedural law this thesis will move to analyse the possible consequences of a violation of equality of arms and the possible remedies to its violation. The remedies in the case of a violation of equality of arms will depend on who committed the violation, whether it was a judge, arbitrator, a party, or another participant in the proceedings. Remedies will also depend on the moment in which the violation was committed and the moment in which the interested party seeks for redress for the violation suffered. It is hypothesized that remedies may be within the proceedings or post proceedings and that such remedies may be procedural or substantive.

The ultimate goal of this research is to give concreteness to a concept which, as fundamental as it may seem for the international process, runs the risk of not being useful because of its vagueness. Giving this concept concreteness will mean: giving it a clear juridical status, finding for example that it is a general principle of international law or not; defining which participants to the proceedings are tied by such principle, finding that it is a principle that governs the relationship between the parties but on which the tribunal and the other participants may have an impact; defining what kind of obligations and rights entail from such concept, what rights and obligations does the tribunal derive from it, what rights and obligation do the parties have and so forth; finally, spelling out the possible consequences and remedies in case of a violation of equality of arms during the proceedings.
Navigating the Peace-Justice Divide – The Impact of ICC Investigations in Ongoing Intrastate Conflicts

The book explores the role of international criminal investigations in ongoing conflicts. It analyses how far investigations of international courts and tribunals further or hinder conflict resolution efforts in intrastate conflicts. It focuses on the work of the ICC as it is spearheading a development to implement international criminal justice in conflicts. While the International Criminal Tribunal for the former Yugoslavia (ICTY) was formed in reaction to situations in Yugoslavia, the ICC is the first Court to investigate crimes in conflicts as an already existing institution.

The book offers important insights into the future of international criminal justice and transitional justice in ongoing conflicts. The number of international investigations in ongoing conflicts is steadily increasing. This has most recently been illustrated by the investigations of the ICC in Libya, Côte d’Ivoire, and Mali. A possible referral of the situation in Syria to the ICC may well be forthcoming in the future. The discussions surrounding the ICC warrant against Sudanese President al-Bashir, the role of the ICC in Libya, and a possible referral of the Syrian situation to the ICC illustrate that the book is at the centre of current discussions in international politics and international law. It also offers an overview of the work of the first Chief Prosecutor of the ICC, Luis Moreno Ocampo.

The number of cases of international criminal justice in conflicts has been steadily increasing, while the understanding of the effects of trials in conflicts remains sketchy. Information on the effects of such investigations and trials is thus of key importance. The current research on transitional justice and trials in conflicts cannot fill this gap. While transitional justice is broadly discussed across several disciplines, there remains a lack of empirical foundations for the research. The book takes a first step towards closing this gap by combining a cross-case overview of transitional justice mechanisms implemented in conflicts with case studies of ICC investigations in ongoing conflicts.

The cases chosen are two controversial ICC investigations to date. The first case is the investigation of crimes committed by the Lord’s Resistance Army (LRA) in a 25-year rebel campaign across Uganda, the two Sudans, the Democratic Republic of Congo and the Central African Republic. The second case is the ICC investigation of an alleged government-sponsored genocide in Darfur and the investigation of rebel commanders in Darfur accused of having attacked African Union (AU) Peacekeepers. These cases show the entire range of possible effects triggered by ICC investigations in conflicts over investigation periods of several years. To investigate these cases, the author has interviewed Court officials, government officials, and rebel officers and commanders, as well as experts. He also spent 16 weeks in Uganda on field research.

The dissertation presents possible causal mechanisms triggered by the ICC investigations that can contribute to solving and protracting armed conflicts. ICC investigations can facilitate the emergence of the rule of law, they may further reconciliation or help to deter and isolate those who commit atrocities. They might block conflict resolution or heighten the tensions between conflict parties. The impact of international criminal investigations in conflicts is much more ambiguous than suggested in the literature. Several (contradictory) mechanisms might be at work at the same time.
Ms. Astrid Wiik is a German-Norwegian citizen. She was funded by the IMPRS-SDK from October 2011 until October 2012. During this time, she worked as Assistant Legal Counsel at the Permanent Court of Arbitration in The Hague, the Netherlands.

