Treaty Conflicts in Investment Arbitration by Ahmad Ali Ghouri

Review

by

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I.

International investment law and investment arbitration are becoming increasingly important in a global market economy. What is critical in cases of foreign investment is that foreign investors place their investment, a factory being built abroad, or a big infrastructure project, under the control of a foreign law and the sovereignty of a foreign state, whose administration, courts, and legislator may not always be docile vis-à-vis foreigners and may not always offer comparable domestic institutions and safeguards to the ones the investor is used to from home. In the worst case, a foreign government may even expropriate foreign investors without compensating them. To mitigate this political risk and to offer independent dispute settlement in the relations between foreign investors and host states is the object and purpose of international investment law and investment arbitration. In fact, international investment law has grown tremendously over the past two decades with now more than 3,000 international investment treaties in place and more than 450 disputes that have ensued under these treaties. The European Commission, for example, considers international investment law as the "new frontier for the common commercial policy" (COM(2010)343 final (7 July 2010) at 2).

What is more, international investment law is not only of relevance to protect our investors abroad; it also protects foreign investors at home and restricts our governments in their executive, legislative, and judicial activities and binds them to the substantive standards contained in international investment agreements. These standards, on top, are critically vague and amiguous in requiring "fair and equitable treatment", "full protection and security", protection against "mesaures tantamount to expropriation", "national treatment", "most-favored-nation treatment", etc. These standards have sometimes been interpreted very broadly by investment treaty tribunals and investors are creative in bringing claims against a large number of host state measures that go to the heart of how a political community intends to order its public affairs. Germany, to take an example, is now facing a claim under the Energy Charter Treaty in connection with its nuclear power phase out; in Australia and Uruguay, Philipp Morris is challenging legislation on tobacco labeling by arguing that plain-packaging, or extreme health-warnings, constitute unfair and inequitable treatment and an expropriation, thus demanding millions in damages.

It therefore comes as no surprise that there is now wide-spread criticim of this branch of international law because it puts fundamental values of constitutional law in question, when foreigners are allowed to settle disputes in by-passing domestic courts, in demanding protection against the application of domestic law, and when arbitrators interpret the vague standards in

international investment treaties in a creative fashion without having a democratic mandate as law-makers. In addition, arbitral tribunals are not interpreting investment treaties in a uniform manner but create an increasing number of inconsistent decisions, not only when it comes to irreconcilable interpretations of one and the same treaty standard, but even with contradicting decisions on identical questions of fact. States, non-governmental organizations, and international organizations start to react, by withdrawing from international investment treaties or by changing their content so as to ensure more transparency and that states have sufficient space to pursue policies to serve and protect public interests. In addition, writings on international investment law constitute one of the growth areas in th literature on international law and dispute settlement, making it increasingly difficult to navigate the field.

II.

In this maze of literature, Ahmad Ali Ghouri makes his voice heard. His thesis on "Treaty Conflicts in Investment Arbitration" goes to the heart of the debate about the legitimacy of international investent law and investment arbitration and about the relationship between investment protection and the protection of non-investment concerns, such as the protection of the environment or human rights. In his thesis, which consists of a summarizing chapter that sets out the problématique, the methodology used, and the solutions reached, and five already published articles, Mr. Ghouri assesses one of the core problems arising in international investment law, namely the conflicts that international investment treaties may create with other international agreements and how these conflicts should be resolved.

This topic is so important because investment treaties are primarily bilateral and single issue treaties that do not clarify how they relate to international agreements that protect interests that may compete with those of foreign investors. Tensions exist, inter alia, between international investment law and other branches of international law, such as human rights, international environmental law, and EU law. These tensions are exacerbated by the apparantly fragmented nature of international investment law as a law governed by several thousand bilateral treaties. Ultimately, the problems of fragmentation may put the legitimacy of international investment treaties and investor-state arbitration into question because they may result not only in incompatible results but also in an overemphasis on investment protection to the detriment of competing concerns.

Differently from other authors that criticize international investment law fundamentally and advocate for institutional change, Mr. Ghouri proposes, as a solution to the fragmentation

problem, to go back to the principles of general international law relating to international treaties and to the law of sources. He does not attempt a "reconceptualization of international legal obligations, but [an] elaborati[on of] the implications for states and foreign investors of other international obligations arising from non-investment treaties."[1] He stresses that international investment law cannot be seen in isolation from the rest of international law, that principles of treaty interpretation mandate taking into account other international legal obligations under Article 31(3)(c) of the Vienna Convention on the Law of Treaties, and that investor-state arbitral tribunals should make use of balancing as an interpretative technique to deal with conflicting rights and interests under different international treaties.

