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Human Rights and Investment Arbitration – Fields of Interaction

Prawa człowieka i arbitraż inwestycyjny – przestrzeń interakcji

Introduction

The main scientific purpose of this article is to identify and analyse legal issues that arise between human rights and investment arbitration. At first glance, these two branches of public international law remain completely unrelated and do not have any significant features in common. It does not come as a surprise – human rights *per essence* are focused on individual human beings, and “while investors can be individuals, international investments law deals mostly with investors envisaged as legal persons, not individuals, the investor being in most cases a private corporation” (Dupuy, 2009, p. 45). However, it appears that despite this distinction, there is an interaction between investment arbitration and human rights, which implies a number of significant legal problems. These problems can possibly include the violation of human rights of citizens of the state hosting an investment by a foreign investor. On the other hand, the state can be unable to fulfil its legal obligations regarding human rights due to the necessity to protect foreign investment as agreed in – most commonly – Bilateral Investment Treaties (BIT) or, to the contrary, it may violate its contractual obligations towards an investor and afterwards defend itself throughout arbitration proceedings by stating that this violation has been necessary in order to protect human rights. It turns out that both investors and host states may turn to public international law provisions,

including human rights treaties, to reinforce their respective positions or to put forward autonomous claims (*Human Rights Law and Investment Arbitration*, n.d.). Moreover, arguments regarding human rights may be raised throughout investment arbitration proceedings by entities that are not parties to the dispute, including *amicus curiae*. It could indicate that while

[...] initially relatively little attention was given to human rights law considerations by arbitral tribunals, [...] now it can no longer be said that human rights and investment arbitration are wholly disassociated. To the contrary, the tide seems to have turned and recent decisions show that arbitration tribunals are increasingly open to considering human rights issues (*Human Rights Law and Investment Arbitration*, n.d.).

The interaction between human rights and investment arbitration is of a very complex nature, and although it is more and more often emphasized in the doctrines of both human rights law and investment arbitration law that it may occur, the situations in which this occurrence is likely to happen are not entirely clear yet. For instance, it remains unclear to what extent it is justified to invoke arguments regarding human rights in investment arbitration proceedings. Moreover, it is debatable which legal regime should prevail in case of a conflict between them. Since there is a tendency nowadays in international and national legal systems to reinforce human rights protection, it is particularly valuable to analyse the scope of this protection from the perspective of situations in which issues regarding human rights have not been widely discussed so far, including international investment law and arbitration.

The paper, after presenting some general remarks on the interaction between human rights and investment arbitration, discusses the most common scenarios in which human rights issues may appear in the course of investment arbitration proceedings. Finally, it concludes that there do exist some fields of interaction between human rights and investment arbitration, as well as situations in which a conflict between them may appear. Identifying these conflicts would help to understand the complex relationship between the two legal regimes in question. It will also lay the foundation for further research on how to ensure the ultimate scope of human rights protection throughout the different stages of investment arbitration proceedings.

1. The interaction between human rights and investment arbitration – general remarks

In most general terms, investment arbitration can be defined as a procedure for resolving disputes between foreign investors and host states. Its primary aim is to ensure a sufficient level of legal safety for investors placing their investments abroad in an unknown jurisdiction. In other words, the possibility for a foreign investor to sue a host State is a guarantee for the foreign investor that, in the case of a dispute, it will have access to independent arbitrators appointed by the parties themselves, who will solve the dispute and render an enforceable award (*Introduction to Investment Arbitration*, n.d.). This allows the foreign investor to have his disputes solved by professional and highly qualified experts, and, what is particularly important, to bypass national jurisdictions that might be perceived to be biased or to lack independence (*Introduction to Investment Arbitration*, n.d.). In the most typical scenario, host states give their consent to investment arbitration in bilateral investment treaties (BIT) or in multilateral investment agreements, e.g., The Energy Charter Treaty (ECT). An investment dispute to be solved throughout arbitration can be heard by the permanent arbitration institution administering investment arbitrations, including the most famous one, namely, the International Centre for Settlement of Investment Disputes (ICSID). Other institutions that administrate investment disputes include the Stockholm Chamber of Commerce (SCC), the Permanent Court for Arbitration (PCA) or the International Chamber of Commerce (ICC), etc. However, the investment arbitration agreement may also provide for an *ad hoc* arbitration that is not administrated by any of the permanent arbitration institution. In both cases, the arbitral tribunal is appointed by the parties to solve one particular dispute that arose in conjunction with a foreign investment and, therefore, its jurisdiction is generally limited to solve this particular dispute.

