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HUMAN RIGHTS AND INVESTMENT LAW: RIGHT TO WATER

Abstract

In this article, the problems corollary to the claims based on human rights violations and brought before investment tribunals have been discussed. Particularly, the article focuses on the right to water as an indispensable counterpart of the right to life. Investment tribunals tend to more analyze claims based on international investment treaties and decide them in favor of investors, whereas human rights claims stemming from other international treaties are to some extent ignored. The article stresses the inappropriateness of such an approach and attempts to suggest efficient solutions.

Annotasiya

Məqalədə insan hüquqlarının pozuntusuna əsaslanan və investisiya tribunalları qarşısında qaldırılan iddialarla bağlı problemlər müzakirə olunmuşdur. Xüsusilə, məqalə yaşamaq hüququnun ayrılmaz hissəsi olan su hüququna fokuslanır. İnvestisiya tribunalları daha çox beynəlxalq investisiya müqavilələrinə əsaslanan iddiaları təhlil edir və investorların xeyrinə qərar verir, digər beynəlxalq müqavilələrdən irəli gələn insan hüquqları iddialarını isə müəyyən dərəcədə nəzərə almır. Məqalədə bu cür yanaşmanın uyğunsuzluğu vurğulanır və səmərəli həll yolları təklif edilir.

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Introduction

Considerable scholarly authorities have been devoted to the relationship between human rights and investment law. Most investment treaties, such as Bilateral Investment Treaties between

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Argentine and the USA,[1] Azerbaijan and San Marino,[2] Japan and Russian Federation,[3] the United Kingdom and China,[4] and etc., and investor-state arbitration awards usually do not refer to human rights concerns. The International Centre for the Settlement of Investment Disputes Convention[5] (hence ICSID) also does not contain provisions related to human rights as this Convention covers only procedural issues. Furthermore, human rights are even not indicated as an index in ICSID reports, which constitute an important source for various decisions on investment law issues.[6] All of mentioned is a strong justification for the allegation that human rights in the context of investment arbitration are to some extent perceived as supplementary.

Claims based on human rights can be brought before investment tribunals by investors, home and host states and *amicus curiae*.[7] Arbitrators also can in their own discretion analyze and decide upon human rights issues. The claims on human rights brought by investors are usually strategically arranged either in a way that claims are independent of treaty-based claims (those based on International Investment Agreements (IIA) clauses or as a supportive addition to the treaty-based claims by taking appropriate methodology or argumentation from human rights law.[8] The former is called "independent assertion of human rights", whereas the latter – "supportive assertion of human rights".[9] Most claims of the host states are usually based on the allegation that protection of human rights is a justification for the measures taken that lead to the violations of the rights of investors. The claims brought by NGO's and public interest lawyers are usually in the form of *amicus curiae* briefs seeking a permission from the tribunal to intervene with arbitral proceeding with the purpose to increase awareness about the violated human rights.[10] Arbitrators usually address to human right concerns *ex officio*.[11]

One of the most obvious conditions where a state's human rights

[1] *See* Argentina – The United States of America BIT (1991).
[2] *See* Azerbaijan – San Marino BIT (2015).
[3] *See* Japan – Russian Federation BIT (1998).
[4] *See* The United Kingdom – China BIT (1986).
[5] *See generally* The International Centre for the Settlement of Investment Disputes Convention (1966).
[6] Clara Reiner, Christoph Schreuer, Human Rights and International Investment Arbitration, 1 (2009). Available at: https://www.univie.ac.at/intlaw/h_rights_int_invest_arbitr.pdf (last visited Dec. 19, 2021).
[7] *Amicus curiae* is defined as "[a] person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter". *See* Black's Law Dictionary, 263 (8th ed. 2004).
[8] Vivian Kube, Ernst-Ulrich Petersmann, *Human Rights Law in International Investment Arbitration*, 11 Asian Journal of WTO and International Health Law and Policy 65, 70 (2016).
[9] *Ibid*.
[10] *Id*., 4.
[11] *Ex Officio* is defined as "[f]rom office; by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office". *See* Black's Law Dictionary, 661 (4th ed. 1968).

commitments to those living inside its territory may fall under the framework of investment treaty arbitration is about the investments in the water and sanitation division.[12] In the course of the most recent decade, there have been about twelve bilateral investment treaties (hence BITs) claims brought against governments in relation to the issues in this sector; ten of these claims were brought against Argentina, while the other two were brought against Bolivia and Tanzania.[13] Others may have been raised without any requirement to make these lawsuits publicly available.[14]

