Systemic Interpretation Of International Law: Reconciling International Investment Agreements And Human Rights.

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Abstract

International Investment Agreements are undoubtedly today one of the most relevant instruments for States aiming to regulate its relations as home and host State of foreign direct investment. However, as they were created with the single object to protect foreign investment mainly carried out by multinational entities, such isolation from other international norms -both customary and conventional- as well as broad clauses allowing investors to challenge States under expensive international arbitraments, has already shown to have adverse impacts, mainly on the adoption of regulations by States with the purpose to implement or enhance international human rights. As Colombia is already respondent in an arbitrament because the enactment of a measure intended to protect the environment, this article aims to analyse from an academic point of view if a systemic interpretation of international law might be a solution to avoid the aforementioned negative outcomes arising from this fragmentation.

Keywords: International Investment Agreements, foreign direct investment, human rights, multinational entities, investor-State dispute settlement, Colombia, fragmentation of international law, systemic interpretation of international law.

Introduction

International investment agreements (IIAs) are undoubtedly today one of the most relevant instruments for States aiming to regulate its relations as home and host States of foreign direct investment (FDI) since the the post-second world war era. For multinational entities (MNEs) those agreements also play a major role because, even though those legal entities are not subjects of international law IIAs lay down its rights and obligations as protected investors -MNEs are not direct liable by their actions under international law, although they benefit immensely of it (Karavias, 2015. p. 96)-.

Bearing that in mind, local communities of host States are always vulnerable to the negative impacts resulting from investors' activities, particularly if they are related to the extractive industries. The most common consequence is the endanger or violation of human rights, which represents a real concern for host States as they are responsible for the promotion and protection of those fundamental rights under its territory -both under customary and conventional international law-.

Having said that, as way to avoid negative impacts on those communities some Governments of host States resort to its legitimate police power -understood as the States' authority under international law to adopt regulatory measures for the achievement of public welfare without this constituting *per se* a violation of an IIA (Daza-Clark, 2016. p. 64)-, which in many cases interfere with the interests of inversions that are being carried out in that State. As a result, if an investor see itself as an affected party, they are allowed to bring a case under an international tribunal of arbitrament, resulting in expensive disputes or discouraging Governments to implement the before mentioned measures.

As Colombia is already involved as respondent on a particular investor-State dispute settlement (ISDS) because of the adoption of a public measure mainly dealing with the protection of the environment, the purpose of this article is to study from an academic point of view if a systemic interpretation of international law is a correct solution to avoid the degradation of human rights resulting from the drafting and isolation of investment treaties from other areas of international law, as well for the abuse of ISDS.

The first section of this article deals with the international framework, conception, and evolution of IIAs. Afterwards, the collision of interests between home States and investors is described, followed by the analysis of the Colombia v. Eco Oro Minerals Corp. case to illustrate such conflict. Lastly, a systemic interpretation is described and analysed as way to avoid the fragmentation of international law, to conclude that such approach may indeed be the best tool to avoid the isolation of IIAs from other sources of that system and its negative consequences relating to human rights.

International Investment Agreements: International Framework, Conception, And Evolution

As States look out to expand their economies, particular agreements relating to trade and investment -such as FTAs, PTAs, and RTAs- have gained within the last few decades more relevance than other international instruments that might also regulate such relations, as is the case with the World Trade Organization agreements. This effect has been called "the spaghetti bowl phenomenon"(Bhagwati, 1995. p. 4) and may be explained as the proliferation of those preferential trade agreements, since the aforementioned multilateral trade framework does not prevent the signing countries from entering into other particular arrangements (Panezi, 2016. p. 1)

Slightly different in nature, IIAs are widely used by States looking to attract FDI -either as home or host State-. They might take different forms depending on the scope of issues covered, but they are basically catalogued as Bilateral Investment Treaties (BITs) and Treaties with Investment Provisions (TIPs).

The precursors of the IIAs were the Friendship, Commerce and Navigation treaties (FCN), which date back to 1778. Those instruments were signed with the purpose to create political and commercial alliances and did not rely on investment protection. It was not until the end of the second world war that States started to incorporate some clauses to protect the abroad investments, since trade was gaining much relevance in the international order (Alschner, 2013. p. 457)

Although the incorporation of those stipulations on the FCN treaties are regarded as a first attempt to regulate the FDI, it was actually in 1959 that the first IIA was born as a BIT signed between Germany and Pakistan. The novelty of this treaty relied on its main purpose and scope, as for the first time the parties intended "...to create favourable conditions for investments by

nationals and companies of either State,..." (1959 Germany-Pakistan BIT, 1959). In order to accomplish those goals the treaty provided as main features national treatment and the prohibition against expropriation without compensation.

