Non-Investment Considerations in Investment Treaty Arbitration

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Most investor-state disputes arise out of investment treaties, and not contracts. Investor-state arbitration practices are based on rules and procedures of commercial arbitration. This inter-party model of dispute resolution is generally preferred by parties to an investment agreement, which makes tribunals overlook some of the broader public policy considerations to the disputes. The public character of the disputes due to a state's involvement and the relation of the procedures to commercial arbitration leads to tension between the two, and the emergence of non-investment considerations.

Non-investment considerations are norms of International Law which are not related to the protection of foreign investors, and these can be violated without a concurrent violation under an investment treaty. For example, the protection of human rights, international labour laws, freedom of speech, environment and wildlife protection, right to innocent passage etc. are non-investment considerations arising out of investment agreements[A1] . For example, the dispute in Eco Oro v Colombia considered human rights obligations, and the tribunal in Philip Morris v. Uruguay was related to human health and environment considerations. These considerations usually are not provided within the investment treaty, and merely customary in nature.

There exists a tension between these Non-investment considerations and the State's obligation towards foreign investors, as the States also have a duty to protect its citizens. Courts and arbitral tribunals are often burdened to consider these disputes. Since investment-treaty arbitration has gained an unprecedented momentum recently, it seems to expand and interact with other avenues of international law, including Environmental Law, Humanitarian Law, Human Rights Law, and so on. The intersection of Investment Law with these fora warrants a discussion on its impact and the considerations. In this article, I address the ways in which non-investment considerations can play a role in investment-treaty arbitrations, where I first explain the jurisdiction of the tribunals in accounting for non-investment

considerations. Then, I examine the possibility of non-investment considerations based on the provisions of various investment treaties, followed by an analysis of how the applicable law decided by the tribunal can incorporate them. Lastly, I comment on the use of non-investment considerations by States as a defence against responsibility.

Do tribunals have the jurisdiction over non-investment considerations?

Investment tribunals are by definition bound by compromissory clauses in the investment treaties (Bilateral Investment Treaties or Multilateral Treaties), and the consent of the states is paramount. Compromissory clauses are clauses in treaties providing for the submission of a matter or matters to arbitration. These[A2] clauses limit the type of disputes that can be considered by the tribunals, and they have no competence in questions outside their allocated responsibility. Tribunals can only apply the legal systems employed by the parties contained within the arbitration agreement. States usually consent to arbitration only for a certain type of disputes, which are generally restricted to investment disputes. They limit the jurisdiction of the tribunals to adjudicate upon disputes between a foreign investor and state. This is also derived from Article 25 of the ICSID Convention.[A3] Article 25 of the Convention relates to the jurisdiction of the ICSID, and extends its jurisdiction to legal dispute sarising directly out of an investment.

However, tribunals can also consider questions that do not explicitly talk about the investments. The questions must be linked to the investment, either directly or indirectly. Tribunals usually restrict themselves from commenting upon Non-investment considerations such as human rights or environment protection, but if these Non-investment considerations are related to the investment, the tribunal might consider them. This was confirmed in Von Pezold v. Zimbabwe. The tribunals would have no jurisdiction if the Non-investment considerations were completely detached from the investment. Similarly, in Biloune v. Ghana, the tribunal held that ruling on *every* violation of the foreign investor's right was outside its jurisdiction, and the tribunal would limit itself to rights concerning the investment despite.

Provisions of non-investment considerations in Investment Treaties: [A4]

One of the reasons why non-investment considerations in investment treaty arbitration is a relatively recent phenomena, is because of its scarce mention in traditional investment treaties. Most of the governing investment treaties, including treaties like the NAFTA and the ECT[A5] , do not talk about Non-investment considerations; but there has been a recent trend to provide for the same. For example, the 2012 US model BIT does mention the "protection of health, safety, and the environment, and the promotion of internationally recognized labour rights" in its preamble . This acts as a guiding principle for the treaty. Secondly, the Canada-Benin Foreign Investment Promotion and Protection Agreement also mentions that foreign investors are 'encouraged' to voluntarily adhere to non-binding international standard on labour laws, environment protection, and human rights. Thirdly, the Netherlands-Hungary BIT offers a broader scope of arbitration as it is worded to include "any dispute concerning expropriation", which could be used by investors to invoke the responsibility of the state based on other international norms, extending to non-investment considerations. Even when states are entering into new investment treaties, they should be obligated to take into account their international obligations which extends to human rights, protection of the environment etc. Therefore, the syntax of the investment treaty plays an important role in the determination of non-investment considerations.