This main idea of investment arbitration seems to indicate that this mechanism is not related to human rights protection systems in any way and has no impact on the human rights dimension in any way. Human rights regulations are also not included in the Washington Convention (Convention on the Settlement of Investment Disputes Between States and Nationals of Other States), and ICSID reports do not even include the term “human rights” in their index (Morawska, 2014, p. 221). Nevertheless, the research hypothesis of this article assumes that there are certain points

of contact in which these orders of systems interact or even conflict with each other. The wide scope of the impact of investments (e.g., in the sector of privatized public services) and the involvement of the state as a party to the dispute mean that the Tribunal's decision may affect the situation of third parties and have an influence on the state's policy, also in the field of human rights protection (Gorywoda, 2014, p. 8). For this reason, human rights considerations are occasionally raised in arbitral tribunals' judiciary. Investigating the nature of the interaction between the two legal systems in question is crucial to develop models for solving potential conflicts between the two legal regimes in question.

Since the interaction between the investment dispute resolution mechanism and the protection of human rights eludes legal intuition and can be qualified – at least *prima facie*, as highly unintuitive, it is necessary to outline the most common scenarios in which these two legal orders may come into contact. In the next parts of the article, I will analyse these scenarios and assess their practical significance.

2. Violation of foreign investment by a state regulating its own legislation in order to protect human rights

In the first possible scenario, human rights and international investment arbitration may interact when a foreign investment is violated by a host state that regulates its own legislation. In these situations, host states may rely on human rights arguments in response to investor's claims or, in other words, they can use human rights as a defensive argument in arbitration proceedings to justify the violation of an investment.

For instance, a host state may implement a new law (e.g. to regulate its own market) or modify the existing legal regulations (e.g. to regulate investments located therein) in order to ensure human rights protection in its territory. By doing this, a state may indirectly breach its obligations towards investors, which it is obliged to comply with according to international investment treaties binding this host state (Gorywoda, 2014, p. 9). And accordingly, in the course of arbitration proceedings, the state may indicate as a defensive argument that it has infringed an investment, because it was obliged to protect its constitutional order, or to ensure the protection of human rights in its territory (Gorywoda, 2014, p. 9). This problem has been most extensively dealt with by the Tribunals in

connection with the necessity defence raised by Argentina in numerous cases relating to the 2001 Argentinian crisis (Tanzi, 2013, p. 592).

The decision on liability issued in the famous *Suez* case (*Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. vs. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010) has been in a way a groundbreaking decision in this respect. What has been particularly innovative is

[the] balanced character of [the Tribunal's – M.M.-G.] findings, as it seems to have favourably addressed both the economic interests of the foreign investors and the public interests of the host state [...] [as] the Tribunal did not avoid the relevance of human rights law in connection with public services, which had been invoked by Argentina in its defence (as well as by five NGOs admitted to the proceedings as *amici curiae* (Tanzi, 2013, p. 592).

Argentina and the *amicus curiae*'s submissions received by the Tribunal suggest that Argentina's human rights obligations to ensure its population the right to water somehow trump its obligations under the BITs and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations (para. 262). However, even if the Tribunal considered the relevance of human rights defence in the course of investment arbitration proceedings, it ultimately rejected Argentina's argument and affirmed that Argentina could have tried to apply more flexible means to ensure the continuation of the water services to its citizens and, at the same time, respected its obligations of fair and equitable treatment; since a state is "subject to both international obligations, i.e. human rights and treaty obligations, and must respect both equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive" (para. 260–262). Thus, both types of obligations could be respected, and the violation of one of these by the state has not been justified. This decision shows the general tendency in the judiciary of arbitration tribunals. When such arguments are raised in investment proceedings, arbitrators are rather unwilling to accept them and to consider the defence of states as effective.

