Zeitschrift des Max-Planck-Instituts für Rechtsgeschichte und Rechtstheorie
Journal of the Max Planck Institute for Legal History and Legal Theory

Rechts Rg geschichte

Rechtsgeschichte
Legal History

www.lhlt.mpg.de

http://www.rg-rechtsgeschichte.de/rg31
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 31 (2023)
http://dx.doi.org/10.12946/rg31/293-295

Rg 31 2023 293 – 295

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Capitalizing on International Law's Fragmentation

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Capitalizing on International Law's Fragmentation*

The boom of investment arbitration since the early 2000s has fueled a challenge against a form of international dispute settlement perceived as biased in favor of corporate interests because it is orchestrated by private actors – arbitrators – away from democratic scrutiny and is increasingly used to prevent governments from adopting legislation to address emergencies, including climate change.

To the pervasive claim that international law must provide a response to emerging problems – with investment arbitration seen to foster the growth of foreign investment while evading the political and economic costs of corruption and weak institutions in the Global South – Kathryn Greenman's *State Responsibility. The History and Legacy of Protecting Investment Against Revolution* (2021) responds with the twist of historical legacy. As she reminds us, *AAPL v. Sri Lanka* (1991) is best known for opening the floodgates to treaty-based investor-state arbitration. Yet the substance of the award exposes the puzzle that Greenman's legal-historical study unravels. The *AAPL v. Sri Lanka* decision held the state responsible for the destruction of a foreign investor's property, even though the country was in the midst of a civil war. To reach this decision, the arbitral tribunal relied on several early 20th-century mixed-claims commissions' awards that dealt with state responsibility for damages done by rebels.

Greenman's study is timely, because this case law, produced in the context of the decolonization wave of Latin American territories, has been revived in the aftermath of the Arab Spring. Foremost, Greenman's foray into the contradictory legacy, in the present, of the legal disputes between the recently independent states of Mexico and Venezuela, on the one hand, and Spanish, US, British or French investors, on the other, challenges the path dependency narrative of the post-neoliberal turn, according to which imposing an internationally defined standard of due diligence to protect foreign business interests fosters the integration of states in the Global South into the world economy.

Greenman argues that defining relations between states and foreign investors as lying outside the scope of sovereign national authority – in other words, the codification of these relations as *private* – is not only the result of the cooptation of the »mafia« of arbitrators[1] by business interests. Rather, approaching state liability for damages incurred by foreign investors as an issue solved with reference to international norms in the framework of arbitration disputes is the *structural* outcome of concurrent political, economic, and legal transformations.

Greenman's monograph, based on her doctoral thesis, is a study of the mixed-claims commissions set up at the turn of the twentieth century – under threat of force by the United States and various European countries – to examine claims for damages incurred by Spanish, US, British or French investors as a result of rebel actions during post-independence revolutionary wars in various Latin American states. Greenman's analysis of the codification attempts of this contradictory case-law in later decades underscores the imperial entanglement between law and politics in the early 20th-century genesis of international dispute settlement mechanisms. It also exposes the inherent characteristic of international law as at the same time a tool of power and a site of resistance as well as »something in its own right that cannot be subsumed under politics« (29).

Greenman's study is thus a powerful demonstration that due to »international law's inherently genealogical nature« (26) – that is, the constant retrieval of the past to justify present obligations – any critique of the current status quo requires historicization. In order to understand which cases from the past are used as precedents by current arbitration panels to justify the regulation of rela-

* Kathryn Greenman, State Responsibility and Rebels. The History and Legacy of Protecting Investment Against Revolution, Cambridge: Cambridge University Press 2021, XV + 230 p., ISBN 978-1-316-51729-1

1 See Pia Eberhardt, Cecilia Olivet, Profiting from Injustice. How Law Firms, Arbitrators and Financiers are Fueling an Investment Arbitration Boom, Brussels / Amsterdam 2012.

tions between states and foreign investors away from national jurisdiction, Greenman's study emphasizes the relevance of examining the socio-political and economic context of this process. This is essential, first, in order to explain the genesis of the mixed-claims commissions at the turn of the 20th century as a system to deal with disputes between states and foreign investors. Second, it underscores that the legacy of these commissions' case-law was the outcome of intense struggles in doctrinal accounts and codification attempts until the mid-20th century.

The mixed-claims commissions emerged in the context of the transition from old colonialism to a new form of economic imperialism in the region. »The United States made a strategic choice for arbitration, imposed by (threats of) force on unfair terms, rather than outright invasion or occupation, to try and oust its European rivals and assert its interests in the region« (8). Thus, the movement for peace through arbitration then promoted by the United States was intimately linked to US capitalist expansion – as much as it was dominated by US establishment lawyers closely associated with business interests – while embracing the country's anti-imperialist stance.

While the newly decolonized countries from Africa and Asia managed to reassert the principle of non-responsibility of the state for injuries to aliens by rebels in the codification operations of the International Law Commission in the 1950s–1960s, their parallel demand for a New International Economic Order recognizing national authority over natural resources and foreign investors failed, because the battle had already shifted to a specialized domain of international law that developed outside of formal codification processes – investment arbitration.

The mixed-claims commissions spurred doctrinal battles within what other authors have described as the »bank of symbolic credit«[2] of international law in these early years of the institutionalization of the international scene, the *Institut de droit international*. Against the backdrop of a general consensus on the principle of non-responsibility of the state for damages incurred by foreign investors due to actions by rebels, these struggles revolved around the internationalization of the standard of protection owed to aliens in case of negligence. While the dividing line between US and Latin American scholars in these debates was not absolute, the fact that their battles on the boundaries of due diligence were fought within the framework of the case-law produced by the mixed-claims commissions contributed to reinforcing both investment arbitration as a distinct domain of international law, and due diligence as the exception to non-responsibility that ended up being more important than the rule.

