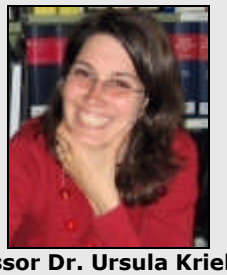
ISSN : 1875-4120
Issue : Vol. 10, issue 1
Published : January 2013

This paper is part of the "Aligning Human Rights and Investment Protection" TDM Special edited by:



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by P. Acconci

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Is It Time to Integrate Non-investment Concerns into International Investment Law?

Pia Acconci*

As current international investment law regulates the conduct of heterogeneous actors, one debated issue is how to combine their different interests and expectations, in particular those of the private investors, and those of the host States, which are in principle public ones.

Defining public interests at an international law level is an old problem to which a solution has not yet been found.

In international investment law the existence of public interest tends to be required as one of the typical requirements that a State has to satisfy if it wishes to lawfully expropriate/nationalize a foreign investment. The majority of investment treaties refer to such a requirement without defining it.

I refer to public interests as those related to the protection of non-investment concerns, such as the protection of the environment and human rights. These concerns have become very important in the last decade owing to some changes which have occurred in the international practice.

Many BITs mention sustainable development in their preambles. A few industrialized countries have included special provisions in their investment treaties to protect health, the environment and workers rights as exceptions. This is the case of the investment treaties concluded by the United States and Canada in conformity with their most recent Model BITs. Emerging countries like India are following a similar pattern.

Some disputes between a foreign investor and a host State have arisen from the latter's intention to protect similar public law concerns by changing its own domestic regulations and/or by adopting a new legislation against the foreign investor's interests and expectations[1].

These disputes have brought about a new wave of criticism towards arbitration as the most common means to settle host States-foreign investors disputes. In light of its 'private' nature, arbitration may not be a satisfactory mechanism when a dispute arises from the host State's intention to protect public law concerns/interests[2]. That is one of the reasons why some States, like Australia, have decided to stop including reference to arbitration in their investment treaties, others, such as Bolivia and Ecuador, have denounced the ICSID Convention and others, like Argentina, have chosen to remain in the ICSID, by adopting proactive judicial strategies - based on the submission of various objections during the arbitral proceedings -, so challenging the present system.

Integration - as one of the key principles of sustainable development - is considered one of the more appropriate tools to achieve a balance between the protection of private economic and public non-economic concerns.
To a large extent integration has been implemented in the European Union law.

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[1] See, for example, ICSID Case No. ARB/02/3, *Aguas del Tunari S.A. v. Bolivia*; and, more recently, the tobacco cases (ICSID Case No. ARB/10/7, *Philip Morris v. Uruguay* and UNCITRAL Case, *Philip Morris Asia, Ltd. v. Australia*).
[2] As to the importance of considering international investment law, in particular investment arbitration, as part of a public law framework, cf. G. Van Harten, *Investment Treaty Arbitration and Public Law*, Oxford, OUP, 2007, especially p. 47.

However, trends in investment treaty practice and arbitral caselaw are showing acknowledgment rather than integration of non-investment concerns in the international investment legal framework.

Is this acknowledgment enough to make investment arbitration more acceptable and the international investment legal framework less controversial?

As in the last decades arbitrators have had an active role in implementing and sometimes clarifying the basic structure of international investment treaties[3], one may wonder if arbitrators might contribute more to a change in international investment law with a new approach to the applicable rules.

This would be possible since the ICSID Convention and other international investment treaties, like the NAFTA Treaty, the Energy Charter Treaty and many BITs, provide that the applicable law to the merits of a dispute can include international law. In theory, the reference to international law should allow arbitrators to apply international rules concerning human rights and the environment together with those on investments, when the circumstances of the case make it appropriate.
In practice, many investment arbitration tribunals have either ignored or refused the requests of the host countries to apply international rules on the protection of human rights. In a handful of cases, investment arbitration tribunals have referred to the caselaw of the European Court of Human Rights to show that their decisions concerning the application of some principles, like the denial of justice[4] or proportionality[5], were well-founded.

To combine different concerns, a number of tribunals have accepted third-party participation and the submission of *amici curiae* briefs by non-governmental organizations, which aimed to underline the need for transparency in investment arbitration and/or the importance of taking non-investment concerns into account for the settlement of the dispute[6]. The ICSID Procedural Rules for Arbitration proceedings were amended to this end in 2006[7].

