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BOOK REVIEW

THE DILEMMA OF CONSENT TO INTERNATIONAL ARBITRATION IN INVESTMENT AGREEMENTS WITHOUT A FORUM BY FERNANDO TUPA

Reviewed by Christina Beharry

Consent is often said to be the cornerstone of a tribunal's jurisdiction.[1] Fernando Tupa's book explores the application of this fundamental principle when the dispute settlement provisions of an investment agreement are silent on the arbitral forum.[2]

Tupa's central thesis is that consent to international arbitration is forum-specific. Without a specified forum and arbitral seat, a foreign investor has no means of exercising a general expression of consent. The legal consequence, according to Tupa, is that consent to international arbitration exists "in principle" but is essentially inoperative. Tupa builds on this by exploring the significance and practical consequences of these principles.

Early on, Tupa observes that international investment cases are particularly susceptible to this dilemma because the arbitral seat is not typically set out in investment agreements (as compared to international commercial arbitration) so there would be no domestic court to fill in the gaps.[3] In addition, he explains that institutional arbitral rules (*e.g.*, ICSID, ICC, SCC, *etc.*) contain requirements for the submission of a dispute to that specific forum.[4]

So, what are we to make of dispute settlement provisions lacking a forum? Tupa initially establishes that international law should govern the interpretation of such

[1] Ambatielos Case (Merits: Obligation to Arbitrate) (Greece v. United Kingdom of Great Britain and Northern Ireland), `1953 I.C.J. 19 (Judgment May 19).

[2] FERNANDO TUPA, THE DILEMMA OF CONSENT TO INTERNATIONAL ARBITRATION IN INVESTMENT AGREEMENTS WITHOUT A FORUM (Ian A. Laird et al. eds., 2023).

[3] *Id.* at 10, *et seq*.

[4] *Id.* at 13.

provisions.[5] He then analyzes the two main types of investor-state dispute settlement provisions that do not constitute enforceable and effective state consent to arbitration: (i) when no arbitral forum (*i.e.*, arbitral institution or arbitration rules) is specified or when subsequent agreement on the forum between the disputing parties is required and no default or fallback option is provided, and (ii) when the arbitral forum set out has become unavailable (*e.g.*, only ICSID arbitration is permitted but one of the contracting parties has withdrawn from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)). Relatedly, Tupa asserts that even use of the word "shall" in a dispute settlement provision should not automatically be interpreted as a "complete" offer of consent but could also refer to future action.[6]

Tupa then takes stock of the case law interpreting non-forum-specific dispute settlement provisions, favoring the line which adopts the principle that consent is forum-specific.[7] Afterwards, he specifically examines cases in which the most favored nation (MFN) clause was invoked to get around the absence of a forum. Tupa criticizes this approach due to what he terms a "sequential issue"[8] and the "fundamental limitation" on using an MFN clause to import consent when none exists.[9]

Finally, Tupa deals with the practical consequence of non-forum-specific provisions. Tupa recognizes that the lack of forum is dependent on parties (albeit unlikely) agreeing to a forum to which to submit a dispute after the dispute has arisen.[10] To address unfair outcomes, he points to various avenues potentially open to a foreign investor such as availing itself of another bilateral investment treaty or

[5] *Id.* at 17-18, 26. Specifically, Tupa argues that treaty provisions should be interpreted objectively based on the text in accordance with the Vienna Convention on the Law of Treaties and that the standard of proof for the existence of state consent is "clear and unequivocal" evidence.

[6] *Id.* at 38.

[7] *Id.* at 40-58.

[8] *Id.* at 59 (that is, an arbitral tribunal must have jurisdiction *ratione voluntatis* before it can apply the MFN clause).

[9] *Id.* at 60, *et seq.*

[10] *Id.* at 81.

other dispute settlement mechanisms contemplated in the investment agreement (*e.g.*, national arbitration, domestic courts, or diplomatic protection).

Tupa's book offers a thoughtful and detailed examination of a subject that may be overlooked by practitioners and arbitrators alike. Tupa's study is well-researched and compels a closer and more critical reading of dispute settlement provisions to ensure their meaning and scope are properly interpreted.

CHRISTINA BEHARRY is a Partner in Foley Hoag's International Litigation and Arbitration Department in Washington, D.C. Her practice focuses on public international law, investor-State and commercial arbitration, and trade and investment policy. She has represented clients across the globe in disputes involving various industries including aviation, mining, oil and gas, real estate, renewable energy, chemical manufacturing, postal services, agriculture, forestry, healthcare, telecommunications, and tobacco. Christina publishes regularly on international arbitration and has edited a book titled Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration (Brill Nijhoff). Prior to joining Foley Hoag, she practiced in the Trade Law Bureau of the Department of Foreign Affairs and International Trade where she represented the Government of Canada in investment disputes brought under NAFTA Chapter 11 and assisted in the negotiation of bilateral investment treaties.

INSTITUTE FOR TRANSNATIONAL ARBITRATION
OF
THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

A. MISSION

Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

B. WHY BECOME A MEMBER?

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning - an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

Advisory Board members also have the opportunity to participate in the work of the Institute's practice committees and a variety of other free professional and social membership activities throughout the year. Advisory Board Members also receive a

free subscription to ITA's quarterly law journal, World Arbitration and Mediation Review, a free subscription to ITA's quarterly newsletter, News and Notes, and substantial discounts on all ITA educational online, DVD and print publications. Your membership and participation support the activities of one of the world's leading forums on international arbitration today.

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The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

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The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

E. PUBLICATIONS

The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary international arbitration treaties, in ITA's quarterly newsletter, News and Notes. All ITA members also receive a free subscription to ITA's World Arbitration and Mediation Review, a law journal edited by ITA's Board of Editors and published in four

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