With regards to the above mentioned cases, generally, two distinct types of investment proceedings with an effect on the water have been raised.[15] One type of disputes that has emerged from privatizations in the water division primarily concerns the issues regarding the affordability of water.[16] Another multiplicity of cases concerns interests in different businesses (industrial spheres) that can possibly debase water quality or negatively affect the maritime ecology.[17] In the cases related to the right to water, arbitral tribunals have needed to manage debates emerging out of:[18]

- *"Disputes between investors and state authorities regarding the levy systems and their impact on the moderateness of water, particularly, in the course of a financial crisis;*
- *failure of investors to organize a prior agreed number of water connections because of non-compliance of investors with the promises granted by them under the relevant investment contracts;*
- *danger of contamination to ground and drinking water assets and threat of damage to the maritime environment".*

This paper focuses on the tension between the human right to water and investor rights within the framework of investor-state arbitration

[12] Luke Eric Peterson, Human Rights and Bilateral Investment Treaties, 26 (2009).
[13] *See generally* Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17 (2011); *See also* Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic, ICSID Case No. ARB/03/18 (2007); *See generally* Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26 (2016); Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (2015); *See also* Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12 (2006); *See* Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case no. ARB/02/3 (2005); *See also* Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/03/30 (2003); *See* Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic, ICSID Case No. ARB/03/17 (2018); *See generally* Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3 (2007); *See also* SAUR International v. Argentine Republic, ICSID Case No. ARB/04/4 (2014); *See* Anglian Water Group v. Argentine Republic, UNCITRAL (2003); *See also* Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22 (2008).
[14] Peterson, *supra* note 12, 26.
[15] Ursula Kriebaum, *The Right to Water Before Investment Tribunals*, 1 Brill Open Law 16, 17 (2018).
[16] *Id*., 19.
[17] *Id*., 17.
[18] *Ibid*.

proceedings, analyzes the corresponding problems emphasized in concrete arbitrational cases, discusses the restrictive approach of the investment arbitrational tribunals and attempts to suggest appropriate solutions.

I. Case studies on the right to water within investment arbitration proceedings

A. Vivendi case

Compania de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic[19] (hereinafter Vivendi) was the first investor-state arbitration proceeding where the tribunal stressed the right to water as a very significant right for the human being. This case particularly, analyzes the dispute that arose out of a concession contract that was concluded between the Tucuman Province of Argentina and the subsidiary of the French company Vivendi International.[20] After the conclusion of a contract, water tariffs increased and due to the complaints from the public local authority restricted Vivendi's discretion to manipulate water tariffs and to suspend water services to non-paying customers.[21] Vivendi initiated an ICSID arbitration proceeding based on the BIT between France and Argentine. Respondent argued that the measures taken by Tucuman province were legitimate because the human right to water should have been safeguarded.[22] The decisions of the first and second tribunals did not analyze raised human rights issues, therefore, Argentine raised this issue in its application to the Annulment Committee which in turn stated that not all but some of the raised fundamental issues should be analyzed properly.[23] One of the most important issues clarified by the Annulment Committee was that states should not be able to avoid ICSID arbitration by giving exclusive power to the host state courts to interpret concession contracts (even if such contracts concern issues related to access to water).[24]

B. Azurix case[25]

The dispute arose out of the concession contract for the distribution of potable water and sewage services between the US company Azurix and the Argentine Province of Buenos Aires. The repairs of infrastructure which had been granted by the concession contract were never implemented, and this resulted in the reservoirs full of algae, cloudy water and an unpleasant

[19] *See* Compan˜ı´A De Aguas Del Aconquija Sa and Vivendi Universal Sa v. Argentine Republic, *supra* note 13.
[20] *Ibid*.
[21] *Ibid*.
[22] *Id*., para. 3.3.3.
[23] *Ibid*.
[24] *Ibid*.
[25] *See* Azurix Corp. v. Argentine Republic, *supra* note 13.

pungent odour.[26] After the public controversy, the local authority of Province accused the investor in the contamination of water and agitated non-payment of water bills among consumers. Azurix initiated an arbitration proceeding under ICSID against Argentina in accordance with the Argentina – US BIT. Respondent alleged that its primary objectives to protect the public interest and the right to water should be taken into consideration in the course of the assessment of expropriation claims.[27] In line with decisions made upon treaty-based claim of Azurix, one of the important statements of the arbitral tribunal was emphasizing on the core features of the right to water described in General Comment 15.[28] Particularly, this document states that although the right to water is not a right to free water, this right assumes water to be affordable by all.[29] Furthermore, General Comment recognizes unaffordable increases in the water tariffs as a violation of a right to water.[30] This case is an illustration of an attempt of the arbitrational tribunal to resort to legal documents which to some extent goes beyond the "applicable law".