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[3] Cf. J.W. Salacuse, "Investment Treaties Through a Different Lens: A New Global Regime?", *Yearbook on International Investment Law & Policy*, 2009-2010, especially pp. 577, 588; S. Montt, *State Liability in Investment Treaty Arbitration*, Oxford and Portland, Hart Publishing, 2012, especially p. 125 ff.

[4] See ICSID Case No. ARB(AF)/99/2, *Mondev International Ltd. v The United States of America*, Award, 11 October 2002, paras. 139-144, which refers to the caselaw of the European Court of Human Rights concerning denial of justice in favour of the private investor.

[5] A few tribunals have referred to to the proportionality test applied by the European Court of Human Rights in relation to *de facto* expropriations. See ICSID Case No. ARB(AF)/00/2, *Tecnicas Medioambientales Tecmed SA v. Mexico*, Award, 29 May 2003, para. 122; ICSID Case No. ARB/01/12, *Azurix Corp. v. Argentina*, Award, 14 July 2006, para. 311. For reference to the jurisprudence of the European Court of Human Rights concerning the ascertainment of expropriations, see also UNCITRAL Arbitration, *Ronald S. Lauder v. The Czech Republic*, Final Award, 3 September 2001, para. 200; ICSID Case No. ARB/05/07, *Saipem S.p.A. v. Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, especially paras. 130-134.

[6] See NAFTA/UNCITRAL Arbitration, *Methanex Corp.* v. *The United States*, Decision on Petitions from Third Parties to Intervene as Amici Curiae, 15 January 2001; NAFTA/UNCITRAL Arbitration, *United Parcel Service of America Inc. (UPS) v. Canada*, Decision on Petitions from Third Parties to Intervene as Amici Curiae, 17 October 2001; ICSID Case No. ARB/03/19, *Aguas Argentinas, S.A., Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. Argentina*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005 2005. On the contrary, the ICSID tribunal in the *Aguas del Tunari v. Bolivia* case did not accept non-disputing parties submissions (ICSID Case No. ARB/02/3, *Aguas del Tunari v. Bolivia*, Letter by the President of the ICSID tribunal to the Director of the International Program Earthjustice, 29 January 2003). Cf. N. Blackaby, C. Richard, "Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?", *The Backlash against Investment Arbitration: Perceptions and Reality* edited by M. Waibel, A. Kaushal, K.-H. L. Chung, C. Balchin, Alphen aan den Rijn, Kluwer Law International, 2010, p. 253 ff.

[7] See new Arts. 32 and 37 of the ICSID Arbitration Rules.

A few tribunals have taken non-investment concerns into consideration in their judgments. The *Methanex*, *Glamis*, *Chemtura* and *Grand River* cases are particularly noteworthy, as they represent the most far-reaching awards which have been published. The Tribunals have accepted that the protection of non-investment concerns in the international investment legal framework can be considered as a legitimate exercise of the host State's police powers[8]. Other tribunals have accepted the 'Salini test' to define foreign investments and have thus considered the contribution of a foreign investment to the host State's development as one of the key defining elements[9].

Additionally, arbitrators might follow innovative interpretations of the applicable rules in accordance with international law[10].

The interpretation of investment treaties is of marked importance for the integration of non-investment concerns into international investment law.

Broad interpretations of the applicable rules - both to the merits and to the arbitration procedure - would be in line with Art. 31 (3) (c) of the Vienna Convention on the Law of Treaties, as some scholars have already pointed out[11].

Others have proposed the application of interpretative criteria and techniques which are applied in public law, such as the standard-of-review technique[12].

The issue is to choose the applicable standard in international investment law.
Should such a standard be deferential or reasonable and proportionate?

An arbitral investment tribunal shows more deference to a host State, as long as it chooses to combine the standard-of-review and the State margin of appreciation techniques.
Proportionality tends to be considered less relevant as long as the State's margin of appreciation becomes important, since an inverted relationship exists between proportionality and a State margin of appreciation.