The first generation of IIAs were short, exclusively focused on the protection of the investments against nationalisation and expropriation, and did not provide a clause for the international dispute resolution between State and investors -the ICSID was only established in 1965-. This was a direct result of the economic asymmetry among the negotiating parties, as many developed countries feared that investing on developing States were too risky.(UNCTAD, 2015. p. 122)

As years passed by, IIAs started to include Investor-State Dispute Settlement (ISDS) provisions, but otherwise remained essentially the same tool to guarantee the rights -and almost no obligations- for the investors. The former statement is even more evident if the macro-economic context of the years to come since the first IIA was signed is taken into account: MNEs became major players on the global economy, giving them even more leverage than some States. According to Fatouros (as cited in (Karavias, 2015) an MNE may be described as follows:

> Essentially, the MNE will consist of a parent company, which controls a network of legally discrete subsidiaries, which are in turn incorporated in several countries. Second, this complex of discrete entities constitutes a single economic unit, responsive to the managerial direction of a sole decision-making centre. (p. 95)

While the macro-economic playing field became more inclined to MNEs due to a general vision from the international community towards a more deregulated, private-oriented markets,

the asymmetry between its rights and accountability under the IIAs pretty much stayed the same, even though the conditions had changed.

Such imbalance has been called by some economists the result of the lobby and bargain power that those entities have on their home States (Stiglitz, 2007. p. 537) , which usually are developed ones -as some studies have already shown, the 10 biggest corporations around the globe make more money than most countries in the world combined (Global Justice Now, 2016)-.

While the 1990s and first decade of the 2000s saw a proliferation of those treaties as a result of new geopolitics -the fall of the Berlin Wall, end of the Soviet Union among others- (UNCTAD, 2015. p. 123), and the profitability for the MNEs became even bigger, many States learned the hard way that such advantages could be against their own interests.

It was during those decades and at current time that many host States have started to evidence the negative impacts of some investment activities, primary those relating to the extractive sector. Since those projects usually take many years to consolidate -the first stages of a mining concession might take up to 10 years before start operating on the field-, it is only a matter of time for the collision of interests to be apparent.

The endurance of adverse effects by local communities represent a real issue for the home States, since today it can hardly be argued that its main purpose is none other than the public welfare. Even more, not only is today accepted as a customary and conventional international law the duty of States to prevent and protect the population against any violation of human rights -which are captured on numerous multilateral human rights treaties, and have evolve from the protection of basic liberties to more complex areas such as the promotion and protection of

collective resources, like the environment- but almost all constitutions in the world impose that obligation as a limitation to the conduct of the State (Valencia Restrepo, 2008. pp. 447-449).

Bearing that in mind, States usually will take one of two approaches: either try to correct some of those negative impacts by implementing public policies -which in many cases stand against the interest of MNEs and give rise to expensive disputes under an international tribunal, since an ISDS clause is pretty much standard in all IIAs- and risking being a less competitive country for FDI, or adopt some chilling measures on their regulation -even if it potentially represents a violation of their national and international commitments under the international human rights law- and appear more interesting for international investors.

Public Policies And Investors' Rights: Collision Of Interests

Whereas the purpose of the the States is the welfare of the population -mainly the protection of human rights- that of the MNEs is to gain profits for its shareholders. This has led some Governments to adopt regulations aiming to attract more FDI in spite of their own public obligations, lowering or not implement the necessary measures to ensure the well-being of the population, specially those international commitments to respect human rights (Arevalo, 2013. p. 106).

It has been notice by some scholars, that there has been in the last decades a political and economic tendency -called New Constitutionalism- looking for an appropriation of the public duties of the State by key private players, which results on a constant pressure from economic elites pushing for privatisation and deregulation of trade, investment and financial services. As there are multimillion dollars business to attract from potential investors, States are prone to limit their own legislative and regulatory autonomy to please big macro-economic participants, such as MNEs (Cutler, 2016. p. 99).

