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Book Review: *Judicial Acts and Investment Treaty Arbitration* by Berk Demirkol
[Cambridge University Press, Cambridge, 2018, 258pp, ISBN: 978-1-107-19846-3, £ 85, h/bk]

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ABSTRACT

The international legal protection to the investors against the actions of the host-state may emanate from any organ of the host-state, and it may be related to any function of the state, whether legislative, executive, or judicial. However, given the peculiar nature of the judicial acts, questions have been frequently raised about how far these ‘independent’ acts can be subjected to investment claims before the ‘international’ investment treaty tribunal. In this backdrop, this pioneering and award-winning work addresses the above significant need by critically examining the investment claims involving the Judicial acts in investment treaty arbitration.

The international legal protection to the investors against the actions of the host-state may emanate from any organ of the host-state, and it may be related to any function of the state, whether legislative, executive, or judicial. However, in view of the peculiar nature of the judicial acts, questions have been frequently raised as to how far these ‘independent’ acts can be subjected to investment claims before the ‘international’ investment treaty tribunal. The leading arbitrator, Jan Paulson’s masterpiece on Denial of Justice in International Law (2005) vastly filled this vacuum, though questions remained as to whether there can be any state responsibility for domestic judicial acts beyond the denial of justice in investment treaty arbitration. Moreover, amidst the scenario of backlash against investment treaty arbitration, a series of contentious and sensational investment decisions led by *Saipem v Bangladesh* (2009), *ATA v Jordan* (2010), *White Industries v India* (2011), and *Eli Lilly v Canada* (2017) have heightened the interest to explore this area more closely.

In this backdrop, this pioneering and award-winning work addresses the above significant need

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by critically examining the investment claims involving the Judicial acts in investment treaty arbitration. Though it examines an area that may arguably lie at the intersection of both domestic law and international law, the author carefully chose to contribute to international investment law and international dispute settlement rather than to comparative law (or even to comparative international law). This is a highly analytical work that mainly hinges on finely detailed legal arguments and the jurisprudence of international courts and tribunals to support its recommendations. Yet, the work is highly absorbing as it has chosen a highly demanding style to command the full attention of the readers.

In the opinion of this reviewer, the central contribution of the work is contained in the first four chapters. At the outset of the work, the author is very categorical that international state responsibility exists for judicial acts. He counters the skeptics and advises that ‘what needs to be elaborated further in this day and age is the extent of state responsibility for judicial acts’ and not ‘questioning whether such responsibility exists at all’ (14). The chapter then shifts its focus to examining the rules of state responsibility (both primary rules and secondary rules) as applicable to judicial acts for bringing the claims before investment treaty tribunals. Of particular interest in this analysis is the development of the ‘proliferation of the primary obligations in relation to state responsibility vis-à-vis individuals’ which generates a variety of new grounds and causes of action (19). Accordingly, the author is of the staunch opinion that denial of justice is not the only cause of action that may be invoked in the context of state responsibility for judicial acts. In fact, he argues for the extreme position and observes that ‘[e]ven a simple non-compliance with a least important norm is an internationally wrongful act, which gives rise to state responsibility in international law’ (26).

Chapter 2, the first substantive chapter, specifically examines three main investment treaty undertakings which are having the potential for breach by the host-states in the exercise of judicial function. They are: fair and equitable standard of treatment, effective means standard and the prohibition of unlawful expropriation. Though, as observed by the author, it is true that the protection under other investment treaty undertakings ‘overlaps extensively’ with the undertakings examined in this Chapter, a separate discussion on other investment treaty undertakings involving judicial acts could have been more useful to the readers for future references.

Yet, what is more striking about this chapter is the author’s meticulous treatment of effective means standard and the issue of non-investment treaty claims with regard to the exercise of judicial function. In the section on effective means standard, the author not only critically analysed the standard with remarkable clarity, but compared it with the nuances of

denial of justice. He brings out the hypocrisy of investment treaty tribunals in this regard and vehemently argues that the ‘only specificity of the effective means standard cannot be providing a larger protection to the investor than the protection against denial of justice’ (47). The other section on non-investment treaty claim is also dealt with in an exemplary manner. In this section, the author authoritatively and convincingly establishes that breach of a norm stemming from a non-investment treaty or in customary international law may give rise to a self-standing cause of action, in case the investment treaty provides for broader consent to jurisdiction.

Again, in chapter 3, whether it is providing valuable practical insights on when breaches in respect of wrongful judicial acts can be considered as complete, or giving a fine exposition of when an investment treaty claims relating to judicial function attains maturity, or differentiating between the substantive requirement of local remedies and procedural rule of local remedies, the author displays his profound knowledge and sophisticated understanding of secondary rules of adjudication. However, many of his statements are contestable, as for instance, the inapplicability of local remedies rule to non-ICSID arbitrations.

The next chapter deeply explores the issue of redressing wrongful judicial acts by addressing the practical legal issues in the prosecution of such claims including the legal interest, damage, the causality between the damage and the wrongful judicial act as well as the provision of non-pecuniary remedies such as declaration, juridical restitution, and injunctive remedies. It also undertakes case studies (of two investment decisions) and critically compares the remedies in the light of practice of investment arbitration. It is also used to highlight the uncommon remedy of ordering the cessation of court proceedings.

The next three chapters examine specific wrongful judicial acts and the specific circumstances in which those acts are committed. While chapter five examines the intricacies involved in the denial of justice and the violation of due process and their inter se linkages, chapter six and seven, deal with abusive and coercive measures of the domestic courts. As these areas are already explored by many writings, the questions posed in this part, may not look as new and fresh as in the preceding chapters. Yet, the author has consciously attempted to maintain high degree of originality, by taking up only hard questions, in which he succeeds to a major extent. Finally, the last chapter briefly summarise the important findings of the study.

Overall, the monograph provides an incisive and intellectually stimulating yet fascinating study. It methodically argues for an increased scrutiny of judicial acts by the investment treaty tribunals. However, it is notable that the larger implications of such pervasive arbitral interventions over domestic judicial conduct on global or domestic governance or even on

investment protection has not been examined in this work. Despite this major limitation, it is hoped that the analytical groundwork which has been done in this book will be greatly helpful for such an endeavour in the future. In essence, *Judicial Acts* immensely enriches the existing literature on the practice of investment arbitration and international dispute settlement.