C. Suez case[31]

The dispute arose out of a concession contract concluded with the aim to manage water and sewerage supply in Buenos Aires. After about eight years of cooperation, the financial crisis encouraged the commencement of emergency measures which resulted in the stabilizing of water tariffs. Respondent argued that the measures were taken with a purpose to protect the right to water of people.[32] Both Argentina and the intervening NGOs stressed the necessity to interpret treaty clauses in light of other norms of international law including the right to water. Tribunal stated that human rights law (especially, the right to water) imposes certain obligations upon states; however, it concluded that both investment and human rights obligations of Argentina are not "contradictory, inconsistent or mutually exclusive".[33] In other words, the ICSID arbitrational tribunal again highlighted that within investment arbitrations, there is no place for hierarchy in respect to obligations derived from the norms of human rights law and provisions of the relevant investment treaty.

D. SAURI case[34]

This dispute arose from a concession contract concluded between a French company Saur and the Argentine Province of Mendoza. In 2002, Argentina

[26] *Id*., 124.
[27] *Id*., 278.
[28] *See generally* General Comment No. 15, UN Doc. E/C/12/2002/11 (2002).
[29] *Id*., 24.
[30] *Id*., 26-27.
[31] Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic, *supra* note 13.
[32] *Id*., 252.
[33] *Id*., 262.
[34] Saur International S.A. v. Argentine Republic, *supra* note 13.

adopted new emergency measures which coerced the investor to seek for the increase of the water tariffs.[35] Mendoza Province rejected the application for increase, and Saur complained that taken measures resulted in unprofitability of its business and incapability to properly operate it. In the course of arbitrational proceedings Respondent stated that the existence of certain obligations under the relative investment treaty does not mean that in the hierarchy of norms its human rights obligations are at the lower level in comparison with provisions of international treaties or norms of domestic law.[36] Hence, Argentina argued that its obligations under the investment contract should be interpreted in accordance with the framework of the protective human right standards, especially the human right to water.[37] Arbitral tribunal unequivocally recognized that human rights all in all, and the right to water specifically, are one of a few sources that it should consider solving the dispute. The reason was that both the domestic law of Argentina and the legal framework of the general principles of law encompass these rights. Also, the tribunal stated that on the one hand, the provision of access to drinkable water is an obligation of the state, and on the other hand, is an important right of citizens.[38] Therefore, state is obliged to protect this right and punish those whose measures create obstacles for the proper realization of this right.[39] Nevertheless, the tribunal held that this right is compatible with the investor rights because they stem from different normative sources. In other words, the tribunal stated that although it recognizes the obligations of state under its citizens' right to water, this right should be adapted to the obligations of the state under international treaties.[40] However, at the stage of rendering final decisions on liability and compensation, tribunal did not decide upon the issues of human right. This case one more time shows that the general approach of the arbitral tribunals under ICSID is to recognize the existence and importance of the obligations of states to promote human rights (particularly, the human right to water), however, they try to avoid including these rights into the international legal framework on investments.[41]

II. Restrictive approach of the investment arbitrational tribunals

As it is seen from the abovementioned cases, arbitral tribunals usually try to escape direct reference to the effects of non-compliance with protection and provision of the standards of the right to water. One reason for such

[35] *Id*., 21.
[36] Tamar Meshel, *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, 6 Journal of International Dispute Settlement 277, 293 (2015).
[37] *Ibid.*
[38] *Supra* note 31, 276.
[39] *Supra* note 26, 330.
[40] *Supra* note 31, 430.
[41] Meshel, *supra* note 36, 294.

restrictiveness may be the fact that the validity of the jurisdiction of the investment arbitral tribunals is usually derived from the consent of the parties to submit their future dispute to the tribunal under the ICSID Convention.[42] The obvious risk is that if tribunal decided without having jurisdictions, then further stages of enforcement and recognition will be denied. That is why, most arbitral tribunals fear going deep into the issues of human rights. However, in my opinion, being outside the scope of the investment treaty or the agreement does not necessarily mean that the ICSID tribunal *per se* lacks jurisdiction because the rules of international law – which include human right concerns – are usually applicable in the context of investment disputes.[43]

