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ESSAYS

STATE REGULATORY POWERS AND GLOBAL LEGAL PLURALISM

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• *How international economic regimes impose obligations on states that are contradictory to human rights.* •

ABSTRACT

The article examines how global legal pluralism imposes conflicting mandates that use contradictory approaches and points of departure to address the same conflict on states. Three examples of the contradiction between economic regulation and the human rights regime will be presented: the foreign investment protection regime, the global regime on mining concessions and the international trade regime. Through these examples, the author shows how different actors, transnational corporations, affected local communities and their global activist networks seek out the most favourable forum amongst the constellation of international legal institutions to present their demands and protect their interests. There are, however, no rules or mechanisms available to resolve these legal contradictions.

KEYWORDS

Foreing investment | Economic regulation | Mining concessions | International tarde regime | Legal pluralism

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The autonomy and segmentation of the various international regimes[1] implies that aspects of the same legal problem are addressed by different regimes, each with its own approaches, principles and procedures. They are often isolated from each other's influence and there are considerable contradictions between them. This has direct consequences for the scope and the enforceability of rights, imposing divergent obligations on states, and often obligations that are in direct conflict with one another.

Even though the globalisation process tends to limit the exercise of Westphalian sovereignty which seeks to exclude external interference, national states still wield broad regulatory powers over the economy. Furthermore, in recent years, various South American states have begun to regulate economic issues that previously had been deregulated or that had never been regulated. This process is sustained legally by the development of more robust social legislation, which is greatly reinforced by international human rights law as well as a more open approach to state intervention in the economy and in the promotion of social policies.[2]

The new social constitutionalism in South America and the constitutionalisation of the international human rights regime throughout the region have considerably broadened the obligations of states to protect and guarantee fundamental rights. The duty to protect, according to the human rights regime, obliges national states to exercise

due diligence to prevent the violation of rights by *non-state actors*. States must also produce information on groups that are structurally discriminated against or excluded as well as adopt affirmative actions, preventative measures and adequate and transformative compensation measures to address widespread situations or systematic patterns that produce or reproduce inequality amongst citizens.

Moreover, reinterpreting civil rights within structural equality terms increases the positive obligations of states, including their indirect responsibility for the actions of individuals creating risks that a state could reasonably predict and prevent. Constitutional and legislative recognition of cultural, environmental and social rights (labour, social security, consumer, health, education, etc.) also requires states to expand their functions considerably.

A direct consequence of this process is the expansion of the *state's role in the provision of benefits* and the broadening of its *duties to regulate* economic relations, business activities and markets. Environmental law regulates, for example, companies' production processes, their development and use of extractive activities, risk assessments and frameworks for compensating collective damages. Consumer rights law obligates the state to regulate information production and consultation mechanisms, moderates freedom of contract and imposes compensation measures for damages based on objective risks and collective scope (or infringement of a series of homogenous individual interests). Indigenous peoples' cultural rights to their territories, land and natural resources impose regulatory regimes on mining and extractive operations, create frameworks and procedures for consultation and securing informed consent, ensure participation in the profits of the investing companies as well as directly prohibiting certain means of exploiting these resources.

Similarly, the emerging right to health imposes firm obligations to regulate, for example, private health care providers, minimum standards, provisions for private or semi-public systems, protections for sectors or groups who traditionally suffer discrimination, payments that are predefined by the state to avoid abuses of contract, and specific duties to provide compensation based on risk prevention. The emerging right to social communication generates obligations to produce public information and, at the same time, reinforces the state's duty to prevent undue media concentration and to guarantee the access of historically marginalised groups or sectors to expression in the public sphere. The principle of structural equality, or ensuring support for subordinated groups, implies that there is an obligation to regulate affirmative action measures (based on gender, race, social status or disabilities) in order to ensure access to private education systems or recruitment processes, or access to social or public services.

In many cases, these new areas of state regulation affect the interests of national and transnational private companies by imposing restrictions on property and freedom of contract and authorising state intervention in the market and economic activity. Furthermore, the expansion of regulatory obligations protecting rights introduces a conflict with the "deregulatory" mandates created by international economic regimes, which are designed to ensure market protection. In the following paper, we will present examples that illustrate this divergence.