Balancing is necessary, in Mr. Ghouri's view, because the rules of the Vienna Convention often do not provide clear or satisfactory answers on which of two treaties shall prevail in the circumstances of a case, primarily because the content of investment treaties consists largely of principles not of precise rules, that could be overwritten by a later rule to the contrary. Accordingly, this "requires tribunals to realign their interpretative methodologies and practices in order to establish investor-state arbitration as a legitimate system of rights adjudication."[2] Furthermore, for Mr. Ghouri, treaty conflicts are essentially value conflicts that require decision-makers to engage in balancing and establish ad hoc hierarchies among competing values.[3]

III.

Cumulative theses are still an unusual format for a doctoral dissertation in law, where the classical format of writing a monograph still prevails. This is different from other fields in the natural sciences, but also empirical social sciences, and economics, where article dissertations are becoming more and more common. This raises the question as to the standards to be applied to an article dissertation in law, in particular as regards the coherence of the articles submitted. As regards quality, by contrast, it is clear that no difference can exist as compared to a classical monograph, in terms of novelty of ideas, quality of the research, methodology used,

[1] See Ahmad Ali Ghouri, *Treaty Conflict in Investment Arbitration* (2012) 6.

[2] Ibid.

[3] See, in particular, Ahmad Ali Ghouri, 'Determining Hierarchy Between Conflicting Treaties: Are There Vertical Rules in the Horizontal System', 2 Asian. J. Int'l L. 235 (2012).

originality in the planning and execution of the research, mastery of the field of research, and familiarity with the relevant literature, as well as the manner of presentation and style.

In my view, it is appropriate to analyze, in a first step, each submitted article separately (with the important caveat that the examination of the thesis is not bound by the decision of even a peer-reviewed journal to have published any of the articles in question), and in a second step to examine the introduction of the thesis that embeds the articles into a larger research framework, describes and analyzes the overarching problems fueling the research, draws connections between the articles, reflects on the methodology and audience of the research, fills gaps that may exist when solely looking at the articles alone, and draws conclusions flowing from the cumulated research undertaken in the separate articles. In this process, minor overlaps between the submitted articles, as well as gaps between articles, will have to be disregarded in examining the thesis, because the nature of an article-by-article dissertation requires that every piece can function as a self-standing article.

IV.

Mr. Ghouri lays out his thesis in the summarizing introduction and five attached articles. He builds up his analysis by analyzing in Article 1 how the investment arbitration system has evolved, in Articles 1, 2, and 3 what the normative functions of investment treaties are, in Articles 2 and 3 the policy options for arbitral tribunals to address legitimacy concerns in investment arbitration, in particular as regards balancing between competing rights and interests, and in Articles 4 and 5 the relationship between investment treaties and other systems of international law and the question whether there is a hierarchy between them.

Article 1 is an accurate analysis of the historic development of international investment law which shows both the multitude of arbitral institutions (including varying arbitral rules) and the multitude of treaties involved in this regime. Mr. Ghouri also shows, by briefly addressing WTO law, that there is no uniform international economic legal regime. Article 1 is a largely descriptive piece that unfortunately provides no specific angle on the historic development. It is also not entirely clear why he chose to focus on the overlaps between investment and trade law and not overlaps with other legal regimes. While this article is not original in the arguments it brings, it serves the purpose of elucidating the framework in which treaty conflicts play out in international investment law and provides an impeccable analysis of treaty practice and institutions. This is the kind of chapter that would also figure in a

monograph thesis as one of the introductory chapters. It is very well written and concise in introducing readers into the history and functioning of international investment law.

Article 2 is a shorter piece that offers solutions to how to counter the problem of internal fragmentation in international investment law and external fragmentation in relation to other international legal regimes by introducing the notion of international investment law and arbitration as a "collective value system". This provides an overarching framework within which to develop investment law and its relations to other regimes. While the focus of Article 2 is on the question of whether investment law constitutes a system, it does not well develop how this system brings to bear collective values and how the notion of investment law as a "collective value system" can be used to resolve treaty conflicts. Article 2 therefore introduces a strong concept and illustrates Mr. Ghouri sense for innovation in doctrinal reconstruction but falls short of explaining the implications of this concept in the Article itself. The concept, in connection with the idea, that investment treaty tribunals are bound to live up to the requirements of international justice, however, is picked up in the introductory chapter and further explained. As a self-standing piece, Article 2 leaves too many questions open. Yet, its strength is the vision it develops for international investment law and investment treaty arbitration.

