Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society

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In the lectures in honor of Sir Hersch Lauterpacht recently delivered by this author at the Research Centre for International Law of Cambridge University, it was concluded that dispute settlement in the new century will be characterized by three parallel and intertwined developments: constitutionalization, accessibility and privatization.1 These trends will undoubtedly have a strong influence on State behavior— not so much because of the dilution of sovereignty in a globalized international community, but rather because of increasing controls that will be exercised on the manner in which States carry out their functions in respect of individuals. This article will discuss one particular aspect of globalization in connection with the settlement of disputes in areas presently or prospectively brought under international protection.

Protecting Rights under International Law: Old Subjects, New Requirements

Foreign investments have thus far been the paramount example of this new approach to the protection of the rights of certain qualifying individuals and the manner in which the international community scrutinizes State behavior in respect thereof. The International Centre for Settlement of Investment Disputes ("ICSID") has been the leading institution in making this new approach possible. Although the standards of control are not well defined, the principle is this: States are accountable to foreign investors to the extent that wrongful State action interferes with their rights as provided for in national legislation, treaties or contracts.

These developments are not really surprising, as they have been taking place over a long time. First, in the field of human rights, not only foreigners but also nationals have been granted the protection of some mechanisms of international control and verification, be they global or regional. Similarly, in terms of the enforcement of international humanitarian law, international conventions and implementation mechanisms have been active for a significant period of time.

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Conceptually, therefore, international control of national activities has been available on a continuing basis, with limits imposed by the extent of the coverage and the subject-matter to which it applies.

Globalization will inevitably mean that the international community will bring new areas into the same type of scrutiny. Besides foreign investments, international trade is also gradually appearing as a strong candidate for this approach. Claims by traders before national courts or administrative mechanisms have often involved delicate issues of international law and not infrequently have been the basis on which States have pursued claims before the World Trade Organization (“WTO”). Claims of this kind are channeled in some instances through regional institutions, as is particularly the case in the European Community.

In some specific free trade agreements – notably the case of NAFTA – individuals affected by wrongful State action have been allowed to take their claims to binational panels. Although they apply national law and standards, these panels entail a process of international control of national administrative actions requested directly by the individuals affected.

Many other examples can be mentioned in this context. Intellectual property, the law of the sea, and claims settlements of various kinds, particularly those resulting from times of war, are but a few areas in which forms of international control have been exercised. Proposals for new areas include the environment – an international environmental court having been suggested – and State bankruptcy and insolvency, as evidenced by recent discussions of the matter in the International Monetary Fund.

**Progress and Regression in the Search for Balance**

To pursue this discussion, it is first necessary to identify the framework in which domestic and international law will operate. The protection of property and acquired rights is no longer a fundamental issue in international law. For a long time the right to protection could not be easily reconciled with the supremacy of national sovereignty. Only after difficult confrontations was an understanding reached about the limits of the respective contentions, and conditions were established for the exercise of diplomatic protection and the right to expropriate, as well as for the right to compensation. International adjudication was instrumental in reaching such understandings.

The success of this approach, together with inescapable economic realities, has been so evident that outright direct expropriation is today rather exceptional. It must satisfy a number of well-settled requirements in order to be accepted as law-