Astrid began her dissertation under supervision of Prof. Dr. Burkhard Hess in the summer of 2008 at Heidelberg University. From September 2008 until September 2011 she received a scholarship from the Landesstiftung Baden-Württemberg and was a member of the graduate college on international dispute resolution. In 2010 and 2011, Astrid was a Visiting Fellow at the Lauterpacht Centre for International Law at the University of Cambridge, UK. She worked as research assistant to Prof. Dr. Burkhard Hess from 2008-2011. In 2008, Astrid graduated with honors from Heidelberg University, having studied law in Heidelberg and at NUS in Singapore.

In May 2013, Astrid started her practical legal training in preparation for the second state examination (Rechtsreferendariat) at the Kammergericht Berlin. As part of her bar training Astrid worked at the Federal Ministry for Economic Affairs in the department representing the German government before the European courts. She is currently working for a global law firm.

Astrid submitted her doctoral thesis in February 2014. She is also the author and co-author of several articles in public international law.

ASTRID WIiK

Amici Curiae before International Courts and Tribunals

Non-governmental actors in particular consider amicus curiae, Latin for ‘friend of the court’, a tool to convey to international courts factual or legal information, the public interest dimension of a case, or to increase the transparency, legitimacy and democracy of international dispute settlement.

Despite an increasing number of international courts and tribunals’ assertion of authority to receive and consider amicus curiae submissions and a steady growth in the number of amicus curiae submissions in international dispute settlement, the concept, its actual use, and its interaction with existing procedural and participatory mechanisms remain nebulous.

This dissertation aims to close this gap by providing a comprehensive study of amicus curiae before international courts and by establishing whether there is an added value to amicus curiae as it is currently used in international dispute settlement.

To this end, the case law of the ICJ, ITLOS, ECtHR, Inter-American Court of Human Rights, the WTO dispute settlement mechanism, and investment arbitration tribunals was researched to identify cases with amicus curiae participation and the practical use and regulation of the concept. The data assembled for each court was then compared based on comparative law methods.

The dissertation is structured in three parts. The first part provides the reader with the necessary background information. Chapter 2 traces the development of amicus curiae from its inception in early British law to its rise in international courts, showcasing its inhomogeneous development. Chapter 3 discusses the presumed functions and drawbacks of amicus curiae participation to provide a backdrop against which to measure the added value of the concept.

The second part of the dissertation examines the current use and regulation of the concept. Chapter 4 focuses on the process of admission of amicus curiae, while Chapter 5 examines the requirements established with respect to its participation. These Chapters also highlight areas where further regulation is desirable. Chapter 6, drawing together Chapters 4 and 5, establishes the current characteristics and functions of amicus curiae before international courts. It shows that amici curiae before the various international courts share a set of basic characteristics, but that significant differences with respect to the functions attributed to the concept make it impossible to speak of one international amicus curiae.

The third part of the dissertation analyses the effectiveness and effects of amicus curiae participation. Chapter 7 evaluates to what extent international courts have actually relied on amicus curiae briefs. It shows that the substantive effectiveness of amici curiae varies significantly between international courts and explores the complex reasons for the differences. Chapter 8 analyses the effect of amici curiae on international dispute settlement as such. It shows that the presumed functions of amicus curiae rarely correlate with the concept’s actual use.

The dissertation concludes by arguing, based on the findings in the preceding chapters, that amici curiae can add value to international dispute settlement if they cater to a court’s specific needs (and if aligned with its judicial function) in a case, but that they are ill-suited to mitigate perceived systemic deficiencies of international dispute settlement, including widening the international dispute settlement system towards a public interest-oriented system.
Prof. Dr. Burkhard Hess

Professor Burkhard Hess is the founding and executive director of Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and an Honorary Professor of Law at Heidelberg University. Previously, he held chairs at Heidelberg and the University of Tübingen. He was a Visiting Professor at Renmin University of Beijing, Paris-Sorbonne University, and Georgetown University Law Center, and served as a part-time judge at the Court of Appeal of Karlsruhe. Professor Hess serves on a regular basis as an expert and advisor to the European Commission, the European Parliament, the Council of Europe and national governments.