Insofar as FDI regards, this trend is captured in the drafting of the negotiated IIAs, as they become instruments exclusively focused on the protection of investment and totally isolated of other international legal regimes. From investment treaties that include what it is called stabilization clauses, or freezing legislation (Letnar Černič, 2010. p. 252) -the aim of those stipulations is to prevent investors of new regulations that could negatively impact them, limiting the expected outcomes of such policies on local communities-, to broad and vague formulation of provisions that has allowed investors to bring to an international tribunal disputes based on core

domestic policy decisions, like those relating to health or the environment (UNCTAD, 2015. p. 125).

All of this in conjunction with ISDS clauses that limit to great extend the jurisdiction of the international tribunal regarding the sources of law which might be applied on the case -even when the dispute did arise from the adoption of a legitimate public measure, for example the implementation of human rights treaty-, has already be noted to "constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so" (United Nations, 2011. p. 11).

Nevertheless, if the above mentioned stipulations were a general trend before the 2010s, they appear to be less in demand.

Since the number of of treaty-based ISDS cases exploded from the mid 1990s and still continue on the rise -they mostly arise from IIAs signed in the 1990s (UNCTAD, 2017b. p. 2) many countries opted to transform their drafting based on recommendations of international agencies and organizations, such as the UN since the years 2010s. This new era of IIAs brings some safeguards to protect the autonomy of States to adopt new regulations that aim to protect the public welfare as well as to implement and maintain contracted commitments in relation -among others- to human rights.

One way to incorporate this new content is by using exception clauses. Usually, such clauses are called non precluded measures (NPM) and as their name implies, exclude from liability under the IIA some actions of the Government that would otherwise constitute a breach of its obligations, as long as they represent legitimate public interest and do not constitute an arbitrary or unjustifiable discrimination of the FDI (Moloo & Jacinto, 2011. p. 9).

It is worth noting that such exclusions are view as an already known doctrine of international law: the police powers of States. The main argument is that those measures taken by States in order to achieve the public welfare -usually relating to health, environment, and security among others- and have a negative impact on the investors' interests, do not constitute automatically a violation under international law, since the State's sovereignty allows it to adopt regulations that do legitimately pursue the general public well-being (Daza-Clark, 2016. pp. 64-65), without meaning that such sovereignty is without limits. Indeed, it has already been argued that such doctrine is used by some tribunals with the intention to reconcile the "sovereign right of the State, as the guardian of the general public interest, to regulate economic activities on its territory with its treaty or contractual obligations" (Pellet, 2016. p. 447).

However, even if an IIA includes those new stipulations some home States will still have to face expensive international disputes brought by investors, in spite of the alleged compliance with all the required conditions. As the drafting of the ISDS rarely explicitly integrate other sources of international law besides the agreement itself as valid to be considered by the tribunal, arbitrators are bound to rely only on an isolated economical context and on stipulations that appear to be on a vacuum of international law. This creates a scenario where even the most well-intended clauses -such as the above mentioned- may end as a mere declaration of intentions, since they are in need of more context, a more robust environment such as other sources of international law and commitments already adopted by the signing parties, in order to give realistic context and meaning to the IIA stipulations as well as to the alleged breaches of the State.

Eco Oro Minerals Corp. v. Colombia

Eco Oro Minerals Corp. (Eco Oro) is a Canadian public-traded company specialised on the exploration and extraction of precious metals in Colombia, since 1994. Their investment is concentrated on the gold-silver Angostura deposit, which is located on the north-east of the Country, in Santander, which also constitutes one of the most relevant natural environments across the globe: the *páramo*.

Páramos are fragile ecosystems located mostly on the Andean tropical region, Colombia being the country of the world with the vast majority of them(Rivera & Rodriguez, 2011). They are widely recognised by its peculiar landscape, consisting of clouds of fog, plants that resemble little palm trees, and lagoons. Usually situated 3000 meters above the sea level, they may be describe as the territory of the Andean tundra limiting above with glaziers (Ortiz Delgado, 2016).

This type of ecosystem is recognized for its two significant functions: on one hand the ability to regulate the hydrological cycles in terms of quality and availability of water -which implies a constant flow of filtered, potable water-, and on the other hand its faculty to collect and absorb CO2 steaming from the atmosphere -it has been stated that it is ten times more efficient than a tropical forest-, which describes its power force to help mitigate the climate change (Ortiz Delgado, 2016).

Although it may seem evident the importance to protect this kind of environment, Colombia is still trying to find a proper way to achieve such goal.