The margin of appreciation of States is commonly applied by international courts dealing with the protection of human rights, like the European Court of Human Rights, to recognize the discretion of

[8] NAFTA/UNCITRAL Arbitration, *Methanex Corp. v. The United States*, Final Award on Jurisdiction and Merits, 3 August 2005; Arbitration under NAFTA Ch. 11, *Glamis Gold Ltd. v. The United States*, Award, 8 June 2009; NAFTA/UNCITRAL Arbitration, *Chemtura Corp. v. Canada*, Award, 2 August 2010; NAFTA/UNCITRAL Arbitration, *Grand River Enterprises Six Nations et al., Ltd. v. The United States*, Award, 12 January 2011.

[9] ICSID Case No. ARB/00/4, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, Decision on Jurisdiction, 23 July 2001, paras. 52-58. See also, *inter alia*: ICSID Case No. ARB/96/3, *Fedax N.V. v. Venezuela*, Decision on Objection to Jurisdiction, 11 July 1997, para. 43; ICSID Case No. ARB/00/6, *Consortium R.F.C.C. v. Morocco*, Decision on Jurisdiction, 16 July 2001, para. 65. Other tribunals, however, rejected the relevance of the contribution of the foreign investment to the host State's development as a key defining element (see, *inter alia*: ICSID Case No. ARB/03/08, *Consorzio Groupement L.E.S.I.-DIPENTA S.p.A. v. Algeria*, Award, 10 January 2005, para. (13) (iv); ICSID Case No. ARB/05/3, *L.E.S.I. S.p.A. & ASTALDI S.p.A. v. Algeria*, Decision, 12 July 2006, para. 72 (iv); ICSID Case No. ARB/06/5, *Phoenix Action Ltd. v. The Czech Republic*, Award, 15 April 2009, paras. 85-86).

[10] Cf. C.H. Brower, II, "Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes", *Yearbook on International Investment Law & Policy*, 2008-2009, especially p. 378; J. Wouters, N. Hachez, "When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured?", *Human Rights & International Legal Discourse*, 2009, especially p. 318 ff.

[11] See B. Simma, T. Kill, "Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology", *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer* edited by C. Binder, U. Kriebaum, A. Reinisch, S. Wittich, Oxford, OUP, 2008, p. 678 ff.

[12] Cf. W. Burke-White, A. von Staden, "The Need for Public Law Standards of Review in Investor-State Arbitrations", *International Investment Law and Comparative Public Law* edited by S.W. Schill, Oxford, OUP, 2010, p. 689 ff.

States in implementing their international obligations. The question is to define how broad such a margin can be. As non-economic concerns have not been defined and integrated into international investment law and, by its nature, this margin is variable, a case-by-case approach is the only method currently available.

Reasonableness and proportionality may contribute to find a fair balance between different expectations, interests and concerns, particularly between the host State regulating powers and a foreign investor's rights/expectations[13].

Whichever method that arbitrators choose to integrate non-investment concerns into international investment law - reference to international rules other than those on investments and/or new interpretative criteria/techniques, which may result in broad interpretation of the applicable law, on account of the human rights and environmental needs of a host State's population -, arbitrators from inside can identify and foster the changes that are needed for a peaceful and favourable international investment environment.

Going to arbitration is a cost both for a community and a company, but it may be necessary when the letter of the law is not adequate in respect of the complexity of the dispute. Should this be the case, not only local communities and the public opinion, but also investors would benefit from innovative approaches by arbitrators[14].

At any rate, in order to avoid lengthy arbitrations, international investment law should become less controversial, as to the relevance of non-economic concerns[15]. This would be possible if States would adopt appropriate binding interpretative guidelines for conflicts between international investment law and international rules on the protection of non-investment concerns. It would be even better if a greater number of States would integrate non-investment concerns into international investment law by introducing specific provisions and/or standards.

This can be achieved through new negotiations which might concern existing BITs and/or new proposals for a multilateral treaty[16].

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[13] Besides the *Tecmed* case (above, footnote 5), see ICSID Case No. ARB/02/1, *LG&E Energy Corp*. et al. *v. Argentina*, Decision on Liability, 3 October 2006, para. 195. Cf. A. Newcombe, L. Paradell, *Law and Practice of Investment Treaties*, Alphen aan den Rijn, Kluwer Law International, 2009, p. 363 ff.; B. Kingsbury, S.W. Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality", *International Investment Law and Comparative Public Law* edited by S.W. Schill, Oxford, OUP, 2010, p. 75 ff.; C. Henckels, "Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration", *Journal of International Economic Law*, 2012, p. 223 ff.