Article 3 analyzes the structure and nature of investment treaty obligations and contains an interesting analysis of different ways to conceptualize investment treaties (as sovereign acts, sovereign contracts, sovereign decrees, and special laws). It provides an intriguing norm-theoretic background to problems of conflicts between investment treaties and competing rights and interests. In addition, Article 3 sensibly introduces the notion of balancing as a concept to resolve conflicts of competing rights and interests. What is highly original and innovative in this context, is how Mr. Ghouri develops balancing against the norm-theoretic background of the nature of investment treaties. This has not been done in this fashion before. On the downside, Article 3 does not further develop the contours of the concept of balancing clearly, nor does Mr. Ghouri address how this method has played, will play out, and should play out in arbitral jurisprudence. In fact, there is are several arbitral decisions that engage in balancing but that are not further discussed in Article 3, such as *Tecmed v. Mexico* or *Saluka v. Czech Republic*. In addition, Mr. Ghouri could have drawn on the existing literature on balancing and proportionality analysis in investment arbitration, for example, by Stone Sweet, Investor-State Arbitration: Proportionality's New Frontier, 4(1) Law and Ethics of Human Rights 47 (2010) and Kingsbury/Schill, Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law, IILJ Working Paper 2009/6.

Moreover, what could have been added as a further conceptualization of investment law is the view of investment law as a public law discipline, in particular as Mr. Ghouri states at the beginning of Article 3 that there is a certain "parallelism" between international investment law and domestic public law.

Article 4 addresses the rules on conflicts under the Vienna Convention on the Law of Treaties and suggests that they are insufficient to deal with the roblems in international investment law regrading treaty conflicts. Furthermore, in an insightful way and with strong arguments that also critically reflect on positions taken by Martti Koskenniemi and Jean d'Aspremont, Mr. Ghouri explains that at the heart of conflicts of treaties are conflicts of values and hence that a formal view on the problem will fall short of providing convincing solutions. Article 4 is a very ambitious and engaged piece that moves beyond the Kelsenian view on treaty conflicts and that mandates international lawyers to look beyond the positivistic form and to deal with values. This is, in my view, the strongest and most insightful piece among the articles forming part of the dissertation; it shows Mr. Ghouri's mastery of the theoretical debates in international law. It is highly original and argues that international lawyers need to look at the societal values behind legal rules, in particular when there are conflicts between rules and values. Somewhat surprisingly, Article 4 does not address Article 31(3)(c) of the Vienna Convention and remains silent on how international courts and tribunals, in particular in the investment context, should determine hierarchy between values concretely and on what basis. In addition, in the context of the whole thesis, the connection to investment law remains could have been made clearer.

Article 5, finally, addresses the conflict between BITs and EU law. This chapter is insightful for the topic of treaty conflicts because it shows different conflict solutions techniques as applied in the EU context (namely ex-Article 307 EC) and under the Vienna Convention. This shows how treaty-makers can address conflicts and thereby avoid unpredictable solutions in dispute settlement. This piece contains convincing legal arguments and doctrinal construction in the field of EU external relations law. When published, in November 2010, it was at the heigths of the debate at the time. The further developments in the field of EU investment policy have added additional debates, policy papers, and arbitral and court decisions. Notwithstanding, Article 5 even today is an instructive read because the conflict issues it discusses are expounded in a most clear manner.

In terms of quality, legal craftmanship, mastery of literature, and originality of ideas, the five articles taken together are all worthy of being included in an article-by-article dissertation and attest to the qualities needed for being awarded a doctorate in law.

V.

The Introduction of the thesis finally sets the themes that overarch the individual articles. Here, Mr. Ghouri introduces the central problem of treaty conflicts and its importance for the legitimacy of the system. He also sets out his core argument that the treaty conflict problems in investment arbitration can be resolved based on existing positive law, in particular the methods of treaty interpretation and the principle of systemic integration contained in the Vienna Convention on the Law of Treaties. This is all done is a clear and analytically strong fashion and with convincing arguments regarding the solution Mr. Ghouri proposes to use to deal with treaty conflicts in investment treaty arbitration.