Lately, he has evaluated the European Insolvency Regulation and the Brussels I Regulation (regarding international insolvency and freedom of circulation of judgments), and has also contributed to the drafting of the proposal for a Regulation creating a European Account Preservation Order. Professor Hess’ research areas comprise European and comparative procedural law and dispute settlement. He is the author of various books on German and European civil procedural law as well as co-editor of IPRax and of Kölner Kommentar zum KapMuG.
Professor Thomas Pfeiffer is director of the Institute for Comparative Law, Conflict of Laws and International Business Law at Heidelberg University and previously held a chair at the University of Bielefeld and served as a Judge at the Court of Appeal of Hamm (part-time). More recently, he acted as vice rector of Heidelberg University. Professor Pfeiffer was a Visiting Professor at Hong Kong City University and twice at the Georgetown University Law Center, and recently invited for a visiting professorship to the Straus Institute for International Dispute Resolution, Malibu, Ca. On a regular basis, he serves as an expert and advisor to the European Commission, the European Parliament, the Council of Europe and national governments. Lately, he has evaluated the European Insolvency Regulation and the Brussels I Regulation. Professor Pfeiffer is also an active arbitrator and editor of Jahrbuch für Italienisches Recht, Sammlung Lindenmaier-Möhring, and of the law journal Rechtswissenschaft and the monthly Newsletter of the Working Group for International Law of the German Bar Association.

Prof. Dr. Thomas Pfeiffer

em. Prof. Dr. Dr. h.c. Rüdiger Wolfrum

Professor (emeritus) Rüdiger Wolfrum was the director of the Max Planck Institute for Comparative Public Law and International Law from 1993 to 2013. He graduated in Tübingen and Bonn and held chairs at the Universities of Mainz, Kiel and Heidelberg. During his time in Kiel he served as a judge at the appellate administrative court of Lüneburg and later of Schleswig. He was a Visiting Professor in Minneapolis and Yale and served as President of the German Society for International Law (2006-2009) and as President of the International Tribunal for the Law of the Sea (ITLOS; 2005-2008). He is currently a Judge of the ITLOS and president or member of various arbitral tribunals related to maritime delimitation. Since January 2013 he has been a managing director of the Max Planck Foundation for International Peace and the Rule of Law, Heidelberg. Professor Wolfrum is the author and editor of various books on international law as well as German public law, including the Max Planck Encyclopedia of Public International Law.
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Prof. Dr. Dr. h.c. mult. Peter-Christian Müller-Graff

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Alexis Mourre

Alexis Mourre is an Avocat au Barreau de Paris and a member of the London Law Society. He specialises in international arbitration and international litigation. He has served in more than 160 international arbitral procedures, both ad hoc and before the most prominent arbitral institutions. Alexis Mourre is, inter alia, vice president of the ICC International Court of Arbitration and vice chair of the IBA arbitration committee. He has been a visiting professor at the University of Santa-Clara (California) and presently teaches at the Universities of Versailles and the Dominican Republic. Alexis Mourre has published extensively in the field of international business law, private international law and arbitration law.

Prof. Dr. Allan Rosas

Professor Allan Rosas is a Judge at the Court of Justice of the European Communities and President of the Third Chamber of the Court. Previously, he was First Vice-Rector and a professor of law at the Abo Akademi University in Turku and Director of its Institute for Human Rights. Professor Rosas holds a doctoral degree from the University of Turku. He represented the Finnish Government in several international conferences and functioned as an expert for Finnish Ministries and Parliament committees as well as international organizations, including the UN, UNESCO, OSCE and the Council of Europe. At the Legal Service of the European Commission he was in charge of EU external relations. He has published extensively in international law, international relations and human rights law.

