Public Goods and International Investment Law: Does the New Generation of IIAs Better Protect Human Rights?

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Abstract

The implicit inclusion of human rights and other public goods in international investment law by way of interpretation is always contingent on various factual and legal elements. Consequently, it cannot ensure that all investment arbitration tribunals will arrive to the same or at least similar conclusions when it comes to the inclusion of human rights. That is why the trend to include explicit provisions or references into the newly negotiated IIAs seems to be advisable. The article aims at presenting some new trends in both treaties (BITS and other IIAs) and awards of investment tribunals.

Keywords

investment agreements – investment arbitration – human rights – public goods – treaty interpretation – subsequent agreements and practice

1 Setting the Scene

There is no love at first sight between bilateral investment treaties (BITS) and other international investment agreements (IIAs) and human rights. In fact,

* The present article has been the Opening Speech at the Workshop of the Interest Group on International Economic Law of the European Society of International Law devoted to 'Global Public Goods, Global Commons, Fundamental Values: The Responses of International Economic Law', held in Naples on 6 September 2017.

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such agreements do not mention human rights at all, or in a cursory way only, which has also influence on decisions of investment arbitration tribunals. First, individuals or groups of individuals which human rights are at stake do not have usually a standing in arbitrations between an investor and a host State. Second, defendant States only rarely invoke human rights considerations, even if they have obligations arising from universal or regional conventions on human rights. In the absence of human rights provisions in IIAS, States may usually invoke other defences, if possible.

This is due to various reasons which can be partly explained by a growing specialization, compartmentalization or fragmentation of contemporary international law. Indeed, international investment law is a branch of international law which differs in many aspects from human rights law. These branches, namely the respective multilateral or bilateral treaties and agreements, include different sets of rights and obligations. They address to at least partly different holders of rights and obligations. This is in spite of the fact that both IIAS and human rights treaty impose obligations on States and provide for rights of individuals, natural or legal persons. It is even possible to argue that both of them aims at protecting similar, if not the same individual rights, namely the right to property, the right to a fair and non-discriminatory treatment, certain procedural rights, like the access to courts, etc.

However, IIAS and human rights treaties operate in a quite different way. Human rights are owed by States to all individuals, human beings in their territory or under their jurisdiction or control. There is no requirement of nationality of such individuals and no reciprocity. The correlative obligations of States operate *erga omnes*, or more precisely *erga omnes partes*. In addition, the control and enforcement of human rights, by way of international courts or quasi-judicial bodies, is based on both inter-state and individual complaints. Depending on the specific treaty regimes, not only States but also individuals, groups of individuals and NGOs have standing. The international instruments include a large catalogues of rights and freedoms, including possible general or right-specific exceptions and limitations. This makes it possible to apply human rights not in an absolute manner but rather balance them against the other rights of other persons.

On the other hand, protection and promotion of investments, under BITs or some other IIAS, is based on the principle of reciprocity. Those agreements only protect investors and investments of one State party in the territory of the other State party. The respective treaty instruments usually provide for the rights of investors and the obligations of States. They also allow, in more or less express way, for asserting certain rights of the host State, representing public interests, but they generally disregard other persons and their rights.

Nevertheless, human rights can be viewed as a kind of global public goods. As such, they can be used, directly or indirectly as defences, where appropriate. To be able to do so, States should take care in drafting BITs and other IIAs. It seems that a certain disbalance in favour of private interests (investors and their investments) and against general interests has been widely recognized. And the situation started to change, in particular during the past ten years. In addition to some arbitral decisions, new model BITs and new IIAs are drafted in a more balanced way. These agreements also include sometimes questioned mega-regionals, such as the Comprehensive Economic and Trade Agreement (EU-Canada, CETA), or the project of the Transatlantic Trade and Investment Partnership (EU-US, TTIP), etc.