There are only a few critical points, I would like to mention. First, what could have been developed more clearly, in my view, is the concept of conflict. At times, Mr. Ghouri seems to focus on hard conflicts, meaning the inability to meet two international legal obligations at the same time; but more centrally he distinguishes between explanatory and supervisory cross-fertilisation which does not necessarily involve conflicts but cross-fertilisation and partly is not about the conflict of treaties, but the conflict of different decision-making institutions (as is the case with the review by the British Columbia Supreme Court of the Metalclad arbitration), or the conflict of different objects and purposes (for example as regards the notion of "investment" in bilateral investment treaties and the ICSID Convention in Section III of the Introduction). Likewise, Mr. Ghouri does not only focus on conflicts between international treaties but on interactions between competing interests and treaties more generally. One sometimes wonders therefore whether treaty conflict is the central concept or whether Mr. Ghouri is not more interested in cross-fertilisation. Why the concept of conflict was used, I suspect, is that it connects better to the current debate in international investment law, and more generally the fascination of lawyers with conflicts rather than harmony. In that perspective, the use of the conflict terminology is a clever way to market ideas and solutions, such as balancing in the present context.

Second, how balancing between investment and non-investment concerns can and should work, and how it actually already works in arbitral jurisprudence could have been addressed in more depth. This refers above all to the now quite wide-spread use by investment

treaty tribunals of the concept of proportionality to balance investment protection and competing interests in the context of applying the concept of indirect expropriation or the fair and equitable treatment standard. The practice that already exists makes one wonder about Mr. Ghouri's argument that investor-state arbitral tribunals need to "realign" their jurisprudence. As an argument for that need he refers mainly to cases from the first years of investment treaty jurisprudence, including above all *Metalclad v. Mexico* and *Santa Elena v. Costa Rica*. But one wonders if these cases and their interpretative methodology have not been labor pains of investment treaty arbitration and have now been overhauled by much more sophisticated interpretative methodology that include balancing and proportionality analysis. It is for this reason, that the reader is sometimes unclear whether there are any more recent cases in arbitral jurisprudence Mr. Ghouri targets when he says that "investor-state tribunals … fall short on their determination of applicable international law to resolve treaty conflicts" (p. 73).

Finally, Mr. Ghouri rightly analyzes the problem of conflicts between treaties (and competing interests more generally) as value conflicts and advocates that resolving such conflicts requires the development of spontaneous value hierarchies. Yet, Mr. Ghouri does not develop on which grounds arbitral tribunals should accord higher value to one and not the other value. Who decides, and on what basis, which value prevails in a given situation of conflict? And how does this work in an international community where universal values are regularly cast into doubt? This problem would have merited further analysis.

VI.

Notwithstanding these critical points, the Articles as well as the Introduction are very well written, clearly structured, and extensively referenced. They show good familiarity with international law and international economic law more generally and an intimate familiarity with the law, practice, and scholarship on international investment law. They also show Mr. Ghouri's ability to apply the scientific methods of international legal research independently, in particular as regards the analysis of arbitral jurisprudence and treaty practice and the doctrinal reconstruction of the field. He also sets innovative accents in how he deals with treaty conflicts in international investment law by proposing new conceptual and methodological approaches for investment treaty tribunals and treaty-makers. His work reflects critically on existing practice and scholarship and advances the thinking about international investment law and arbitration.

The thesis and the suggestions that Ahmad Ali Ghouri makes are important and timely. He aims at guiding decision-makers in how to deal with conflicts of interests and conflicts of

treaties on the basis of positive international law. It is therefore an important contribution to one of the pressing debates in international economic law and international dispute resolution. Above all, Mr. Ghouri's thesis is strong and visionary in developing concepts for the future development of international investment law. This is particularly the case with concepts such as his idea that international investment law and its relationship with other international legal regimes can be reconceptualized as a "collective value system" and that a guidepost for arbitral tribunals are the "requirements for maintenance of justice in international law" (p. 4). He also shows a keen sense in unmasking debates about conflicts of rules as conflicts of values and thereby poses the important question of how the clash of values can be resolved. He is engaged and optimistic that investment treaty tribunals are able and willing to live up to the ambitious task of not only settling individual disputes but to function as a system of rights adjudication that is able both to protect foreign investors and to help bring competing interests to fruition. Mr. Ghouri is certainly idealistic in his ambitions for investment law and investment arbitration, but is clever in showing that his ambitions are in line with positive international law.

VII.

Overall, I can therefore recommend to the Faculty of Law of Turku University to accept Mr. Ghouri's dissertation as part of the requirement for being granted a doctorate in law.