The structural outcome of these systemic and doctrinal struggles was a two-tier system of rules enabling »postcolonial states and imperial powers to be treated differently in similar circumstances, while providing at least a veneer of universality« (71). The conjunction between the setting-up of the mixed-claims commissions and inter-imperial rivalries between various European powers, enabled the United States to assert their growing economic and political power on the international scene. Arbitration could thus serve the purpose of promoting US anti-imperialism while simultaneously fostering the capitalist expansion of US interests in Latin America. Furthermore, capitalizing on the fragmentation of international law suited the US domestic legal practice of reliance on judge-made law and indeed enabled »the universalization of the US way of doing things« (119).

A Lecturer in Law at the University of Technology in Sydney, Greenman is a legal historian, not a sociologist, but her study is of acute interest to both legal scholars and the emerging body of political science scholarship on the social and professional variables that structure international law as a professional market. Greenman's study provides a welcome prequel to sociological accounts of the boom of international arbitration from the 1970s oil crises[3] onwards and the subsequent predominance of the model of the Wall Street multinational corporate law firm as a vehicle

2 Guillaume Sacriste, Antoine Vauchez, The Force of International Law: Lawyers' Diplomacy on the International Scene in the 1920s, in: Law & Social Inquiry 32,1 (2007), 83–107.

3 See Yves Dezalay, Bryant G. Garth, Dealing in Virtue. International Commercial Arbitration and the Construction of a Transnational Legal Order, Chicago 1996.

of legal globalization.[4] Greenman's contention that the political and economic context can be distinguished from cultural variables, however, tends to downplay the inherent contradiction of international law as at once a tool of empowerment and of control. This means that there is a symbiosis between cultural, political, and economic variables. For example, it is precisely the multipositionality – across scholarship, legal practice, business, and diplomacy – of the lawyers involved in the doctrinal battles examined by Greenman that provided the veneer of universality to legitimize the insulation of business interests from national sovereignty. This gap in her study should be further explored by political sociologists interested in the entanglement between law, politics, and economics that helps explain the structure of the international legal order.

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Nina Cozzi

Neue Erkenntnisse zur Nichteinhaltung von EU-Recht*

In den letzten Jahren ist ein wachsendes Misstrauen gegenüber der Europäischen Union zu beobachten. Mehrere Staaten, populistischer und nicht-populistischer Orientierungen, haben die eigene Funktion in und Zugehörigkeit zur EU hinterfragt. Insbesondere seit dem Brexit haben verschiedene europäische Länder komplexe rechtliche und institutionelle Gespräche über die zentrale Bedeutung der EU in ihren nationalen Rechtssystemen geführt. In diesem Zusammenhang und innerhalb des allgemeinen akademischen Diskurses zum Europarecht betrifft eine zentrale Diskussion die Nichteinhaltung des EU-Rechts durch ihre Mitgliedsstaaten, d. h. staatliches Verhalten, das nicht mit den Verpflichtungen aus nationalem, internationalem oder EU-Recht übereinstimmt (4).

Zu dem Thema wurde bereits viel veröffentlicht, das 2021 erschienene Buch von Tanja A. Börzel aber bietet einen innovativen Einstieg in die Debatte und stellt die etablierte Herangehensweise an das Thema in Frage. In der Einleitung nimmt Börzel vorweg, dass sie mit ihrem Buch dreierlei zu klären beabsichtigt, nämlich 1. wie das unterschiedliche Verhalten der Mitgliedsstaaten bei der Nichteinhaltung des EU-Rechts zu rechtfertigen sei, 2. welche Gründe für den seit den 1990er Jahren zu konstatierenden Rückgang der Nichteinhaltung auszumachen seien und 3. welche Unterschiede bei der Nichteinhaltung der Vorschriften in verschiedenen Politikbereichen vorliegen.

Obwohl die Europäische Kommission die Nichtbeachtung von EU-Vorschriften seit mehreren Jahren als »systemisches« und »pathologisches« Problem bezeichnet, legt Börzel im ersten Kapitel des Buches dar, dass es keine Hinweise dafür gebe, dass die Europäische Union ein Problem mit der Befolgung ihrer Vorschriften habe (13).[1] Ausgehend von einer Definition der verschiedenen Formen von Nichteinhaltung und einer äußerst sorgfältigen Analyse der methodischen Herausforderungen, mit denen sich diejenigen konfrontiert sehen, die sie erfassen wollen, stellt die Autorin zunächst die *Berlin Infringement Database* vor, aus der sie im Weiteren die für ihre Analyse herangezogenen Daten schöpft (14–24). Es handelt sich dabei um eine Datenbank mit detaillierten Informationen zu jedem Vertragsverletzungsverfahren, einschließlich der Rechtsgrundlage, der Art des Verstoßes und des erreichten Stadiums für alle 13 367 Einzelfälle, in denen die Kommission zwischen

4 See Sara Dezalay, Law Firms and International Adjudication, in: Max Planck Encyclopedia of International Procedural Law 2021, https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3489.013.3489/law-mpeipro-e3489 (last visited 7 June 2023)

* Tanja A. Börzel, Why Noncompliance. The Politics of Law in the European Union, Ithaka / London: Cornell University Press 2021, XVI + 263 p., ISBN 978-1-5017-5339-8

1 Übersetzungen ins Deutsche hier und im Folgenden von der Rezensentin.