2 Indirect Protection of Human Rights through the Incorporation of Public Goods and Interests in IIAs

Such outcome can be reached by more ways, including more detailed and specific drafting of certain absolute standards of treatment (such as fair and equitable treatment, FET clause), delimiting measures which constitute or do not constitute an indirect expropriation and other means. Particular attention is to be paid to articles by which States parties reaffirm their right to regulate with a view of legitimate policy objectives, such as the protection of public health, security, environment, public morals, social or consumers protection or the promotion and protection of cultural diversity.

As a matter of example, it is possible to mention certain provisions of CETA and some bilateral treaties. They do not usually include specific chapters or provisions on human rights. In spite of that, human rights are in fact covered, indirectly, by several chapters and articles aiming at protection of various public goods and interests.

First, they are included in provisions on General Exceptions, which are often modelled under the example of Article XX of the GATT. E.g., IIAs such as Article 18 of the Canadian Model BIT,¹ Article 24 of the Norway draft BIT² or Article 28.3 of the CETA,³ basically all state that “nothing” in those Agreements

1 Art. 18 (General Exceptions), Canadian Model BIT (2012): 1. For the purpose of this Agreement:

(a) a party may adopt or enforce a measure necessary:

(i) to protect human, animal or plant life or health, ...

2 Art. 24 (General Exceptions), Norway's Draft Model Treaty. Cf. Catherine Titi, *The Right to Regulate in International Investment Law* (Baden-Baden: Nomos, 2014), s. 174.

3 EU-Canada Comprehensive Economic and Trade Agreement (CETA), consolidated version of all chapters (http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf).

shall be construed to prevent a Party from adopting or enforcing measures necessary “to protect human, animal or plant life or health”. Although human rights are not expressly spelled out, there are little doubts that such protection relates to the right to life and the right to health.

Second, many recent BITS and other IIAs include more explicit provisions on the right of a host State to regulate in general interest or to pursue legitimate policy objectives. E.g., Article 8.9 of the CETA or Article 2 of the Investment chapter of the draft TTIP say that the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.

Such a right appears also in some new BITS, including the new 2016 Czech Model BIT, Article 12 (Investment and regulatory measures/objectives).⁴ In its para. 1, this article enumerates the same legitimate policy objectives which appear in the CETA and other IIAs. Moreover, Article 12(2) puts that, for a greater certainty, “the provisions of this Agreement shall not be interpreted as a commitment from a Contracting Party that it will not change the legal and regulatory framework”. On balance, it is fair to admit that most Czech BITS are from 1990s or the early years of the new century and do not include such provisions. This is typical for most of older BITS, including those of Argentina and other frequently suited countries, which are still in force and are used as a basis for investment arbitrations.

Third, additional and more specific human rights, in particular social rights, can be identified in other chapters or articles of some IIAs dealing with trade and/or investment and labour. As a matter of example, let us mention the CETA Chapter 23. In addition to the right to regulate and to provide for and encourage high levels of labour protection (recognized in Article 23.2), the Parties affirm, in Article 23.3,⁵ their commitment to respect, promote and realize the fundamental principles and rights at work in accordance with the obligations of the members of the ILO and the commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998.⁶ Furthermore, each Party shall ensure that its labour law and practices promote

4 See the text available at: http://www.mfcr.cz/assets/cs/media/Vzor_Vzorova-dohoda-o-ochrane-zahranicnich-investic.docx.

5 EU-Canada Comprehensive Economic and Trade Agreement (CETA), op. cit., pp. 184–185.

6 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998 adopted by the International Labour Conference at its 86th Session. Those rights include: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

the following objectives included in the ILO Decent Work Agenda, and in accordance with the ILO Declaration on Social Justice for a Fair Globalization of 2008 adopted by the International Labour Conference at its 97th Session.⁷

Fourth, and more specifically related to the obligations of non-state actors to respect human rights, few IIAs also introduce the concept of Social Corporate Responsibility. As it is well known, traditional BITs include only rights of investors and obligations of host States. Such agreements have been criticized and rightly so.⁸ The first proposals and model agreements have been advanced by certain NGOs, such as the International Institute for Sustainable Development (IISD).⁹