3. Violation of investor's human rights by the host state

In the second scenario, it is the investor who may claim that his human rights have been violated by the host state. As already emphasized, human rights are primarily associated with natural persons. However, the legal concept of property and its economic importance constitute the absolute basis of any investment, including foreign investment, and the right to property was recognized as a fundamental right already in the French Declaration of the Rights of Man and the Citizen of 1789 and has been consistently recognized until now as one of the elementary human rights, either in international systems or under the national constitutions of democratic states (Dupuy, 2009, p. 45). Moreover, the concept of assigning these rights to economic entities (legal persons) is increasingly being recognized as well; the legal persons have already been granted the beneficiaries of human rights protection under the European Court on Human Rights system many times (Emberland, 2006; Ziemblicki, 2020, pp. 241–251). The investor could also (at least by analogy) be a beneficiary of the right to a fair trial and claim in the course of the arbitration proceedings that his human rights have been violated. As a consequence, this scenario, although not among the most typical ones, is definitely possible.

For instance, in *Biloune v. Ghana* case (*Biloune and Marine Drive Complex Ltd. v. Ghana*, Ad hoc tribunal (UNCITRAL rules), Award on Jurisdiction and Liability, 27 October 1989), a Syrian investor based his claim on violations of human rights (namely arbitrary detention and deportation) besides contractual breaches of an agreement between him and Ghana (Kube & Petersmann, 2018, p. 229). The tribunal, however, declared that it lacked jurisdiction to rule on human rights issues as an independent cause of action, since according to the jurisdictional clause of the contractual agreement, arbitration only covered disputes arising “in respect of an approved enterprise” (Kube & Petersmann, 2018, p. 229). Interestingly, even though the Tribunal refused to address human rights claims on the basis of lack of jurisdiction, actions alleged to be human rights violations were nonetheless taken into consideration when deciding on expropriation: “The relation was deemed sufficient for factoring it in when determining the severity of the intrusion that precisely for that reason was found to be tantamount to expropriation” (Kube & Petersmann, 2018, p. 229). This indicates that even if arbitral tribunals are unwilling to accept the direct

human rights claims, they do not remain entirely indifferent to human rights issues, and they do take them into account at least indirectly.

4. Violation of human rights by a foreign investor

The interaction of human rights and international investment law may also occur when a foreign investor violates human rights in the host state while carrying out his investment. In this scenario, the violation would refer to human rights of third parties, i.e. entities that are not directly related to an investment in any way, in particular, of residents of regions where the investment is located, on whom it may have a negative impact (Gorywoda, 2014, p. 9).

According to the general rule of investment arbitration, it is a foreign investor who can pursue claims against the host country. In other words, an investor is always the one to initiate the arbitration proceedings, and he would be the claimant in the dispute in any case. To the contrary, a host state has no right to initiate arbitration proceedings and would always be a defendant in the dispute. For this reason, the scenario analysed in this part of the article, although it obviously is conceivable, seems highly problematic. As mentioned in the literature, in this case, if a foreign investor violates the human rights of these third parties, they may try to join a given arbitration proceeding or to initiate separate proceedings. In this scenario, the host state may also raise an argument regarding human rights violation by the investor in a counterclaim or third parties may try to pursue their own claims (Gorywoda, 2014, p. 9). Neither of these options is, however, a standard part of an investment arbitration procedure, and it is questionable to what extent they would be acceptable from the procedural point of view.