Most recently on February 8th 2016, the Constitutional Court of Colombia issued the judgement C-035/16 (Ortiz Delgado, 2016) related to exploration and extraction of minerals and hydrocarbons on the páramos. It decided was against the best public interests such activities, since

the economical benefits arising from it did not surpassed the negative impacts on the communities. To arrive to such conclusion, the Court basically did study a collision of constitutional principles and weighed in -as the purpose of this article is not to analyse the above mentioned judgement but its impacts on Eco Oro's investment, it will only address the relevant issues-.

The judges identified the constitutional tension to resolve as the economic freedom and private initiative, versus the fundamental right to a save environment and sustainable development. After much constitutional judgements and scientific researches were cited, the Court did the following remarks:

- The extractive activities were of special relevance, since the concessions to explore and extract minerals -legal titles as the one that Eco Oro used to have- revert a public interest. This statement was based on fact that indeed, even if a Concession is granted to a particular, Colombia is still the owner of the underground minerals.

- Since the particulars are not owners of the such natural resources, the Government has the autonomy to regulate the limitation, conditioning, and prohibition of extractive industries in order to pursue a more relevant public interest. Otherwise, particulars would usurp the public functions of the State.

- The páramos are of exceptional importance: they support the hydraulic resources, minimise the CO2 on the atmosphere, and is precursor of sustainable development. Yet, they are not properly protected from a legal point of view.

- As a conclusion, the exploration and extraction of minerals and hydrocarbons on zones delimited as páramos are no longer allowed -without any kind of exceptions-, because of the major

relevance that those ecosystems represents for the public welfare against the economic gains that it might bring.

As this judgement prevent any kind of mining on the páramos the administrative mining authority (ANM) issue the resolution VSC 829 on August 2nd 2016, which did notify Eco Oro the cancellation of its mining rights in respect of 50% of the concession area (UNCTAD Division on Investment and Enterprise, 2016). Nevertheless, way before the resolution was issued, the investor had already on Mrch 7th, 2016 notify the Government of Colombia of its intent to submit to arbitration a dispute arising under the FTA signed between Canada and Colombia -which eventually did on November 29th, 2016, after a failed cool off period-.

The MNE states on its news webpage the reasons to request an arbitration:

> “The Company is a protected investor under the Free Trade Agreement and is therefore entitled to the protections set out in the investment chapter of that agreement. It is the Company's position that Colombia has breached the protections established in the Free Trade Agreement, including by: (i) failing to afford Eco Oro fair and equitable treatment through arbitrary, inconsistent and disproportionate measures and the frustration of its legitimate expectations; and (ii) unlawfully expropriating Eco Oro's investment by destroying its value without the payment of prompt, adequate and effective compensation. Colombia's measures have not only deprived Eco Oro of its investment but also the returns that would have resulted from the Company's investment of hundreds of millions of dollars over the past two decades in reliance upon Colombia's commitments. Eco Oro is therefore asserting its entitlement to recover the losses to its investment resulting from Colombia's

breaches. The amount of such losses will be determined at a later stage in the Arbitration" (Eco Oro Minerals Corp., 2016).

Indeed, the MNE is a protected investor under the Canada-Colombia FTA, and as far as is publicly known, the breaches alleged are:

- Fair and equitable treatment, and
- Indirect expropriation.

The relevant stipulations on the FTA relating to their claims are those in the chapter 8, more specifically articles 805 -minimum standard of treatment- and 811 -expropriation- (Canada-Colombia Free Trade Agreement, 2008).

The article 805 prescribes home States "shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security." Meanwhile, article 811 prohibits the expropriation -either directly or indirectly- of investments, and establishes an exception as well as its requirements: "(a) for a public purpose; (b) in a non-discriminatory manner; (c) on prompt, adequate, and effective compensation in accordance with paragraphs 2 to 4; and (d) in accordance with due process of law."

When presented with only this two articles, looks like arbitrators in this case would not have to look further to find Colombia in breach of its obligations, since it seems very clear that the host State did comply with the numeral (c) of article 811, as no compensation has been given to the MNE. Nevertheless, annex 811 of the same treaty regulates at length the aforementioned article, differentiating between two situations: direct and indirect expropriation.

As for indirect expropriation, paragraph 2 of such annex stipulates it is a situation "which results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure". It follows prescribing in numeral (a) the necessity to a case-by-case study in order to determine that it has been indeed an indirect expropriation, as well as some factors that might help in such determination. But more importantly, numeral (b) stipulates an exception clause:

> Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation.

