Towards a Repository of Policy Options for IIA Reform

Research Project
Bridging the Gap between International Investment Law and the Environment[1i]

Ms. Yulia Levashova,
Utrecht University/Nynerode Business Univeristy
The Netherlands

The most visible outcomes of the research project were: (1) a two-day international conference, organized in the Hague on 4-5 November 2013, and (2) a peer-reviewed book entitled *Bridging the Gap between International Investment Law and the Environment*. The book contains fifteen contributions of international academic and professional experts,[ii] which were originally presented and discussed at the conference and afterwards adapted on the basis of the received comments.[iii] It will be published in the series '*Legal Perspectives on Global Challenges*' by Eleven Legal Publishing in June 2015.

The goal of the research project was to explore the **interaction and tension between international investment law and environmental law**. The experts discussed the role of various environmental issues in general international law, International Investment Agreements (IIAs), and in international law cases, in particular investment arbitration cases. Specific emphasis was laid on some recent and controversial case-studies. The analysis of these cases has revealed some challenging issues concerning the relationship between investment law and environmental law.

The main conclusions of the project can be summarised as follows:

1. ***Culture.*** **Conflicts** between investment law and environmental law can, to some extent, be **explained by 'cultural differences'** between the practitioners of the two fields of law. Environmental lawyers and investment lawyers work in different environments. For a long time, they have ignored that there are interconnections between these two fields of law. Lack of communication between these two types of experts and lack of knowledge of the developments in each other's fields of expertise have led to misunderstanding.

2. ***Positive interactions.*** The **relation between investment law and environmental law is not necessary conflicting**, in fact the interaction can be beneficial in endorsing and providing capital and resources in pro-environmental projects through investment instruments. This opportunity can be explored in a more structured way. Additionally, **environmental laws can provide incentives for 'green investments'**, e.g. the "payment for ecosystem services'' schemes.

3. ***International investment agreements***. Provisions on environmental protection are included more often in the so-called 'new generation' of IIAs. However, from the text of these treaties it is also obvious that the parties to the modern IIA's are still struggling to define, to **clarify and to reconcile the relation between investment protection and environmental protection**. In most treaties, provisions to that end are only included in the preamble of the treaty, which have less legal effect than the provisions in the operative parts.

4. ***Environmental impact assessment***. General international law does not specify the scope and content of an environmental impact assessment that has to be performed by the states. Presently, the content of environmental impact assessment has to be determined by domestic legislation. Currently, there are significant differences between states as regards the manner in which they evaluate environmental impacts. Regional instruments such as the **Espoo Convention could become a global tool** for environmental impact assessments, both on international and national levels.

[1] The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

5. ***Fair and equitable treatment.*** The core investment protection standards, such as fair and equitable treatment, should be **better clarified** in the text of investment treaties in order **to avoid that the host-state environmental regulatory measures are being challenged** by the foreign investors on the grounds of the breach of fair and equitable treatment provision.

6. ***National law.*** N**ational laws are relevant instruments to take into account by arbitral tribunals** in deciding on investment disputes that have a connection to the host-state environment. A measure taken by a host-state aimed at complying with national laws' requirements, which is generally part of the law applicable to the dispute, should not be regarded as a basis for finding liability, unless there is a clear showing of a violation of international law.

7. ***Conflicting obligations*****.** Decisions of arbitral tribunals generally provide a poor and inadequate analysis of conflicting obligations whenever (national or international) environmental and investment obligations are at stake. It is not always sufficient to provide that the state has to comply with both (thereby in fact disregarding the relevance of the environmental provisions). A **comprehensive consideration of the interplay between the diverging obligations** in some cases is necessary, in order to determine whether or not, on balance, the state has breached its investment obligations.

The main recommendations of the research project are the following:

1. ***Training of arbitrators.*** To breach the 'cultural difference' between practitioners of investment law and environmental law, it is recommended that the arbitrators, who generally are only trained in commercial law and investment law, also obtain **training in general public law and in environmental law**.

2. ***International Investment Agreements.*** In order to secure a better **balance between the protection of investments and the environment**, IIAs should not only refer to the environment in preambular language or by a way of vaguely formulated exceptions, but have to include **substantive provisions on the protection of the environment** into the **core treaty obligations**.

3. ***Due diligence***. States and foreign investors, particularly when providing essential public services, such as water distribution and sanitation, should perform an **adequate 'due diligence' process**. Practical guidance concerning the process of how to conduct due diligence can be found in international **human rights treaties and authoritative soft-law instruments**, such as the Ruggie Guiding Principles and the OECD Guidelines for Multinational Enterprises.

4. ***Fair and equitable treatment***. The fair and equitable treatment standard should be clarified in the text of treaties. This can be done by providing **specific treaty-based exceptions for environmental regulations** in the framework of the fair and equitable treatment provision, by including an **explicit reference to the minimum standard and customary international law** or by offering **concrete specification of conducts that qualify as a violation of the fair and equitable treatment standard.**

5. ***Procedure.*** The **procedure of calling of witnesses and experts** in investment cases should be better regulated in IIAs, because in determining the environmental risks, scientific evidence plays a determining role.

6. ***Amicus curiae.*** It would be recommendable to **strengthen the position of the *amicus curiae* submissions** in investment cases that involve the public interest matters. Tribunals should be encouraged to engage and to communicate with the parties who submit an *amicus curiae* brief. Their submissions should carry proper weight and taken better into account into reasoning of arbitrators.

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[i] The contributors are: prof. Jorge E. Vinuales, Prof. Ige Dekker, dr. Marie-Claire Cordonier Segger, Anna Joubin-Bret (Avocat à la Cour), Yulia Levashova, LL.M, Dr. James Harrison, Prof. Andrea Gattini, Dr. Alessandra Asteriti, prof. Attila Tanzi, Dr. James Fry, Odysseas G. Repousis, LL.M, Dr. Angelos Dimopoulos, Dr. Ottavio Quirico, Dr. Marcel Szabo, Jimcall Pfumorodze, LL.M, Dr. Francesca Romanin Jacur, Dr. Felix Zaharia, Prof. Tineke Lambooy, Dr. Iman Prihandono, Dr. Nurul Barizah, Valeria Poppa, LL.M, Aikaterini Argyrou, LL.M, Dr. Blanca Gomez de la Torre, Gabriel Bottini, LL.M, Dr. Martijn Scheltema. The organisers of the conference and the editors of the book are: Yulia Levashova, LL.M (Utrecht Law School and Nyenrode Business University, the Netherlands), Prof. Ige Dekker (former dean of Utrecht Law School) and Prof. Tineke Lambooy (Nyenrode Business University and Utrecht Law School).

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