[14] Cf. B. Stern, "The Future of International Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate", *The Evolving International Investment Regime: Expectations, Realities, Options* edited by J.E. Alvarez, K.P. Sauvant, K.G. Ahmed, G.P. Vizcaíno, Oxford, OUP, 2011, p. 174 ff.; C. Schreuer, U. Kriebaum, "From Individual to Community Interest in International Investment Law", *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* edited by U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer, C. Vedder, Oxford, OUP, 2011, especially p. 1096, who believe that a more active role by arbitrators in raising community interests might be appropriate.

[15] Cf. J.E. Alvarez, *The Public International Law Regime Governing International Investment*, Maubeuge, AIL - Pocket, 2011, especially pp. 456-457.

[16] Cf. D.D. Caron, "Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy", *Suffolk Transnational Law Review*, 2009, especially pp. 523-524; J. Wouters, N. Hachez, *op. cit.*, especially pp. 340, 344; L.T. Wells, "Backlash to Investment Arbitration: Three Causes", *The Backlash against Investment Arbitration: Perceptions and Reality* edited by M. Waibel, A. Kaushal, K.-H. L. Chung, C. Balchin, Alphen aan den Rijn, Kluwer Law International, 2010, p. 341 ff.; R. Geiger, "Multilateral Approaches to Investment: The Way Forward", *The Evolving International Investment Regime: Expectations, Realities, Options* edited by J.E. Alvarez, K.P. Sauvant, K.G. Ahmed, G.P. Vizcaíno, Oxford, OUP, 2011, p. 153 ff. In favour of bilateralism, rather than multilateralism, see D. Krishan,

In the last decade some BITs have been renegotiated to make them a better tool to mitigate conflicts of interests between the Contracting States about new issues, like the determination of the field of application of most-favoured-nation clauses, of compensation in case of indirect expropriations/nationalizations and the relevance of non-investment concerns[17].

The absence of current multilateral negotiations would appear to be because of the lack not only of a special willingness of States, but also of a commentary and/or action by non-State parties, such as non-governmental organizations, scholars and practitioners.

One proposal could be for a convergence of the different on-going researches and studies into a network with the purpose of designing a model framework for future negotiations.
The concerned parties, like non-governmental organizations, could clarify what they want in the framework of non-investment concerns into international investment law[18].

The recent materialization of the 'post-Lisbon Treaty' European Union as a new important player in the international investment arena has generated expectations about the relevance of public policy objectives and principles in the international legal investment framework, as if a redetermination of the existent level playing field would be near[19].

So far, these expectations have not been realized. Perhaps, the reason is that the current financial crises has the EU looking internally and not externally.

The debate about the design of the EU common policy framework on investments and the legitimacy of international investment law however shows that it is time to wonder if it is still enough to refer to a 'colonial' concept of foreign investor protection, after passing from a colonial period to a global one of international economic relations. Today, the establishment of a favourable climate for foreign investments depends on the expectations concerning not only the treatment of investors, but also the social and environmental dimensions of investments.

"Thinking about BITs and BIT Arbitration: The Legitimacy Crisis", *New Directions in International Economic Law. In Memoriam Thomas Wälde* edited by T. Weiler, F. Baetens, Martinus Nijhoff Publishers, Leiden, Boston, 2011, p. 23 ff.

[17] Cf. C. Peinhardt, T. Allec, "Devil in Details?", *Yearbook on International Investment Law & Policy*, 2010-2011, p. 837 ff.

[18] Cf. H. Mann, "Civil Society Perspectives: What Do Key Stakeholders Expect from the International Investment Regime?", *The Evolving International Investment Regime: Expectations, Realities, Options* edited by J.E. Alvarez, K.P. Sauvant, K.G. Ahmed, G.P. Vizcaíno, Oxford, OUP, 2011, p. 22 ff.

[19] Cf. C. Brown, M. Alcover Llubià, "The External Investment Policy of the European Union in the Light of the Entry into Force of the Treaty of Lisbon", *Yearbook on International Investment Law & Policy*, 2010-2011, especially p. 161.