

SYMPOSIUM ON THE BRICS APPROACH TO THE INVESTMENT TREATY SYSTEM

INTERNATIONAL INVESTMENT LAW AS INTERNATIONAL LAW: RUSSIAN AND WESTERN APPROACHES

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No Western publication on international investment law (IIL) has ever specifically undertaken a comparative study of Russian and Western doctrines of IIL. Although Russian scholars often contrast Western and Russian approaches to international law, scholars in the West mostly proceed without any discussion of Russian practice and perspectives. To fill this gap, this essay introduces the Russian approach to IIL and contrasts it with its Western counterpart. In particular, we show that the Russian approach focuses far more extensively on the nature and categorization of IIL and treats IIL primarily as private international law rather than public international law. The distinctive Russian approach has practical relevance for states and scholars, in part because it helps to explain why Russia has resisted efforts to reform investor-state dispute settlement.

*Categorization Debates in Russian Scholarship*

At the beginning of the twenty-first century, the crystallization of IIL into a stand-alone legal concept became one of the most theoretically sensitive issues in Russian law. Different schools of thought developed regarding the legal nature and place of IIL within the larger bodies of public and private international law. In many ways, these categorization debates persist today and garner significant attention among Russian scholars. Textbooks on IIL, for example, always address the issue of categorization. Some do so at length.

One set of debates centers on whether IIL is a complex legal institution, a stand-alone field of law, or a subfield. Some argue that IIL qualifies as an institution. This view emphasizes the diversity of norms that are intrinsic to IIL, the numerous sources from which they derive (for example, international treaties, customary norms, and the resolutions of international organizations),<sup>1</sup> and the various fields of law to which they belong (for example, civil, administrative, and financial law). From this perspective, the law on investment relations is *sui generis* and multidisciplinary.

Other Russian scholars argue that IIL is better treated as “a stand-alone legal form which is in line with other fundamental fields of law.”<sup>2</sup> On this view, IIL is a separate field of law with unique purposes and special principles.<sup>3</sup>

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<sup>1</sup> VALERY LISITSA, *INVESTMENT LAW* 25 (2015). Russian authorities cited in notes 2–20, except for notes 9–10 and 13, are in Russian. All translations from Russian herein are by the present authors.

<sup>2</sup> Anna V. Popova, *Investment Law as an Integral Element of the Russian Law System*, L. & MOD. STATES 17 (No. 4, 2014).

<sup>3</sup> Arsen Ajupov, *On the Place of International Investment Law Within the System of International Law*, RUSS. NEWSL. ON FOREIGN ECON. 74 (Jan. 2007).

One scholar who adheres to this view describes IIL as “a system of principles and norms governing a wide range of relations between States and other subjects of international law about the introduction and operation of investments, their legal status, [and] investors’ protection and guarantees, as well as investment dispute settlement procedure.”<sup>4</sup>

Yet another group of Russian scholars approaches IIL as a part of international economic law (IEL).<sup>5</sup> These writers define IIL as a “complex [system] of norms of international economic law which govern relations between states in the field of investment,”<sup>6</sup> or as a “sub-field of international economic law” and a “body of international norms which govern cross-border investment flows.”<sup>7</sup>

A second area of debate concerns the place of IIL within broader systems of international law: is IIL a form of public or private law? Here, too, Russian scholars have adopted different views. Some believe that IIL constitutes a field of private international law.<sup>8</sup> Their reasoning focuses predominantly on the participation in IIL of foreign individual and legal persons in a private capacity as investors, and emphasizes the various ways in which the fundamental legal sources of IIL—the Washington Convention (establishing ICSID),<sup>9</sup> the Seoul Convention (establishing MIGA),<sup>10</sup> and regional and bilateral treaties on reciprocal encouragement and investment protection—govern relations between states and private investors. These commentators also point out that IIL governs interstate (public) relations to a much lesser extent,<sup>11</sup> and contend that the growing value of foreign investors to national economies makes it more appropriate to think of IIL as private law.<sup>12</sup>

Although IIL is “designed to promote and protect the activities of private foreign investors,”<sup>13</sup> other commentators (ourselves included) view IIL as a form of public law. Alexander Bogatyrev first explored the possible development of IIL as an institution of public international law in 1992.<sup>14</sup> Roughly a decade later, the first comprehensive Russian study on the international legal regulation of foreign investment mirrored the Western approach in concluding that IIL constitutes a form of public law.<sup>15</sup> Other academics in Russia have since reached the same conclusion.<sup>16</sup> For instance, the treatise *International Economic Law* refers to IIL as the “international regime of foreign investment.”<sup>17</sup> Those who share this view recognize not only IIL, but also international trade law, international financial law, and international transport law, as subfields of public international law.<sup>18</sup> Their thinking

<sup>4</sup> Larisa Volova, *Development of the International Regime of Foreign Investments*, TERRA ECONOMICUS 116, 118 (No. 4, 2011).

<sup>5</sup> VLADIMIR SHUMILOV, INTERNATIONAL ECONOMIC LAW 530–33 (2011).

