Kluwer Arbitration Blog

Regime Interaction in Investment Arbitration: An Introduction

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Debates about the fragmentation of international law and the sometimes conflicting relationship between a state's and investor's obligations under international investment law ("IIL"), on the one hand, and public international law and domestic law, on the other, have gained renewed relevance for investment arbitration. Issues related to the interactions between these regimes have featured in discussions about the proper application of the VCLT to investment treaties and in reform work in, for example, the UNCITRAL Working Group III and the Energy Charter Conference. Yet, despite the extensive discussions and reform work, many questions remain.

In the light of this trend, we are devoting this week on the *Kluwer Arbitration Blog* to exploring the regime interactions in investment arbitration and the ongoing debate on the fragmentation of international law and conflicts with other regimes of public international law and domestic law. As part of our series, we will hear from expert contributors on the regime interactions between investment arbitration and other functional areas of international law, including treaty interpretation (Kiran Gore), counterclaims (Crina Baltag and Ylli Dautaj), climate law (Anja Ipp), human rights law (Kabir Duggal and Nicholas Diamond), and EU Law (Nikos Lavranos).

Introduction

The interactions between IIL and other regimes of international law (such as human rights law, environmental law, and so on) illustrate the so-called normative and institutional fragmentation of international law. Through regime interaction, IIL comes into contact and sometimes conflicts with other regimes of public international law. Meanwhile, IIL as *lex specialis* under public international law comes in conflict and frequently clashes with domestic law and EU law. These tensions raise nuanced issues of treaty interpretation before investment tribunals. As a result, there is an active and ongoing debate about whether investment arbitration should merely be a venue for enforcing international economic law ("IEL") or is instead an appropriate venue for addressing and redressing issues centered in other regimes of international and domestic law, including grievances of broader public interest.

What should investment arbitrators do when fragmented and specialized regimes conflict? What

are the jurisdictional limits of an investment tribunal? What law is directly applicable to an investment treaty dispute, and what law could be indirectly applicable through treaty interpretation? Should investment tribunals enforce only a narrow set of IEL, namely, IIL, or should tribunals consider public international law more broadly (e.g., human rights law, environmental law, labor rights, etc.)? If investment tribunals should indeed interpret and apply public international law broadly, should respondent states be able to invoke such conflicting (or now interacting) regimes as a defense to an alleged breach of an international investment agreement ("IIA") containing investor and investment protection (e.g., as a "shield" against a fair and equitable treatment or indirect expropriation claim, etc.)? Should the respondent state even be permitted to make a counterclaim based on an investors' obligations, thereby turning public international law into a "sword" for states too? Should such counterclaims be limited to public international law obligations or include domestic law ones? In a word: should the fragmented, specialized regimes be harmonized and accounted for by investment tribunals to enforce a global rule of law?

Answers to these questions are long overdue. In fact, addressing these issues of interaction and overlap between investment arbitration and other areas of international law may become increasingly pressing to respond to contemporary backlash against international investment law and arbitration. Critics claim that investment arbitration is inherently unfair and must be rebalanced, while its proponents claim that investment arbitration increases foreign direct investment ("FDI") and itself contributes to providing a level playing field between investors and their host states. As a result, or incidentally, the proponents claim, increased economic activity improves the lives of those less fortunate, promoting economic development. Critics add that economic development should be complemented by sustainable development. Both positions are indeed reconcilable and proper approaches to regime interaction could facilitate such non-binary positioning.

How can the adjudicatory mission of investment arbitration meet sustainable development challenges? Can IIAs be redrafted to align with broader public international law concerns in mind, e.g., by imposing investor obligations? Should such obligations be enforced through elevating domestic law obligations? Should states be free (or freer) to regulate in areas of public policy concerns without the fear of liability (avoiding the so-called "regulatory-chill")? What about renewable energy investments that rely on green commitment incentives? What about investments that improve human rights and rely on state undertakings and specific promised incentives? For example, what about a water management investment, funded by the World Bank in an underdeveloped country to facilitate the states' commitment to honor Goal 6 of the UN Sustainable Development Goals to ensure water and sanitation availability and sustainable management of this resource? What about the fact that, for example, "the OECD estimated that US $6.3 trillion of investment is needed annually until 2030 to meet development goals, increasing to US $6.9 trillion annually to make this investment compatible with the goals of the Paris Agreement, of which only a small proportion will be met by States"?