However, what needs to be emphasized is that public authorities are increasingly turning to foreign corporations to achieve the privatization of formerly public services. Consequently, foreign investors

[...] are led to supply public services, such as drinkable water or electricity, or attend to the management of hazardous waste or that of public transport. Even if the state retains some legal responsibility as to the organization and management of these privatized services of general interest, the foreign investor

may in turn be confronted by claims raised by private consumers, sometimes involving human rights issues (Dupuy, 2009, p. 45).

This sheds light on the problem of the so called “corporate liability”, that is gaining increasing currency nowadays and may possibly result in a number of human rights arguments being raised throughout investment arbitration proceedings. In this context,

[...] the very fact that, from a technical viewpoint, private corporations are not subjects of public international law is generally not perceived, at least by non-governmental organisations (NGOs), as an obstacle for the furthering of such claims in favour of a responsibility incumbent on the private suppliers of public services (Dupuy, 2009, p. 45).

5. Human rights issues introduced by the arbitrators *ex officio*

In some investment disputes, the panels themselves have (*ex officio*) referred to human rights issues in cases where the arguments relating to these issues have not been raised by any of the parties to the dispute. This scenario is particularly interesting if we take into account the very nature of the arbitration procedure that is highly focused on resolving a specific investment dispute, and also the generally reluctant attitude of arbitrators to directly address human rights claims raised by the parties. This scenario has taken place in the context of determining the scope of property rights and the existence of an expropriation. For instance, in *Azurix v. Argentine* case (*Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006) “the tribunal sought guidance in the ECHR and corresponding case law”, while in *Tecmed v. Mexico* case (*Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, 29 May 2003) it “referred to the case law of the ECtHR and the IACtHR for determining the existence of an expropriation and for stressing the legitimacy of distinguishing between nationals and non-nationals in this context” (Kube & Petersmann, 2018, p. 252).

Arbitrators tend to refer to human rights issues *ex officio* primary when they are open to comparative analysis, in general. For instance, the Tribunal in *Total v. Argentina* case, observed that

[...] in determining the scope of a right or obligation, tribunals have often looked as a benchmark to international or comparative standards. Indeed, as is often the case for general standards applicable in any legal system (such as “due process”), a comparative analysis of what is generally considered fair or unfair conduct by domestic public authorities in respect of private firms and investors in domestic law may also be relevant to identify the legal standards under BITs. Such an approach is justified because, factually, the situations and conduct to be evaluated under a BIT occur within the legal system and social, economic and business environment of the host State (para. 111, unpublished; Schill, 2014).

In this context, the more arbitral tribunals are willing to refer to public international law in general, the greater the chance that arguments regarding human rights would be taken into account throughout investment proceedings.

6. *Amicus curiae*

The last scenario in which arguments relating to human rights can be raised in investment arbitration proceedings takes place when *amicus curiae* participate in these proceedings.

Amicus curiae (“friends of the court”) are entities, in particular non-governmental organizations, that are not formally parties to the dispute in court or arbitral proceedings, but participate in these proceedings by submitting written statements, in particular legal opinions or opinions regarding the subject of the proceedings. The purpose of their participation in the proceedings is to support the court (or an arbitral tribunal) in settling a given case. Obviously, the body deciding the case is not obliged to take this opinion into account in any way or even to respond to it. However, it often does so because this opinion can be very helpful in resolving a dispute related to, for example, environmental issues, on which the court (tribunal) may not have full specialist knowledge. The opinions of the *amicus curiae* are also perceived as an instrument that favors the transparency of the dispute resolution procedure (Klein, 2011, p. 46). In arbitration proceedings, the status of such entities may also include the right to access proceedings records, open hearings, and the opportunity to answer questions from the tribunal about their submissions. Although

the participation of *amicus curiae* in international investment arbitration raises some controversy, it is now considered well established and widely accepted. This institution has been permanently present in investment arbitration for at least a dozen years, and additionally the Transparency Rules in the Treaty-Based Investor-State Arbitration (UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration) of December 16, 2013 directly indicate the admissibility of accepting third parties by arbitral tribunals, establishing a detailed procedure to that end (Horodyski, 2017).