<sup>6</sup> INTERNATIONAL LAW: TEXTBOOK IN 2 VOLUMES 272 (Alexander Vylegzhanin ed., 2015).

<sup>7</sup> SHUMILOV, *supra* note 5, at 541.

<sup>8</sup> See, e.g., MARK BOGUSLAVSKIJ, PRIVATE INTERNATIONAL LAW 264 (2009); GALINA DMITRIEVA, PRIVATE INTERNATIONAL LAW (2013); NATALIA ERPYLEVA, PRIVATE INTERNATIONAL LAW (2012).

<sup>9</sup> [Convention on the Settlement of Investment Disputes Between States and Nationals of Other States](#), Mar. 18, 1965, 575 UNTS 159.

<sup>10</sup> [Convention Establishing the Multilateral Investment Guarantee Agency](#), Oct. 11, 1985, TIAS No. 12089, 24 I.L.M. 1598 (1985).

<sup>11</sup> VALERY LISITSA, LEGAL REGIME OF INVESTMENT RELATIONS: THEORY, LEGISLATION AND APPLICABLE PRACTICE 53 (2011).

<sup>12</sup> BOGUSLAVSKIJ, *supra* note 8, at 21.

<sup>13</sup> RUDOLF DOLZER & CHRISTOPH SCHREUER, [PRINCIPLES OF INTERNATIONAL INVESTMENT LAW](#) 44 (2d ed. 2012).

<sup>14</sup> ALEXANDER BOGATYREV, INVESTMENT LAW (1992).

<sup>15</sup> See DMITRY LABIN, INTERNATIONAL LEGAL REGULATION OF FOREIGN INVESTMENT (2001).

<sup>16</sup> See Natalia Doronina, *Regulatory Principles as an Interpretational Source for Legal Norms (the Case of Bilateral Treaties on Investment Protection)*, RUSS. L.J. 123 (No. 5, 2016); Olga Tolochko, *On the Question of the Legal Regulation of Contemporary International Economic Relations*, S. FED. UNIV. L. SCH. NEWSL. 66 (No. 1, 2005).

<sup>17</sup> INTERNATIONAL ECONOMIC LAW 182–91 (Alexander Vylegzhanin ed., 2012).

<sup>18</sup> Tolochko, *supra* note 16, at 66–73.

demonstrates that some scholars in Russia are in step with the West on the categorization of IIL, despite the overall impression that the private international law school enjoys a much more secure position in Russian doctrine.

*The Western Approach: Points of Similarity and Difference*

While interest in the nature and categorization of IIL is particularly acute in Russia, Westerners seem to struggle with the same challenge. The absence of a shared definition has galvanized Western academics to create a rich palette of definitions, including “area,”<sup>19</sup> “field,”<sup>20</sup> “subfield,”<sup>21</sup> and “branch.”<sup>22</sup> This terminological conflict adds another layer of confusion for those who seek to understand IIL as a field of law.

One cohort of Western academics treats IIL as its own area of international law.<sup>23</sup> This group first emerged in the 1990s. At that time, international investment law did not yet exist as an independent discipline, scholars portrayed it as part of international politics rather than international law,<sup>24</sup> and doctrinal writings focused mostly on “the protection of foreign investment under customary international law, investor-state contracts, and contract-based arbitration.”<sup>25</sup> In this context, Dolzer and Stevens,<sup>26</sup> Brower and Brueschke,<sup>27</sup> and Schreuer<sup>28</sup> proffered a distinctive position. In 1995, for example, Dolzer and Stevens urged the international community to regard investment treaties “not as isolated instances of bilateral treaty-making but as an emerging practice giving rise to common standards of investment protection.”<sup>29</sup> These scholars arguably pioneered the idea of treating investment treaty law as a distinct body of international law.

Other Western commentators<sup>30</sup> consider IIL to be a species of public international law. Some go so far as to claim that IIL “is best described as a field of public international law which deals with the laws governing the commercial activities of multinational enterprises that are undertaken in foreign states.”<sup>31</sup> To support their argument, these scholars highlight the existence of international investment treaties,<sup>32</sup> given that treaties in general are “creatures of public international law.”<sup>33</sup>

Still other Western commentators view international investment law as an area of IEL, which is a branch of public international law. As one American scholar put it, IIL is “rapidly evolving toward becoming a core topic

<sup>19</sup> See Campbell McLachlan, *Investment Treaties and General International Law*, 57 INT’L & COMP. L.Q. 361, 397 (2008); Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed*, 29 ICSID REV. 372 (2014).

<sup>20</sup> Stephan W. Schill, *Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT’L L. 57 (2011).

<sup>21</sup> Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AJIL 45, 46–47, 57 (2013).

<sup>22</sup> DAVID COLLINS, *AN INTRODUCTION TO INTERNATIONAL INVESTMENT LAW* sec. 1.1, at 1 (2016).

<sup>23</sup> See, e.g., *INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES* (Freya Baetens ed., 2013); Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECEUIL DES COURS 251 (1997).

<sup>24</sup> Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT’L L. 875, 883 (2001).