This article seeks to present a general overview of some of the ongoing discussions regarding the emergence of a plurality of international regimes, and the relations, divergences and possible convergences between them. We will present examples of how the various international frameworks impose conflicting mandates on states in the area of economic regulation. We will also provide specific examples where efforts have been made to harmonise the different legal systems. In particular, we will consider the foreign investment protection regime, the global regime on mining concessions and the international trade regime as examples. Finally, we will describe how the different actors, transnational corporations, local affected communities and their global activist networks seek out the *most favourable forum* in the constellation of international legal institutions to present their demands and protect their interests.

The foreign investment protection regime

The South African political regime that succeeded in abolishing apartheid promoted a series of public policies which aimed at including sectors of society that had historically been excluded from commercial and productive activities. The logic behind these measures was to contribute in concrete terms to the dismantling of the consequences of

apartheid by adopting affirmative action in the economic sphere in much the same way as had occurred, for example, to ensure access to jobs in the public sector or to housing programmes in segregated cities. The racial integration measures implemented demanded that companies in certain strategic sectors hire a minimum proportion of their managers from, and incorporate as partners members of, the black majority population. Italians from the mining sector challenged the measures, arguing that they were forms of expropriation and invoking clauses on the right to fair and equitable treatment derived from the bilateral investment protection treaties (BITs).[3]

In 2010, the plaintiffs withdrew their complaint, as they felt that the South African government had adopted measures that resolved their claim. Many studies found that the case – brought before the International Centre for Settlement of Investment Disputes (ICSID) – had a chilling effect ("regulatory chill") on the national government's drive to promote this kind of affirmative action in the economic sphere in light of the possibility of new international claims being filed by foreign investors in strategic sectors of the economy, including mining.

Standardised BITs and certain multilateral norms (for example, those that regulate the World Bank's ICSID, or the ones incorporated into NAFTA[4] or MERCOSUR), together with the interpretations, principles and standards established by arbitration tribunals and panels form an international regime whose main objective is to protect foreign investors' private property rights and to preserve the integrity of transnational corporations' assets in emerging economies in general. This regime includes a general rule of *fair and equitable treatment*, which is presented as a principle of non-discrimination, or of formal equality, between foreign and national investors before the law.

The interpretation of this clause by arbitration tribunals has stretched the principle of formal equality and gradually established, in the investor's favour, an almost *guarantee of the absolute stability of the legal frameworks* which investors can consider were in place at the time when they made the decision to do business. It is therefore understood that the protection of investors' *legitimate expectations* about the host state's behaviour is included in the notion of fair treatment. This ambiguous and subjective notion goes beyond the clearer concept of "legitimate trust" that guides the concept of a state's "own acts" in public international law.[5] The concept of "the investor's legitimate expectations" serves as a benchmark for analysing the reasonableness of the policies and laws that result from the exercise of regulatory powers, and which allows investors to challenge measures that may alter the market conditions and returns that they anticipated would be in place at the time of their initial investment.

A policy or measure that affects profit expectations is treated as a form of indirect expropriation *(taking of property)*, which empowers investors to file claims to demand compensation. This concept of indirect expropriation allows an investor to question a state's legal norms or general policies on environmental, social services and health issues which might affect the profit expectations that the company had at the time when it decided to invest in the host country.[6] This interpretation of the fair and equitable treatment clause and the concept of indirect expropriation place heavy restrictions on a state's regulatory powers, because states will never be able to foresee all of the social and economic impacts that could arise after receiving the investment or during the term of the investment, in order to guarantee that there will be no changes to the legal and economic environment in which the project was developed. Moreover, states have the duty to preserve imperative social interests in crisis or emergency situations, which often means that they must implement public policies or impose regulations that could modify the original context in which the investment was made.

According to the current broad interpretation, the fair and equitable treatment principle becomes a *stabilisation clause*, which seeks to set regulatory frameworks and even national public policies in stone. Such an interpretation goes considerably beyond public international law's basic principle of equality of nationals and foreigners before the law. The broad interpretation which arbitration awards have given this clause makes it much more similar to a rule providing for preferential treatment, shielding foreign investors from any change to public policy or the legal framework that is otherwise binding and obligatory for citizens and national companies. Instead of being a rule that provides equal protection, it becomes a special privilege.