In other words, the protections under IIL protect not only the "evil" tycoons and billionaires but

also the well-intended yet profit-driven corporations. Thus, we should look at how to improve investment arbitration by reconciling the benefits of IIL with the constitutionalist values embedded in other liberal regimes of public international law (and possibly as implemented by domestic laws) through regime interaction.

In this series, we will hear from highly esteemed authors on regime interaction in investment arbitration, generally, and how it may translate into necessary reform, redress legitimacy concerns, and improve the adjudicatory mission of investment arbitration as a result.

Dr. Crina Baltag and Ylli Dautaj will address how regime interaction opens-up the possibility to allow states to counterclaim against an investor for the failure to honor their commitments under, for example, environmental or human rights law. They explain that the increased appreciation of systemic interpretation and integration will lead to a heightened standing and increased currency of counterclaims in investment arbitration. In turn, such a development will help combat the backlash against ISDS by redressing some outstanding legitimacy concerns.

Anja Ipp will address the role that ISDS and IIL plays in climate law and consequently climate change. In her post, she explains how investments in the energy sector (renewable as well as fossil fuels) can lead to investor-State arbitration and how such arbitration interacts with the global commitment to combat climate change. She concludes that if "properly negotiated and revised, investment treaties can support global climate goals and give effect to the Paris Agreement" and that until this happens "arbitration practitioners can use the principle of systemic integration to reinterpret current IIAs in coherence with climate law".

Dr. Kabir Duggal and Nicholas Diamond will address the much-debated interaction between ISDS and IIL and human rights. The authors identify the different spheres of interaction between the two regimes and highlight each system's fundamental purposes and protections to identify how both systems can be harmonized. The authors argue that despite interaction between the two regimes being strained at present, efforts should be devoted to *"identifying shared goals"*. Focusing on express references to human rights in investment treaties, the authors also illuminate the ways in which IHRL may permeate the various aspects of investment disputes (jurisdiction, applicable law, merits and damages, third party participation).

Nikos Lavranos will clarify the interaction between ISDS, IIL and EU Law. He explains the previously harmonious coexistence of both regimes to briefly outline how escalating tensions have led to the current ban on ISDS in intra-EU disputes from an EU law perspective. The author examines how various judgments of the CJEU have had a *¨spill- over effect"* on the ECT and all disputes connected to the EU. He will further explain how certain principles of EU law are alien and perhaps even contrary to general principles of public international law. His post concludes by proposing possible approaches to harmonizing both regimes.

Kiran Gore focuses on the Vienna Convention on the Law of Treaties ("VCLT") as a disciplining force in international law. Its rules of interpretation, in particular Articles 31 and 32, are commonly cited by investment tribunals as reflecting universal rules of interpretation. She elaborates on the VCLT's drafting history evidencing that the International Law Commission foresaw that the VCLT would serve as an effective means to create systemic integration. In this light, she explains the role of systemic integration in investment arbitration

Our Own Reflection

It seems that ideological underpinnings and extreme positions taint the reform debate and remove it from a place of constructive dialogue. One thing is clear, the lack of agreed directions to the questions underscored above are indeed to be treated with heightened urgency and seriousness. Regime interaction plays a vital and instrumental role in investment arbitration reform. Sensible reform must take shape soon, and concessions between the various poles of the debate are, therefore, indispensable. The global community stands to benefit from an investment arbitration regime that categorically and unequivocally enforces a holistic IIL, which should also include interacting regimes of public international law and possibly domestic law obligations.

This series will underscore the continued importance of investment arbitration by informing this Blog's readers about the regime interaction debate, with the hope that it is them who will then actively get involved in maintaining and re-shaping the institution of investment arbitration for the generations to come. We believe that the regime interaction debate is instrumental for both improving the legitimacy of investment arbitration and for enforcing the rule of law globally.

To read our coverage of regime interaction in investment arbitration, click here.

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