Later, such initiatives were taken over by international governmental organizations, such as the UN Conference on Trade and Development. The UNCTAD Investment Policy Framework for Sustainable Development is a document dealing with model provisions for future IIAs.¹⁰ The Section 7 of the UNCTAD Framework also includes a clause on duties of investor. It may contain an obligation to respect laws of the host State and a clause on denial of rights under the given treaty if the investment is in conflict with law of the host State. From the perspective of human rights bodies, the most relevant document is the Guiding Principles on Business and Human Rights, adopted by the UN Human Rights Council in 2011.¹¹

Even more importantly, however, the above mentioned UNCTAD model agreement provides for that a treaty may include a provision encouraging or

- 7 Art. 23.3, para. 2, EU-Canada Comprehensive Economic and Trade Agreement (CETA), *op. cit.*, p. 185. Those rights include: (a) health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; (b) establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and (c) non-discrimination in respect of working conditions, including for migrant workers.
- 8 Cf. Peter Muchlinski, *Negotiating New Generation International Investment Agreements. New Sustainable Development Oriented Initiatives*. In: Steffen Hindelang, Markus Krajewski (eds.), *Shifting Paradigms in International Investment Law, More Balanced, Less Isolated, Increasingly Diversified* (Oxford: OUP, 2016), p. 41 ff.
- 9 *International Institute for Sustainable Development, Model International Agreement on Investment for Sustainable Development. Negotiators Handbook*, 2nd ed., IISD 2005 (revised 2006), see at : www.iisd.org/pdf/2005/investment_model_int_agreement.pdf.
- 10 UNCTAD *Investment Policy Framework for Sustainable Development* (2012), UN Pub. UNCTAD/DIAE/PCB/2012/5 (http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf); and its new version, UN Pub. UNCTAD/WEB/DIAE/PCB/2015/3.
- 11 Guiding Principles on Business and Human Rights Implementing the United Nations 'Protect, Respect and Remedy' Framework; viz www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf.

requiring an investor to carry on a due diligence of human rights in the enterprise in accordance with the UN Guiding Principles. Moreover, investors may be also required to respect the standards of Corporate Social Responsibility.¹² It is interesting that clauses on CSR have been progressively incorporated into some recent bilateral treaties. For example, the Norway's draft model BIT of 2007 says in Article 32 that parties shall "encourage investors to conduct their investment activities in compliance the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact". Similar concerns are reflected in the Preamble to the Austrian Model BIT (2011). The Canadian Model BIT also includes a provision (Article 16) on CSR providing that "each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption."

Most recently, the CETA also incorporates a preambular paragraph in which Parties "encourage enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct".

Having said that, the present contribution does not claim that the direct incorporation of reference to public goods in general (and human rights in particular) in the Preambles or operative provisions of new IIAs is the only way how to introduce them into international investment law. The argument is more nuanced. On the one hand, this way seems to be preferable, as such black and white letters in the treaty can hardly be ignored by international arbitral tribunals. First, usual interpretative methods, namely the general rule of treaty interpretation (Article 31, para. 1, of the Vienna Convention of the Law of Treaties)¹³ warrant giving effect to all rules and principles expressly written or referred to in a treaty. Second, the reference to specific rights and documents

12 See UNCTAD *Investment Policy Framework* 2012, p. 58; UNCTAD 2015, p. 107.

13 See Vienna Convention on the Law of Treaties (1969), 1155 UNTS, 331. Article 31 – General rule of interpretation:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

may limit uncertainty about which human rights are to be applied in the context of international investments.

On the other hand, most IIAs in force are old BITs that do not usually contain any such preambular or operative clauses. It is also more likely to adopt labour and other rights in preferential trade and investment agreements than in the classical BITs.¹⁴ And even the more recent agreements, which already included some provisions of this kind, often use just exhortatory and non-binding language. It means that human rights and other public goods can make it into international investment law only slowly, by way of new treaty provisions. At the best, such new agreements may reflect a new trend in IIAs but cannot, in and by themselves, change the prevailing content of international investment law.