Prof. Dr. Hélène Ruiz Fabri

Hélène Ruiz Fabri is a Professor at the Paris-Sorbonne University Law Faculty, Director of the Joint Institute of comparative law of Paris and Director of the Master 2 Degree Programme in International Economic Law. She holds degrees in law and political science from the University of Bordeaux and the Institut d’Etudes politiques de Bordeaux and a Doctorate from the University of Bordeaux. Previously, she taught at the Academy of European Law (Florence) and at the Academy of International Law (The Hague). She has acted as an expert to the French ministries of foreign affairs. Professor Ruiz Fabri has published extensively in the fields of WTO Law and Dispute Settlement, and in Constitutional Law.
Prof. Dr. Christoph Schreuer

Professor Christoph Schreuer is currently working as an independent expert and arbitrator in investment cases. Previously, he was a professor of law at the University of Vienna (2000-2009) and at Johns Hopkins University in Washington, D.C. (1992-2000). He is a graduate of the Universities of Vienna, Cambridge and Yale. Professor Schreuer is a member of the ICSID Panel of Conciliators and has been the chairman of the ILA Committee on the Law of Foreign Investment. He is the author of numerous books and articles, including a commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("The ICSID Convention: A Commentary").

Prof. Dr. Mark E. Villiger

Professor Mark Villiger has been a Judge at the European Court of Human Rights since 2006 and a professor of law at the University of Zurich since 1992. Previously, he was Legal Administrator, Head of Division and Deputy Registrar in the Secretariat of the European Commission of Human Rights and the Registry of the European Court of Human Rights. He holds a law degree and a doctor degree from the University of Zurich. Professor Villiger has authored, inter alia, a Commentary on the 1969 Vienna Convention on the Law of Treaties, on the ECHR, on Customary International Law and Treaties, as well as numerous articles on international and Swiss public law.

Prof. Dr. Andreas Voßkuhle

Andreas Voßkuhle is President of the German Federal Constitutional Court, Chairperson of the Second Senate of the Constitutional Court and Director of the Institute for Political Science and Philosophy of Law at the Albert-Ludwigs-University Freiburg. In 2007, he was elected as Rector of the Albert-Ludwigs-University Freiburg. He is a full member of the Social Sciences Class of the Berlin-Brandenburg Academy of Sciences and Humanities. Professor Voßkuhle graduated from the Ludwig-Maximilians-University Munich, where he also received his doctoral degree. Previously, he was a research fellow at the University of Augsburg and had worked at the Bavarian Ministry of the Interior.
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Sir Michael Wood is a Senior Fellow of the Lauterpacht Centre for International Law, University of Cambridge, and a member of the United Nations International Law Commission. He practices in the field of public international law, in particular before international courts and tribunals. Previously, he was Legal Adviser to the Foreign and Commonwealth Office. He attended, inter alia, the Two-plus-Four negotiations on German Unification, and the Dayton and Rambouillet Conferences on the former Yugoslavia. He was posted at the United Kingdom Mission to the United Nations in New York and was Agent before the European Commission and the ECHR, the ICJ, the International Tribunal for the Law of the Sea and two international arbitral tribunals.

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Hannes Wais is a Senior Research Fellow at the Max Planck Institute Luxembourg. He studied law in Heidelberg, London and Bologna. He holds a law degree and a PhD from Heidelberg University and concluded his bar exam at the regional court of Darmstadt. Prior to joining the institute, Hannes was a research fellow to Professor Thomas Pfeiffer at the Institute for Comparative Law, Conflict of Laws and International Business Law of the University of Heidelberg, a scholarship holder of the Heidelberg Graduate Academy for Successful Dispute Resolution, and a visiting researcher at the Georgetown University Law Center in Washington, D.C. His main research areas are European procedural law and contract law.
Future Developments

In case of a successful evaluation, the IMPRS-SDR will work closely together with the University of Luxembourg. For this purpose, the University’s Faculty of Law, Economics and Finance will become a part of the institutions on which the IMPRS-SDR will be founded in the future. This collaboration promises to provide an even broader international focus for the research school.

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