BITs: Turning Shields into Swords?

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Leiden University, Lorentz Room, Leiden
Public lecture on the occasion of the launch of the Morris Tabaksblat Visiting Chair on Private Actors and Globalisation
Private Transnational Regulatory Regimes - Constitutional Foundations and Governance Design:

• Addresses key questions raised by the emergence of mixed public/private regulatory regimes in transnational governance.

• Aims to set down the theoretical foundations for policy recommendations through appropriate governance design, impact assessment analysis carried out in cooperation with the stakeholders, and research concerning the effects of these regimes on national and transnational legal orders.
Legitimacy of Private Transnational Governance by Contract

• Private mechanisms of governance are being devised to regulate global commerce and transboundary externalities.
• The use of contracts and agreements as instruments of regulatory governance
• “Turn to contract”
Drivers of Turn to Contract

• Transformations in Global and Local Political Economies:
  – Post-Fordist production; flexible production
  – Organisation of production has shifted from hierarchical ordering in vertically integrated firms to dispersed network-like arrangements that extend beyond national borders
  – New contractual governance structures:
    • Joint ventures, strategic alliances, and supply chain management schemes
    • International trade and investment, bilateral and multilateral treaties
  – Public and private institutions form fragmented governance structures
  – Governments shed their welfare functions and take on new roles as facilitators of markets and privatized modes of governance
Bilateral Investment Treaties (BITs)
International Investment Agreements (IIAs)

Grundnorms for International Contracting
Investor-State Regime

• Ousts jurisdiction of local/national courts
• Internationalises contracts and dispute settlement
• Constitutionalises investment protection
• Privatises investment protection
Nature and Function of BITs/IIAs

• Why are these agreements so ‘foundational’?
• What are their purposes?
• Private international commercial arbitral practices and culture
International Human Rights and Investor-State Regime

• Foreign investor may raise human rights in a claim (right to property; due process)

• Host state may raise human rights in defense of a claim (Right to water; defence of essential interest or necessity)

• Arbitrators may raise human rights in interpreting the BIT (aid to construction)

• BIT may directly incorporate references to human rights (Canadian and US Model BITs)
International Human Rights (IHR)

BITs/IIAs and the Advancement of Human Rights
Sources of IHR

- Customary International Law
- Universal Declaration of Human Rights
- United Nations Covenants on Civil and Political Rights and Social, Cultural and Economic Rights
- European Convention on Human Rights/European Court of Human Rights (EHCR)
- United National Declaration on the Rights of Indigenous Peoples
- United Nations Convention on the Rights of the Child
- American Convention on Human Rights/Inter-American Court of Human Rights
BITs and IHRs: Foreign Investor Claims

- Corporate/Individual human rights protection and the European Court of Human Rights
  - Mondev v. United States (NAFTA Chapter 11)
  - Tecmed v. Mexico (ICSID)
  - Azurix v. Argentina
Grand River Six Nations v. USA (NAFTA Chapter 11)

• Company of Canadian First Nations individuals made a NAFTA Chapter 11 claim against the US Government
  – Wanted recognition of indigenous rights in NAFTA Arbitration. Appealed to UN Declaration on the Rights of Indigenous Peoples, customary international law on fair and equitable treatment, and Inter-American Court of Human Rights

• Verdict?
  – Customary Law is applicable to the STATE, not the investor... Claims do not apply to this particular case
Suez and Vivendi v. Argentina (International Centre for Settlement of Investment Disputes, ICSID)

- Case involved a 30 year contract to manage Water and Sewage concession
- During Argentinean financial crisis, investors wanted to modify tariff-rates under the economic equilibrium clause in concession agreement
- Argentina resisted and invoked the human right to water in defence ...
Verdict...?

- Tribunal’s verdict emphasised...
  - ‘defense’s exceptional nature and of the strict conditions surrounding its application’ (para. 258)
  - ‘because Argentina’s measures in violation of the BITs were not the only means to satisfy its essential interests and because Argentina itself contributed to the emergency situation that it was facing in 2001-2003’ (para. 265)
What about the human right to water?
Verdict...?

‘Argentina and the amicus curiae submissions received by the Tribunal suggest that Argentina’s human rights obligations to assure its population the right to water somehow trumps 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. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina’s human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as discussed above, Argentina could have respected both types of obligations’. (para. 262)
**Impreglio v. Argentina**

- Dispute over Argentina’s refusal to permit price increases during financial crisis and the state’s eventual transfer of the water and sewage service back to a state-sponsored company.

- Invoked defence of NECESSITY based in part on human right to water.

**Right to Water**

**Defence of necessity**
Verdict...?

• The tribunal found that there was an imminent peril to the ‘essential interest’ of Argentina’s economic stability, but...

• the tribunal also found that Argentina contributed to the financial crisis and thus could not invoke the necessity plea, with no further reference to the human right to water
Right to Land

- Sawhoyamaxa Indigenous Community v. Paraguay
- Inter-American Court of Human Rights found expropriation of indigenous lands by Paraguay breached right to land
  - Enforcement of German-Paraguay BIT does not justify breach of human rights
Land Restored 2011
How could this change if Human Rights were incorporated into BITs?
Model BITs

- Canadian FIPA (Foreign Investment Protection Agreement)
- US Model BITs
Shields or Swords?

• Competing public international and private international law ontologies and epistemologies
• Nature and Function of BITs and IIAs
• Broadening of transparency and access in some fora (NAFTA Chapter 11; ICSID)
• Jury is still out
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