<sup>25</sup> *Id.*

<sup>26</sup> RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* (1995).

<sup>27</sup> CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1998).

<sup>28</sup> CHRISTOPH SCHREUER, *THE ICSID CONVENTION – A COMMENTARY* (2001).

<sup>29</sup> Schill, *supra* note 24, at 882.

<sup>30</sup> See, e.g., JOSÉ E. ALVAREZ, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT* (2011); ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES* (2009).

<sup>31</sup> COLLINS, *supra* note 22, at sec. 1.1, at 1.

<sup>32</sup> *INVESTMENT LAW WITHIN INTERNATIONAL LAW*, *supra* note 23, at 3.

<sup>33</sup> Roberts, *supra* note 21, at 45, 50.

of international economic law and international law more generally.”<sup>34</sup> This position tends to emphasize the conceptual links that IIL shares with IEL.

In these ways, Russian and Western discourse are both similar and different. Both sides are concerned with categorizing IIL. Both feature at least some adherents to the view that IIL is a part of IEL or a form of public international law. But each community has a distinct heritage and narratives, and each tends to categorize IIL in its own way. The Russian legal literature suggests that Russia places much more emphasis on treating international foreign investment law as “the most important area of private international law”<sup>35</sup>—an idea that the representatives of the “public international law” school, including the authors of this essay, do not support.

In contrast, Western debates (at least currently) seem mainly to revolve around whether investment treaties are a form of international economic law or public international law. Unlike the Russian academic debate, Western literature makes little mention of IIL as an area of private international law. A few Western authors refer to a hybrid public/private approach that recognizes both public and private elements in IIL,<sup>36</sup> but the general tendency in the West has been to move the conceptualization of IIL from a private starting point to a public one.

### *Why the Debates Are Significant*

Russian debates over the nature of IIL are significant for multiple reasons. First, the Russian tendency to favor the characterization of IIL as a form of private international law rather than public international law helps to explain Russia’s resistance in the UN Commission on International Trade Law (UNCITRAL) to the movement toward more public international law measures for investment treaty reform, such as increased transparency, the recalibration of interpretive authority, and the multilateral investment court system. As regards transparency, for instance, the existing system is largely built on international commercial arbitration. Since such arbitration has traditionally rejected transparency as an essential ingredient of dispute settlement, Russia has resisted the reform.<sup>37</sup> In general, Russia has pursued an inflexible, traditionalist approach to the UNCITRAL discussions and seems to be one of the states most opposed to efforts to make the system more multilateral, more transparent, more state driven, and consequently more public.

This position stands in contrast to American, European, and Canadian approaches to the UNCITRAL reforms. The United States has supported some movement toward making IIL more public (as with transparency), but remains cautious about extending these moves too far.<sup>38</sup> The European Union<sup>39</sup> and Canada<sup>40</sup> have openly encouraged greater transparency within and as a part of IIL. These approaches flow more naturally from the public law paradigm.

Second, Russian debates over the categorization of IIL are significant because they are emblematic of a broader tendency in Russian legal discourse and scholarship. To name just one example, a similar orientation toward definitions and categorization appears in Russian writing on space law, where commentators have focused extensively on problems with the definition of key concepts such as “spacecraft,” “outer space,” and “activities in space.”<sup>41</sup> As

<sup>34</sup> Steven R. Ratner, *International Investment Law Through the Lens of Global Justice*, 20 J. INT’L ECON. L. 747, 751 (2017).

<sup>35</sup> ERPYLEVA, *supra* note 8, at 515.

<sup>36</sup> See, e.g., Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 2003 BRIT. Y.B. INT’L L. 151; Roberts, *supra* note 21, at 50.

<sup>37</sup> [Recording: United Nations Comm’n on Int’l Trade Law](#), 34th Sess. (Nov. 1 – Dec. 2017).

<sup>38</sup> *Id.*

<sup>39</sup> UN Comm’n on Int’l Trade Law, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union, UN Doc. A/CN.9/WG.III/WP.145, Annex, para. 3 (Nov. 20, 2017).

<sup>40</sup> [Recording: United Nations Comm’n on Int’l Trade Law](#), *supra* note 37.

<sup>41</sup> ANTHEA ROBERTS, [IS INTERNATIONAL LAW INTERNATIONAL?](#) 187-88 (2017).

Roberts explains, “this fixation on definitions is a classic trait of Russian international law scholarship” and was “an important way for academics to play it safe during Soviet times.”<sup>42</sup> Categorization debates are also present in Western discourse on IIL, but Western legal scholars and practitioners will be better equipped to engage with Russia on IIL and other topics if they are aware of the central role of these debates in Russian thinking.

### *Conclusion*

This essay has described Russian views on the nature and categorization of IIL. We have suggested that while the dominant approach views IIL as a form of private international law, there are other, less visible perspectives in Russian scholarship that more closely align with Western trends, such as the approaches that treat IIL as an area of international economic law or of public international law. For now, however, recalling Russia’s preference for the private international law framework can help state negotiators and scholars understand Russia’s position in UNCITRAL and elsewhere.

<sup>42</sup> *Id.*