The principles of *fair treatment and indirect expropriation* are founded on the idea of protecting the investing company from unreasonable or arbitrary regulations that, for example, abruptly and unjustifiably prohibit previously

authorised activities or disproportionately change existing taxation or environmental rules. As with the notion of fair and equitable treatment, the concept of indirect expropriation aims to prevent the state from arbitrarily altering the legal framework in place at the time of the signing of the deal, which is why an assessment of the reasonableness of the contested measures is always required. However, the interpretation of these principles by enforcement bodies, with their strong pro-business bias, ends up practically eliminating the requirement for arbitrariness and imposing almost a right to a sacred permanency of a pre-established legal framework. It does not take into account changes to the context, exceptional crises or states of emergency, nor the state's social functions.[7] Furthermore, the investment regime bodies are impervious to arguments based on human rights or constitutional obligation.[8]

The people and communities whose direct interests are affected by the disputes – such as the users of the services provided by investing companies or the beneficiaries of the regulations being challenged by investors – cannot participate in these procedures either, limited as they are to companies and states. The South African case illustrates the tension between pro-equality policies used as strategies to restructure relations based on economic and social segregation, and the investment regime's rules of *fair and equitable treatment and indirect expropriation*, which impose restrictions on the regulatory powers of the state.

One issue of particular importance is the tension between the investment regime and the rights of users of public services. An illustrative case can be found in Argentina after the 2001 crisis, when the transitional government froze tariffs on public services (such as water, sanitation, natural gas and electricity) provided to households. The stated objective of this measure was to ensure access to vital services in light of an abrupt increase in poverty and extreme poverty levels brought on by the economic and social crisis. Combined with the sharp devaluation of the local currency, this price freeze directly affected the concessionary companies' expected revenues in dollars, which they had been transferring to their headquarters. In practice, this introduced a change to the regulatory framework that had been taken into account at the time when these corporations had agreed to invest in the sector. The concession agreements presupposed that periodical rate adjustments would be made based on variations in the companies' costs. The Suez corporation, in charge of water and sewage services in the province of Buenos Aires, took its case to the World Bank ICSID arbitration centre by invoking Argentina's bilateral foreign investment protection agreement with France.

As a result, a legal dispute similar to the South African case arose. If the state wanted to guarantee that consumers had access to public services, especially those from sectors that require stronger state protection during crises, its actions would inevitably affect the financial situation of the investing company. It would therefore cause a violation of the company's property rights as interpreted by the investment regime in an almost absolute sense. This, in turn, would allow the company to use the pre-established mechanisms of the BIT to demand economic compensation for this violation. However, if the state were to neglect the consumers' right to have access to the service, it could be held liable for violating national legal or constitutional norms in local courts, and even be subject to complaints filed with the bodies of the international human right regime. The plurality of the regimes and their respective autonomy invariably leads companies to resort to the *most favourable forums* to influence the policies that affect them. Because they choose the forum, they determine the approach and legal framework that will be used to examine the dispute.

One important aspect of the Suez case is that a group of consumers and human rights organisations petitioned the ICSID – as a "friend of the court" (*amicus curiae*) – to defend the government's policy of freezing tariffs. They argued that the policy sought to protect the interests and rights of the users of the water services and, furthermore, that human rights and constitutional norms required the state to adopt concrete measures to alleviate the effects of economic crises on the population living in poverty and extreme poverty. The format of their presentation was necessarily *amicus curiae* brief because ICSID proceedings do not explicitly provide for the participation of persons other than the companies and the state, nor do they envisage a right to be heard.

The arbitration panel accepted the *amicus curiae* brief in this particular case. It affirmed that while the dispute referred mainly to impacts on corporate investment, the state had regulated in a certain way due to the public interest involved in providing water and sanitation services to a socially vulnerable population. This established a precedent, as it was the first time petitions from third parties had been admitted in a dispute at the ICSID. This

is no minor change to the traditionally opaque and closed nature of this arbitration mechanism, even though the final ruling did not take into account the third parties' arguments and considered the state regulation being challenged by the company as unlawful.[9]