3 Alternative (mostly interpretative) Means

However, there are also alternative ways how to include human rights and other public goods or fundamental values into international investment law. They are different in nature and not equally reliable as to the outcome. Two of them have essentially interpretative character, while the third relies on the procedural rules.

First, human rights or public goods may be incorporated into the IIAs through subsequent agreements or subsequent practice which establishes the agreement of the Parties regarding the interpretation of the treaty.¹⁵ Such subsequent agreements or practice establishing the agreement on interpretation, if adopted by all Parties, reflect the “common understanding of the parties” and provide thus for the authentic means of interpretation of that treaty, even if these means do not necessarily imply a conclusive effect.¹⁶

14 Cf. Anthony Van Duzer, Sustainable Development Provisions in International Trade Treaties. What Lessons for International Investment Agreements? In: Steffen Hindelang, Markus Krajewski (eds.), *Shifting Paradigms in International Investment Law. More Balanced, Less Isolated, Increasingly Diversified* (Oxford: OUP, 2016), p. 175.

15 See Article 31, para. 3: There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

16 Cf. commentary to draft Conclusion 3 (Subsequent agreements and subsequent practice as authentic means of interpretation), in Report of the ILC, 2016 (A/71/10), pp. 118 ff., at 132–134.

Although such subsequent agreements do not appear often in international investment law, they are not excluded. A notorious example is the interpretative declaration adopted by the NAFTA Free Trade Commission in 2001, on the meaning of the standard of fair and equitable treatment under Article 1105(1) of NAFTA.¹⁷ However, this interpretation was generally accepted by investment tribunals, being rejected in case *Pope & Talbot*,¹⁸ but confirmed in *ADF Group*¹⁹ or in *Mondev*.²⁰

Second, a potentially most powerful means of systemic integration of human rights, environmental agreements and other instruments aiming at protection of public goods seems to reside in Article 31, para. 3(c), of the Vienna Convention which requires taking into account any relevant rules of international law applicable between the parties. However, although investment tribunals should generally apply the Vienna rules of treaty interpretation, including that of Article 31(3)(c), where appropriate, they often refuse to do so. The tribunal in *Methanex*, while rejecting the investor's claim, arrived at the conclusion without applying the Vienna rules on the interpretation of NAFTA provisions. Similarly, though with the pro-investor outcome, the tribunals in cases *Santa Elena*²¹ and *Unglaube*²² did not even mention the obligations of Costa Rica to protect the natural environment under multilateral environmental treaties.

In fact, most investment arbitration awards refer to decisions of other tribunals, but only few of them take into account subsequent agreements and subsequent practice or even any applicable rules of international law according to Article 31(3) of the Vienna Convention.²³ It means that, although not entirely

17 NAFTA Free Trade Commission, 31 July 2001. Cf. Yannaca-Small, K., Fair and Equitable Treatment Standard: Recent Developments. In: Reinisch, A. (ed.), *Standards of Investment Protection*. Oxford: Oxford University Press, 2008, p. 114.

18 *Pope & Talbot Inc. v. the Government of Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002.

19 *ADF Group Inc. v. USA*, ICSID case No. ARB(AF)/00/1, Final Award, 9 January 2003, par. 179.

20 *Mondev v. USA*, ICSID case No. ARB(AF)/99/2, Award, 11 October 2002, par. 125.

21 *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID case No. ARB/96/1, Final Award, 17 February 2000.

22 *Unglaube and Unglaube v. Costa Rica*, ICSID case No. ARB/08/1 and ARB/09/20, Award, 16 May 2012.

23 Cf. Katharina Berner, Reconciling Investment Protection and Sustainable Development. A Plea for an Interpretative U-Turn. In: Hindelang, Krajewski, *Shifting Paradigms in International Investment Law*, op. cit., pp. 188–203; Pavel Šturma, Vladimír Balaš, *Ochrana mezinárodních investic v kontextu obecného mezinárodního práva* [Protection of International Investment in the Context of General International Law], Praha: PF UK, 2012, pp. 46–47.

absent in some arbitral awards, the Vienna rules on treaty interpretation do not play such a role as they could and should play. While the IIAs, unlike the WTO Agreement, do not expressly provide for such approach, they are international treaties governed by general international law which includes also the rules on treaty interpretation. The tribunals should not just pay a lip service to the Vienna rules but approach interpretation as a single combined operation. Then all legally relevant aspects, including arguments based on a broader context of the IIAs, need to be considered.