The interpretation of the ICSID Convention gives arbitral tribunals the power to refer to international law not only as an applicable one under the standard of "choice of law"[44] but also as a source for the substantive rules, where the dispute is directly connected to the investment made or where the applicable law (in accordance with the parties' choice of law) does not regulate certain issues and "leaves room for the international law to fill loopholes".[45] Furthermore, in *SPP v. Egypt*[46] case, the arbitrational tribunal concluded that it can decide not only obligations of the state to protect investment but also other obligations under the legal framework of international public law. In particular, the tribunal held that the UNESCO Convention for the Protection of the World Cultural and National Heritage was appropriate to be taken into consideration while deciding on the investor claims because the choice of law in favour of host state domestic law should not prevent the applicability of international law.[47]

What is more, the party whose claim is based on human rights is required to "demonstrate substantively" that claims concerned significantly influence on the establishment or operation of certain investment.[48] This, to some extent, plays a role of a safeguard against the risk of exceeding of powers by the investment arbitrational tribunal concerning the issue of connection between raised human right claim and particular investment at stake.[49] If some actions of the investor made in the course of business negatively affect citizens' right to water, it is undeniable that states, due to their obligations under international law, should take some executive or legislative measures, such as

[42] Filip Balcerzak, *Jurisdiction of Tribunals in Investor–State Arbitration and the Issue of Human Rights*, 29 ICSID Review 216, 219-220 (2014).
[43] Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 Lewis & Clark Law Review 423, 433 (2013).
[44] Reiner, Schreuer, *supra* note 6, 85.
[45] Andreas Kulick, Global Public Interest in International Investment Law, 14-15 (2012).
[46] *See generally* Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. Arb/84/3 (1992).
[47] *Id*., 78-80.
[48] Pierre-Marie Dupuy, Unification Rather Than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law *in* Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds.), 62 (2009).
[49] *Supra* note 36, 297.

make changes in the rates of water tariff; implement expropriations in the form of nationalization in order to rise the water affordability level for the citizens; oversee the investors' activities through setting "regulatory standards and monitoring compliance"[50] in order to prevent violation of this right.[51] Also, as the disputes, which are usually at stake in investment arbitrational proceedings, ordinarily arise from the enforcement of the mentioned measures, in my opinion, the awards containing decisions taken in respect to human rights (including the right to water) should not be considered unrecognizable or unenforceable due to the excess of power. In other words, the mentioned safeguarding function illustrates that the arbitrational tribunal possesses valid jurisdiction to decide also upon raised human rights issues because these claims are closely linked with the particular investment at stake.[52]

A broader approach toward the right to water defence of respondent states can contribute to the legality risk of the arbitrations based on investment treaties.[53] There is an opinion that most of the investor-state arbitration tribunals try to favour investors sacrificing public interest.[54] Moreover, there is a tendency in lots of the scholarship authorities that the existent bilateral and multilateral investment treaties should be revised and renegotiated, especially due to the opportunity to resort any future dispute to the investment treaty arbitration.[55] In 2011, John Ruggie[56] declared that the states in the Guiding Principles on Business and Human Rights should retain enough power to provide and protect human rights under the legal framework of investment agreements.[57]

Conclusion

As it is seen from the cases discussed above, investment tribunals tend to more analyze claims based on international investment treaties and decide them in favor of investor, whereas human rights claims stemming from other international treaties are to some extent ignored.[58] Such ignorance is inappropriate, particularly in the case of the right to water. Moreover, the primary goal of investor-state arbitration is not to apply the law in a way that favors investor but to properly consider the balance between parties' rights and obligations. In addition, although the right to water is still not fully recognized as an independent human right, the author considers that the

[50] Catarina de Albuquerque, Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, A/HRC/15/31 (2010).
[51] Balcerzak, *supra* note 42, 227.
[52] *Ibid*.
[53] *Supra* note 36, 301.
[54] Danielle E. H. Allen, This Business Will Never Hold Water, 4 (2010).
[55] *Id*., 4-5.
[56] Karamanian, *supra* note 43, 424-425.
[57] *Supra* note 36, 301.
[58] Moshe Hirsch, Investment Tribunals and Human Rights: Divergent Paths, 108 (2009).

tribunals should take it as a fundamental principle because the right to water is closely connected with "access to water", which in turn is a matter frequently contained in – and therefore, affected by – the legal framework of a lot of investor-state contracts.

Arbitral tribunals act as the only and final adjudicators for the investor-state investment disputes and they should balance human rights and investment protection, "if they are to serve the function for which most international courts and tribunals are created – that is, to strengthen the international rule of law".[59]

[59] *Id*., 113.