A key point for analysing the social organisations' submission in relation to the problem of the autonomy of the *global private regimes*[10] identified by Teubner[11] is the fact that their petition uses the investment regime's language and legal concepts with the goal of linking one legal order to the other. The organisations made the effort to "translate" and "adapt" problems involving social rights to make them understandable in the language, approaches and conceptual frameworks of the investment regime. They questioned the scope that the ICSID panel, and the investment regime in general, confers upon the *fair and equitable treatment and indirect expropriation* concepts. They argued that the broad interpretation of these concepts reduces the margins for state regulation of public affairs in which rights are at risk.[12] In the end, they did not suggest that the investment regime should be subordinated to the human rights regime, but rather that certain concepts of the investment regimes should be adjusted according to a *harmonising interpretation* that incorporates the international obligations of states.

These few cases of "overlapping forums" have been developed by a minority group of social organisations that move between the various systems as "amphibian activists" who use a certain level of flexibility to adapt the language, description, and the factual and legal framing of problems as necessary in order to argue in a hostile territory. Although these experiences are not sufficiently advanced to constitute solid bridges between regimes that themselves function mainly in a refractory and autonomous manner, they have identified initial points of contact that could be explored or investigated in greater depth. De Sousa Santos' concept of "interlegality" would be particularly useful in this sense.

The global regime on mining concessions

One strategy for the internationalisation of conflicts – in the opposite direction of the one used by transnational corporations resorting to the investment regime – is the pursuit of collective lawsuits by local communities whose environmental, social and cultural rights have been violated in the bodies of the human rights regime. In our opinion, this strategy also entails a search for the *most favourable global forum* – that is, one that modifies local power relations in which corporate interests prevail. The appeal to the human rights regime in this type of case aims to strengthen the state's obligation to protect, which is reflected in its mandate to regulate and supervise the operations of private companies that develop extractive investment projects in the territories of affected communities. Several Latin American countries attracted investors in the oil and mining sector by creating regulatory frameworks and signing concession contracts based on standardised models tailored to the interests of transnational capital.

The development of this type of contract is part of what Teubner calls *global private regimes*. In our opinion, this is because the contract model contains elements that are common to several host countries and end up serving as a determinant of foreign investment. Generally accompanied by mining laws that have also been standardised, these contracts limit state control over operations and delegate the functions of environmental monitoring and managing conflicts with local affected communities to corporations. They also keep key aspects of the extractive process in secrecy, which makes it difficult to use consultation mechanisms and helps companies evade political and social control over their operations.

What is more, in many cases, the transnational corporations that engage in the exploitation of extractive projects in indigenous territories have the added bonus of the foreign investment protection regime, with its favourable forums for potential disputes and inhibiting effect on invasive regulations affecting corporate profit expectations. In parallel, the human rights regime establishes state obligations to consult and build consensus with the potentially affected communities, especially indigenous communities and peoples in their collective territories. It also aims to avoid measures that lead to the massive displacement of populations and it is in the early stages of developing principles focused on the precautionary or preventative protection of rights.[13]

The tension here is clear: in terms of overall direction, one regulatory regime leads to deregulation and the self-limitation of the functions of state control, and the other regime forcefully imposes obligations on the state to intervene in the regulation and control of companies' operations. In numerous conflicts, local indigenous, rural and black communities have turned to international human rights mechanisms, such as the Inter-American Human Rights System or UN committees, to demand that their collective rights be respected, to emphasise states' duty to regulate and, in political terms, to counteract the pressure that major transnational mining corporations exert on nation-states.[14] This is a controversial matter, as some governments have used nationalist arguments to defend mining concessions, while concealing conflicts between large corporations and local communities and accusing groups and activist networks of using international pressure to attack national development projects. They contend that some international standards relating to indigenous territories and environmental protection are excessive and are, in practice, imposed by developed countries to boycott the development strategies of emerging countries.[15] In the end, this argument is difficult to sustain, especially in the countries that are incorporating these standards into their own constitutional arrangements and as the result of recent political processes in which collective self-determination was exercised during exciting constituent assemblies.