However, there are also other means beyond the means of interpretation how to include non-economic considerations. As a matter of jurisdiction, an ICSID tribunal can accept the respondent counterclaim based on the alleged violation of human rights. Such a possibility arises from Article 46 of the ICSID Convention which provides: "Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."²⁴

Until recently, however, ICSID or other tribunals did not accept jurisdiction over human rights counterclaims for a lack of sufficient legal or factual links between the main claim and the counterclaim.²⁵ It is for the first time the ICSID award in *Urbaser v. Argentina* (2016)²⁶ that accepted jurisdiction over such counterclaim and integrated a human rights perspective into international investment law. The claimant, a shareholder in a concessionaire that supplied water and sewerage services in Buenos Aires, commenced arbitral proceedings for violations of the BIT between Spain and Argentina. The counterclaim filed by Argentina alleged that the concessionaire's failure to provide the necessary level of investment in the business led to violations of the human right to water.

The tribunal held that a sufficient connection between the main claim and the counterclaim was established by the manifest factual links between the

24 See the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), at: <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>.

25 See, e.g., *Saluka v. Czech Republic*, UNCITRAL case, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004.

26 *Urbaser S.A., Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID case No. ARB/07/26., Award, 8 December 2016. Cf. also Guntrip, E., *Urbaser v. Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?* EJIL: Talk! (10 February 2017).

claims and because the claims were “based on the same investment, or the alleged lack of sufficient investment, in relation to the same Concession”.²⁷

When arrived at the merits, the tribunal found, on the basis of examination of the arbitral clause, the applicable law clause and other provisions, that the BIT was not a closed system but it enabled the respondent to make reference to certain legal sources external to the BIT.²⁸

The precedential decision of the tribunal has certain strong points. First, it found that although the claimant was a non-state actor, it could also bear human rights obligations in international law. Second, the tribunal referred to several human rights instruments, namely to the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, to establish human rights obligations associated with a right to water.²⁹ Furthermore, the tribunal also relied on the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

Quite interestingly, the tribunal also used Article 30 of the UDHR and Article 5, para. 1, of the ICESCR³⁰ to conclude that in addition to human rights related to the right to water, there was also “an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights”.³¹ In the end, however, the counterclaim was not successful on the basis of the above interpretation of human rights obligations by the tribunal. It found the origin of the obligation related to the right to water in the concession contract. Next, as the human right to water provided a duty to perform, the only obligation was placed on the State. Consequently, the claimant’s obligation would be based in the concession contract or domestic law.³² However, the tribunal did not have jurisdiction over matters related to Argentina’s domestic law.

Nevertheless, the tribunal pointed out that “the situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties.”³³

27 Ibid., par. 1151.

28 Ibid., par. 1191.

29 Ibid., par. 1196–1107.

30 Art. 5(1): “Nothing in the present Covenant may be interpreted as implying... any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein.”

31 Urbaser v. Argentina, op. cit., par. 1199.

32 Ibid., par. 1208–1210.

33 Ibid., par. 1210.

4 Conclusion

To conclude, it seems that award in *Urbaser* opened the doors for a human rights counterclaim by the host State. On balance, it did not give full effect to human rights in the merits. It still remains to see which sources and which human rights can establish obligations for non-state actors in general and in the investment arbitration in particular.

Those who wish to rely on interpretative tools or the way of counterclaims in investment arbitration may be disappointed. However, in view of the recent developments the question is whether a glass is half-full or half-empty.

Anyway, the implicit inclusion of human rights and other public goods in international investment law by way of interpretation is always contingent on various factual and legal elements. Consequently, it cannot ensure that all tribunals will come to the same or at least similar conclusions. That is why the trend to include explicit references into the newly negotiated IIAs seems to be advisable.