Since the Government of Colombia did prohibit the mining on páramo zones because of the scientific evidence of environment damage that such extractive activities left, as well to protect the access to potable water, and sustainable development -among others-, it might be a good argument to be brought to the discussion.

Likewise, article 815 of the before mentioned FTA mentions the importance of health, safety, and environmental measures, and recognises the autonomy of each State to regulate such matters:

> "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention

in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party. The Parties shall make every attempt through consultations and exchange of information to address the matter."

Finally but no less important, the preamble of the treaty endorses the respect for human rights, sustainable development, rights and obligations under the Marrakesh Agreement establishing the World Trade Organization, flexibility to safeguard the public welfare, among others. Even more, chapter 17 is related to the sovereign rights and responsibilities that each State have to protect the environment and "and affirm their environmental obligations under their domestic law, as well as their international obligations under multilateral environmental agreements to which they are party."

All of this may be a defence for Colombia in order to demonstrate that the loss of 50% loss of Eco Oro on its Angostura project is the result of a measure for the public welfare, which was not arbitrary, discriminatory, nor an indirect expropriation to be compensated.

Whereas this FTA clearly is more robust than those endorsed on the 1990s, is still a question of whether a tribunal might or might not bring to the arbitration other sources of law, such as international agreements on the protection of human rights -those are not listed under the FTA-, as those may give more context to the measure adopted by the State.

Systemic Interpretation: A Solution To Avoid Fragmentation Of International Law

As has already been stated, the isolation of the IIAs under the vast universe of international law highlights the fragmentation of such system, which has already showed to negatively impact victims of humans rights looking for international justice.

The order of international law may be explained as as a system conformed by general rules on one hand, and particular or conventional rules on the other hand. As it is understand that the last mentioned rules are adopted by particular parties as an instrument to regulate their relations and by such extend its effects are inter partes -treaties being the best example-, the first ones are generally applicable to the States -are erga omnes- and its major representative is customary international law.

As it explains itself, customary international law is compose by a series of rules that have been recognised by the vast majority of the States as general practise -custom- and from which States might withdraw in order to adopt a particular agreement, such as treaties. Still, general international law is also composed by general general principles -as mentioned in Article 38(1)(c) of the Statute of the International Court of Justice (United Nations, 1946)-, and what it is called ius cogens or peremptory international norms -which are usually on the form of principles-.

The debate about what is ius cogens have been an extensive one, but the International Law Commission has been working on it, with its last report stating the following:

> "To identify a norm as one of jus cogens, it is necessary to show that the norm in question meets two criteria:
>
> (a) It must be a norm of general international law; and
>
> (b) It must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted. (Tladi, 2017. p. 45)"

Taking into account that meaning, it is to accept without much debate the condition of ius cogens of human rights, especially since it has been a tendency from many decades ago the acceptance of human rights as peremptory norms, back to the post-second world war era initiated

with the Universal Declaration of Human Rights on 1948 (United Nations, 1948) -when fundamental human rights were proclaimed to be universally protected by the States and complemented by other relevant instruments relating to the environment as is the Rio Declaration on Environment and Development (United Nations, 1992)-. A good example of this is the declaration of France at the Vienna Conference, as the representative stated that “the substance of jus cogens was what represented the undeniable expression of the universal conscience, the common denominator of what men of all nationalities regarded as sacrosanct, namely, respect for and protection of the rights of the human person (Mr. de Bresson as cited in Tladi, 2016. p. 20)”

Now, in what respects to the collision of interests arising from an IIA against the obligation of States to respect human rights, the case of the Sawhoyamaxa Indigenous Community v. Paraguay -which was debated under the Inter American Court of Human Rights (IACHR)- brings to light the position of at least one international Court (Sergio García-Ramírez et al., 2006).

On that case, the judges were presented with an indigenous community which had been deprived from their ancestral lands as they had been given many decades ago to a German company without their consent. The Paraguayan Government alleged that it was not possible for them to give back the property of those territories to the community because they had been legally acquired by the private company, which was also a protected investor under the IIA signed between Germany and Paraguay.

However, the IACHR ruled that the enforcement of an IIA was no exception to be in non compliance with its obligations to respect human rights, on the contrary: the State obligations under the American Convention were to be always respected and compatible with other treaties, since the Convention was a multilateral agreement, enforceable by its own, and did not depend on

the adherence of both parties to it to be respected -it was sufficient that only one party were signatory, since it created to that State a number of obligations relating to the protection and promotion of human rights-.