In the context of the subject of this article, it is worth noting that these entities often try to take part in arbitration proceedings when they assume that the human rights of host states' citizens – who are unable to join these proceedings themselves – require protection. Tribunals initially refused to allow such third-party participation in investment arbitration proceedings. In recent years, however, “there has been an undeniable shift in investor-State arbitration toward greater tolerance of limited third-party participation, perhaps in response to continuing public pressure and criticism” (Levine, 2011, p. 208). For example, five NGOs joined the proceedings in previously mentioned *Suez v. Argentina* case. *Amicus curiae* sought access to documents and hearings as well as the right to submit legal briefs; however, they have only been granted the right to submit the briefs: “although the decision-makers in this case emphasized that the *amicus curiae* could bring new perspectives to the proceeding, they also highlighted the importance of not unduly burdening the disputing parties with broad third-party intervention” (Levine, 2011, p. 212). However, any form of the participation of third parties in investment arbitration proceedings allows presenting issues regarding human rights in the course of these proceedings.

Conclusions

To conclude, there is no doubt that there do exist some fields of interaction between human rights and investment arbitration, as well as situations in which the conflict between them may appear. Although the majority of investment treaties remain silent on human rights law, issues regarding human rights are more and more often raised throughout the proceedings by all parties to the dispute – investors and host states, as well as third parties, including NGOs acting as *amicus curiae*. Arbitral tribunals have

reacted to human rights arguments in various ways: some fully accepted them, or even introduced human rights references to investment proceedings on their own initiative, while others rejected them. Generally speaking, a conclusion can be drawn that arbitral tribunals dealing with investment disputes

[...] are more open toward human rights arguments for clarifying principles of procedural fairness (e.g. access to justice, due process of law), legal methodology (e.g. “proportionality balancing” of investor rights and other competing rights) and as a relevant factual context (e.g. in *Veteran Petroleum Limited (Cyprus) v. Russia*) (Kube & Petersmann, 2018, p. 253).

However, they usually reject independent substantive claims based solely on human rights, mainly because of the lack of jurisdiction to analyse them. Now that we know that there does exist an interaction between the two legal regimes in question, a promising area for future research would be to check how exactly these legal mechanisms interact and how this interaction affects the situation of both individuals and state authorities, and finally how to solve potential conflicts between these two systems.

Investment arbitration has currently faced various forms of criticism and, as a consequence, a serious legitimacy crisis. It is mainly due to the fact that it is considered to be excessively privileging foreign investor interests to the detriment of host states and its citizens. Possibly one of the ways to fix these flaws would be to take human rights issues into consideration when resolving investment disputes. This could be manifested, for example, by taking into account host states to ensure human rights observance and the welfare of their citizens when resolving investment disputes. Furthermore, states’ regulatory freedom, including in the field of human rights, should be considered throughout investment proceedings when evaluating whether legislation changes introduced by the authorities of these states unlawfully violated foreign investment. Unfortunately, the references to human rights law made by investment arbitration tribunals remain occasional and do not follow a transparent, legal methodology, which means that these references can be perceived as selective, or even biased (Kube & Petersmann, 2018, pp. 221–268). However, it is worth observing in what way the interaction between human rights and investment arbitration would develop, since it possibly can both favourably affect the whole mechanism of investment arbitration and strengthen the human rights protection of different groups of entities. What we also need to remem-

ber is that investment arbitration and human rights belong to the same legal order of the international law regime and share some similarities in terms of content and axiological grounds. Their integration is therefore important not only from the perspective of an individual whose human rights may be violated, or a host state which may be held responsible for violating an investment by protecting human rights in its territory, but also from the perspective of the integrity and internal consistency of public international law.