Determination of non-investment considerations Applicable law: [A6]

In any arbitral procedure, party autonomy is of utmost paramountcy. Parties decide upon the law to be applied by the arbitral tribunal. Usually, it's a combination of domestic and international law. As per Article 42(1) of the ICSID Convention, investment tribunals are required to 'decide a dispute in accordance with such rules of law as may be agreed by the parties'. The syntax of the applicable law clause is very important to derive if the tribunal would be able to govern a Non-investment consideration or not. If the applicable law clause includes international law, secondary norms such as the Vienna Convention on the Law of Treaties ("VCLT") or the Responsibility of States for Internationally Wrongful Acts ("ARSIWA") would apply to the tribunals without contentions. The application of primary norms of international law on human rights or environment protection can be questioned. If Non-investment considerations are connected with the investment, these primary norms of international law would apply, as its application would be mentioned in the investment agreement. Mention of the application of international law can be derived from provisions such as Article 1131 of the NAFTA, Article 30 of the US Model BIT, Article 40(1) of the Canada Model BIT , Article 9(3) of the Chinese Model BIT and Article 26(6) of the ECT.

The conflict between the Non-investment considerations and investment obligations can be used to aid the tribunals in determining the former. When a tribunal is faced with such an issue, the general norm would be to turn to the VCLT to determine which obligation takes precedence. As per the *lex specialis* principle, in situation of a conflict, a specific norm would take precedence over the general norm. However, since these norms do not cover the same subject-matter, and it is difficult to establish which norm is more 'specific', the VCLT would not be able to resolve the conflict. This is where the principle of systematic integration comes in, provided within Article 31(3)(c) of the VCLT, as per which a tribunal has potential to interpret the investment agreement by considering the obligation of states under general international norms. This can be useful in integrating non-investment considerations with the investment treaty obligations. For example, in Saluka v. Czech Republic, there was a conflict between the FET Standard and the Full Protection and Security rule, and the tribunal interpreted each of these independently. This broadens the scope of the tribunals, and offers an opportunity to interpret Non-investment considerations and uphold the international standards to protect the environment, uphold human rights etc. Furthermore, in the absence of a contract between the investor and the host state, principles of international law would apply in cases of a genuine dispute in the matters of investment, as it was held in LG&E v. Argentina.

Authors are also of the view that human rights also include the rights bestowed upon investors by the virtue of their investment, deriving authority from the investment treaties and agreements. Human rights and rights of the investor share a common principle, *wiz*, the protection of the individual from the state. For example, in Balkan Energy v Ghana, the arbitrary detention of the manager of the foreign investor gave rise to questions affecting the investment itself, even though the detention could fall within the larger ambit of human rights.

Non-investment considerations as a defence against responsibility by Host States: [A7]

States can, and do, claim that if they are in breach of the investment agreement, they are justified by the defence of necessity, based on the need to protect the environment and uphold human rights. For example, in Suez v Argentina, Argentina claimed that human rights laws required them to regulate the

supply of water, and this obligation should be recognised by the tribunals, while the Claimants contested that this obligation is irrelevant to the investments. Here, and in similar cases such as Biwater v Tanzania, the defences by the state are not accepted due to the strict conditions required to justify the defence of necessity as per the ARSIWA. However, the general practice of arbitral tribunals is to avoid questions of non-investment considerations. For example, in cases such as *Azurix, Siemens,* and *Sempra*¸ tribunals strictly avoid going into questions involving human rights, consumer rights, and constitutional rights. Therefore, applying non-investment considerations as a defence against responsibility might not be a successful route.

Finally, it is important to consider the beneficiary, or the entity protected by international laws. For example, the Chemical Weapons Convention or the Kyoto Protocol are both inter-state norms, and they do not create legal obligations upon a state to protect individuals. However, norms such as Article 17 of the UNCLOS providing for innocent passage, or international norms of human rights specifically aim to benefit an individual, allowing investors to be the legal beneficiaries of the international standards. Therefore, if an individual or a corporation can directly benefit from the international legal norm, and is the entity protected by the norm, there might be a stronger argument supporting the incorporation of non-investment considerations.

Conclusion

There are many aspects which can be considered to understand the role of non-investment considerations in Investment Treaty Arbitration, and I have addressed the ones relating to the jurisdiction of the arbitral tribunal deciding on the issues, the provisions stipulated within the investment treaty in question, the applicable law decided by the parties, the defence against responsibility taken by the host states, and the existence of the legal beneficiary of the norms providing for the non-investment considerations. It can thus be concluded, based on the above arguments, that the trend to account for non-investment considerations in Investment Treaty Arbitration has been catching up, and though it is an exception today, it has potential be the norm in the coming days.

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