

Equality of the parties in investment arbitration - public international law aspects

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I. Introduction

1. The question of the status of transnational corporations in investment arbitration is of central importance for the division of spheres of responsibility, for the pursuit and enforcement of values, and thus for the bases of legitimation of the international legal order today.
2. The promotion of foreign direct investments and the deepening of economic cooperation between States to promote economic development with the common welfare objective of increasing the prosperity of the peoples of the contracting States parties has been the legitimating basis of the ICSID Convention, which is central to investment protection under international law, and of the bilateral investment protection agreements.
3. Investment protection law, as part of public international law – from its basis and purpose – should not be understood as a departure from a state-centered international order.
4. From the point of view of international law, the following questions have to be answered: What are the implications for the investment protection regime and investment arbitration as its core
 - a) if the triad justifying economic globalization (foreign private investment – promotion of economic development – promotion of prosperity) loses its persuasiveness as a paradigm for its justification in a normative sense, and

b) if a discourse of delegitimization prevails that accuses profit-oriented transnational corporations in their role as investors of irresponsible conduct, which is incompatible with the public welfare, and States of enabling this conduct to the detriment of their own population by means of international treaties establishing investment arbitration?

5. The aim to align investment treaties with the principle of sustainable development can be seen by the reforms initiated by States, groups of States, and the United Nations Conference on Trade and Development; besides, this aim should have an impact on already existing investment treaties and investment arbitration as far as it is coherent with international law.

II. Transnational corporations as equal parties under international law within the framework of investment arbitration

6. A necessary condition for the equality of the host State and an investing foreign corporation as parties is that both by consent agree to arbitration in respect of a legal dispute directly related to an investment, i.e. that the State, which is a contracting party to the ICSID Convention and a subject of international law, besides ratifying the convention additionally gives its written consent (Art. 25 (1), Art. 36 (2) ICSID Convention), which has a threefold function (legitimizing element, transformative element and constitutive element).

7. For various reasons, the procedural equality of the host State and the transnational corporations within the framework of a concrete arbitration procedure is justified and thus legitimate with regard to the international legal order as a whole. In particular, it complies with the principle of fair trial and the rule of law as enshrined in international law.

8. The principle of the equality of the parties does not preclude that transnational corporations are given preferential access to arbitration on the basis of international treaties and that arbitration is open only to transnational corporations.

9. The principle of the equality of the parties is inter alia observed during the composition of an arbitral tribunal if the judges are appointed by both parties in the same manner and each judge fulfils criteria which plausibly ensure impartiality. However, the appointment by the parties is not a necessary condition for the equality of the parties.

10. Questions about how to implement the principle of the equality of the parties arise in the arbitral proceedings themselves, in particular with regard to the possibility that several investors seek to bring their claims against the same host State, with regard to the admissibility of a counterclaim by the host State, with regard to the admissibility of “amicus curiae briefs” (third person submissions), with regard to the so-called equality of arms, and with regard to the problem of safeguarding confidentiality interests (in particular State secrecy).

11. Questions of the applicable law within the scope of the merits, such as the possibility of the host State to invoke justifications under international law (e.g. necessity) and the principles of interpretation of the investment protection agreements, are not considered to be questions of the principle of the equality of the parties.

III. (Un)justified unequal treatment to the detriment of transnational corporations as parties with regard to corruption problems

12. The decisions of arbitral tribunals, which deny their jurisdiction or the admissibility of the investor claim if the defendant host State asserts corruption, are convincing (only) with regard to limited types of cases.

13. The lack of jurisdiction of the tribunal or the inadmissibility of the investor’s claim does not seem to be justified even if the transnational corporation’s act of corruption made the investment possible in the first place: The contrary reasoning in investment arbitration decisions, based inter alia on the wording of bilateral investment treaties, the scope of the host State’s consent and/or a violation of fundamental general principles (such as, inter alia, the so-called “clean hands” principle, the “international public policy” or “transnational public policy”, or the principle that no one shall profit from his/her own wrong) is not convincing for various reasons .

14. The same is true even more – in accordance with recent investment arbitration decisions – if the foreign investor acted corruptly after the investment had already been initiated in the host State.

15. Instead, corruption should be taken into account in the decision on the merits of a case in accordance with the objectives and principles of the international legal order in such a way that central values of investment protection are not disproportionately undermined, but nevertheless relevant disadvantages arise for

transnational corporations if they engage in acts of corruption abroad for or during investments. This can be achieved if the amount of investors compensation is reduced for example by a multiple of the sum of the corruption.

16. When considering acts of corruption in the merits of a case, the arbitral tribunal should therefore consider the distribution of responsibility, the pursuit and enforcement of global values, and the bases of legitimacy of the current international legal order, also taking into account the state's anti-corruption obligations, in particular as enshrined in anti-corruption conventions and human rights treaties.

IV. Concluding remarks

17. The procedural equality of host States and transnational corporations within the framework of an investment arbitration procedure has no implications on the status of transnational corporations in the international legal order as a whole; other views, which argue that transnational corporations are (full or partial) subjects of international law in a normative sense, exceed the – *de lege lata* – narrowly limited equality.

18. The risks associated with a normative enhancement of transnational corporations in the international legal order present another argument against the view that corporations are (full or partial) subjects of international law. These risks are hinted at in the delegitimization discourse, which grants profit-oriented companies less influence in the international legal order of the 21st century.

19. Even without the status as subjects of international law, transnational corporations can be bound by norms of international law (international law in the narrow sense and so-called soft law). The UN Guiding Principles for the Business and Human Rights are, inter alia, of particular relevance.

20. If – with good reasons – foreign direct investments by transnational corporations continue to be promoted via international law as a means of increasing prosperity in the participating States for the benefit of the respective population, the public-good orientation of international investment arbitration tribunals should be further developed, on the one hand, by reforming the constitutional aspects of the arbitral procedure, and, on the other hand, by further focusing their jurisprudence on public-good aspects including the proportionate protection of responsible investments.

Full (German) version: *Silja Vöneky*, Die Stellung von Unternehmen in der Investitionsschiedsgerichtsbarkeit unter besonderer Berücksichtigung von Korruptionsproblemen – Unternehmen als völkerrechtlich gleichberechtigte Verfahrensparteien?, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), *Unternehmensverantwortung und Internationales Recht*, C.F. Müller, 2020, pp. 339 et seq.