While ius cogens might be a practical argument to bring into an ISDS, it is also true a tribunal may reject that approach if there is no explicit provision giving the arbitrators jurisdiction to use principles of international law when deciding the case (Jacob as cited in Leibold, 2016. p. 221).

Yet, article 31.3(c) of the Vienna Convention on the Law of Treaties (VCLT) establishes as rule of treaty interpretation "Any relevant rules of international law applicable in the relations between the parties" together with a "good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Vienna Convention on the law of treaties., 1969). What this article disposes is the possibility for arbitrators to bring those principles of international law to interpret the IIA, as well as to check for any contradiction of ius cogens, as long as the parties are signatory of that convention.

On this last argument, there has already been stated by some scholars that the above mentioned article "express what may be called the principle of systemic integration, the process... whereby international obligations are interpreted by reference to their normative environment (system) (Combacau & Sur as cited in Koskenniemi, 2006. p. 208)" This is of immense relevance, as it implies that a systemic interpretation stands within the scope of any international tribunal, which might indeed avoid inapplicability of human rights on IIAs . As put in other words by the International Law Commission:

"To assume that a tribunal may not be entitled to apply general international law in the interpretation of a treaty is to hold that once States conclude a bilateral treaty, they create a vacuum that consists precisely of this type of exclusion. As we have seen in section C above, no support may be found from international practice for such a contention. On the contrary, an enormous amount of materials support the applicability of general international law in order to interpret any particular legal relationship, whether also addressed by a bilateral treaty, a local custom, or a series of informal exchanges amounting to binding rules through acquiescence or estoppel (Koskenniemi, 2006. p. 232)."

Conclusions

As has been exposed through this paper, the regimen of IIAs under international law has been plagued by many criticisms, particularly those relating to the grave consequences product of its isolation of other areas of international law.

Bearing that in mind, the main conclusion of this article is how a systemic interpretation may be deem as the best approach to avoid the fragmentation of international law. As decades has passed since the first IIAs were signed, the negative impacts relating to their isolation from other different areas of law have proofed to be dangerous to other commitments adopted by States. The proposed vision not only helps to resolve some collision of interests from a more human approach, but it is also a useful tool to make IIAs a cornerstone in sustainable development, as they are today intended to be.

Just as the dispute case mentioned involving Colombia, there are many others host States that are bound to deal with similar situations. Unfortunately, the lack of jurisdiction that many arbitrators allege to no involve general principles of international law have shown and still will dictate that unfair, even dissenting awards are going to be adjudicated on ISDS. What this means, is that in some very specific cases taxpayers' money might be used in expensive arbitrations if a State tries to enforce a legitimate public policy for the welfare of the population without the proper backup of potentially affected investors -without this implying that all ISDS cases are to be labelled as unfair or without merits-.

Since this lack of security for host States to implement some regulations affect not only the population, but the investors as well -a more social, equitable Country also means a more economic

stable State-, Governments need to transition from very specific IIAs, majorly concentrated on investors rights to more robust treaties with a systemic approach to international law. In order to achieve that, negotiators of IIAs may get help from international agencies, such as the UNCTAD which has already published a guide on how States may modernise their existing stock of old-generation treaties (UNCTAD, 2017a).

Overall, the inclusion of a clause which explicitly gives jurisdiction to tribunals to apply international law may be very helpful, as this stipulation allows arbitrators to bring other instruments containing obligations already adopted by States and of superior hierarchy -like international human rights treaties in their condition as ius cogens-, thus it has the potential to reduce fragmentation of different bodies of law .

Likewise, States need to demand a more holistic interpretation of IIAs by tribunals in charge to resolve ISDS, even if some of these treaties do not contain in its drafting a clause annexing general international law as a valid governing law. As it has already been argued, article 31.3(c) of the VCTL prescribes a systemic interpretation of international law, which not only aims for a general approach to the legal international order, but was also created as legal manner to accept and maintain a hierarchy between international norms, from which ius cogens are deem superior and of compulsory application without the possibility of being contradicted by others.

Finally, is worth noting that in the manner that more tribunals adopt this proposed approach there will be not only more awards with an inclusive perspective, but it may also discourage the abuse of the ISDS system, as some investors might find not profitable to use those clauses as a way to pressure home States into not implementing or revoking legitimate public measures.

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