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Summary

The main scientific purpose of this article is to identify and analyse legal issues that arise between human rights and investment arbitration. At first glance, these two branches of public international law remain completely unrelated and do not have any significant

features in common. However, it appears that despite this distinction, there is an interaction between investment arbitration and human rights, which implies a number of significant legal problems. These problems can possibly include the violation of human rights of citizens of the state hosting an investment by a foreign investor. On the other hand, a state can be unable to fulfil its legal obligations regarding human rights due to the necessity to protect foreign investment as agreed in investment treaties or, to the contrary, it may violate its contractual obligations towards an investor and afterwards defend itself throughout arbitration proceedings by stating that this violation has been necessary in order to protect human rights. It turns out that all parties to the dispute, both investors and host States – occasionally turn to human rights in order to reinforce their respective positions. The interaction between human rights and investment arbitration is of a very complex nature and although it is more and more often emphasized that it may occur, the situations in which this occurrence is likely to happen are not entirely clear yet. The author, after presenting some general remarks on the interaction between human rights and investment arbitration, discusses the most common scenarios in which human rights issues may appear in the course of investment arbitration proceedings. Finally, she concludes that there do exist some fields of interaction between human rights and investment arbitration as well as situations in which the conflict between them may appear. Identifying these conflicts would help to understand the complex relationship between the two legal regimes in question. It will also lay the foundation for further research on how to ensure the ultimate scope of human rights protection throughout the different stages of investment arbitration proceedings.

KEYWORDS: human rights, human rights defence, investment arbitration, international investment law

Streszczenie

Głównym naukowym celem artykułu jest zidentyfikowanie oraz przeanalizowanie problemów prawnych powstających na styku praw człowieka oraz międzynarodowego arbitrażu inwestycyjnego. Choć wydaje się, że te dwie dziedziny prawa publicznego międzynarodowego pozostają całkowicie odrębne i nie posiadają żadnych elementów wspólnych, w pewnych przypadkach dochodzi między nimi do interakcji, co implikuje szereg problemów prawnych. Tytułem przykładu można wskazać sytuację inwestora, który narusza prawa człowieka mieszkańców państwa przyjmującego inwestycję. W innym scenariuszu to państwo przyjmujące może nie być w stanie skutecznie wypełnić swoich obowiązków w zakresie praw człowieka, z uwagi na wypełnianie zobowiązań wynikających z traktatów inwestycyjnych, bądź też przeciwnie – może złamać zobowiązania, jakie posiada względem inwestora zagranicznego, a następnie w toku postępowania arbitrażowego bronić się, wskazując, iż działania takie były podyktowane koniecznością ochrony praw człowieka w tym państwie. Obie strony konfliktów rozstrzyganych w arbitrażu inwestycyjnym – zarówno inwestorzy, jak i państwa przyjmujące – sporadycznie zatem podnoszą w toku postępowania arbitrażowego argumenty odnoszące się do praw

człowieka. Interakcja praw człowieka i arbitrażu inwestycyjnego ma bardzo złożony i trudny do jednoznacznego zdefiniowania charakter i choć została ona już jakiś czas temu dostrzeżona przez przedstawicieli nauki, to jednak w dalszym ciągu sytuacje, w których może dochodzić do tej interakcji, nie zostały kompleksowo scharakteryzowane. Autorka, po zaprezentowaniu podstawowych zagadnień dotyczących natury interakcji zachodzącej pomiędzy arbitrażem inwestycyjnym a prawami człowieka, analizuje najbardziej typowe scenariusze, w jakich może dochodzić do podnoszenia argumentów dotyczących praw człowieka w toku postępowania arbitrażowego. W konkluzji stwierdza, że istnieją pewne punkty styczne pomiędzy omawianymi porządkami prawnymi, w pewnych sytuacjach pojawiają się ponadto między nimi trudne do rozstrzygnięcia konflikty. Identyfikacja tych konfliktów ułatwi zrozumienie złożonej relacji zachodzącej pomiędzy prawami człowieka a arbitrażem inwestycyjnym, a w dalszej konsekwencji – na zapewnienie optymalnego stopnia ochrony praw człowieka na różnych etapach postępowania arbitrażowego.

SŁOWA KLUCZOWE: prawa człowieka, ochrona praw człowieka, arbitraż inwestycyjny, międzynarodowe prawo inwestycyjne

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