The international trade regime

Major tensions also exist between the international trade regime and the human rights regime. The former is based on multilateral agreements signed by states within the framework of the World Trade Organisation (GATT/WTO), whose main objective is to eliminate tariff and non-tariff barriers to international trade. It covers three broad areas: trade of goods (GATT), trade of services (GATS) and intellectual property (TRIPS). One of its basic legal principles is the prohibition of treating foreign products differently from national products. This means that most of the legally contested trade disputes in this area must determine whether products are *like products* and compete for the same market or have the same utility for consumers (Article III of the GATT). States have some flexibility to adopt measures that are inconsistent with the treaty as *safeguards* (Article XX of the GATT) in order to protect public health, public morals or the environment. However, these measures are exceptional: strict criteria are used to review them and quantitative and qualitative proof must be provided to substantiate their proportionality. They may be invalidated if it is found that the same objective could be achieved by adopting alternative measures that do not hinder free trade and do not constitute an excessive or undue burden on the state.[16]

Among the main areas of dispute at the WTO is the treatment the WTO panels have given to the barriers that some states attempt to adopt as *safeguards* to protect *cultural goods or services*. While the human rights regime recognises the right to identity and to cultural diversity, which has been reinforced by the 2002 UNESCO Declaration and the 2005 UNESCO Convention on Cultural Diversity, the WTO is resistant to such an approach by states.

One relevant case for discussion is the matter of Audio-Visual Products in China. Here, the United States challenged a series of Chinese regulations on the importation and distribution of reading materials, products for home entertainment, DVDs and films for theatres. China used Article XX of the GATT to justify its measures, which allows a country to adopt measures that are inconsistent with the GATT to protect *public morals*. China explicitly invoked the 2001 UNESCO Declaration to highlight that cultural goods and services are of a special nature as they are carriers of identities, values and meanings. It also argued that not only are they meant to satisfy consumption or commercial needs, but they also play a critical role in influencing and defining various aspects of society. In the Appellate Body, China insisted once again on the need to consider these specific characteristics of cultural goods and services. Although the Appellate Body did not analyse this particular aspect of the goods involved in the case, it recognised that the *public morals* exception could be invoked to justify measures that are not consistent with the GATT in the area of cultural goods and services. When the panel analysed the measures imposed by China, it considered that they were not justified under the safeguard clause, as other measures that were less harmful to the free circulation of goods could be used, such as periodic revisions of imported materials, as the US had proposed.

For analysts of GATT jurisprudence, even though China lost its appeal, this decision opened the door for the moderate use of this exception (*public morals*) in the future in relation to cultural goods and services. It also illustrated how UNESCO regulations could potentially be used to defend cases in the WTO framework. The majority of critiques of the case, however, identify the WTO dispute settlement system's obvious limitations in showing greater flexibility and openness towards proposals on the treatment of cultural goods and services. They mainly highlight the difficulty of defining the cultural value or meaning of certain goods precisely and objectively and of using this mechanism's traditional quantitative and qualitative parameters to measure the potential effect or impact of the measures under dispute. If a state attempts to demonstrate the need to limit or establish conditions on the entry of certain goods in order to safeguard interests or values related to the reproduction of local culture, cultural identities or forms of cultural expression that are characteristic of a local community, it will face serious difficulties in producing empirical evidence that meets the mechanism's ordinary standards of proof.

Intellectual property laws (TRIPS) have also come into conflict with the public health policies of emerging countries that aim to reduce the cost of medication and ensure greater access to them at times of emergency. For example, with the support of core countries, large pharmaceutical companies wagered a battle at the WTO in the early 2000s against South Africa and Brazil to challenge their policies on generic drugs. The countries justified their policies by referring to the obligations imposed on them by not only their national laws but also the human rights regime, which enshrines the fundamental right to public health. The transnational pharmaceutical corporations argued that the local policies violated WTO regulations on patents and intellectual property rights. On one side, there were arguments based on social rights, and on the other, arguments based on the unlimited defence of property. As with the Suez case involving water and property, local and global social organisations and states formed a strong alliance in order to defend state regulatory powers and counter the pressure of the large pharmaceutical companies and core countries. Some authors have considered this example as the expression of new forms of global activism in non-traditional scenarios. They describe the potential of a set of complex relations between states and social organisations that are able to combine monitoring and reporting with acts of cooperation.[17]

Conclusion

From the examples described above, we can conclude that one of the most important consequences of global legal pluralism is the limits it imposes not only on Westphalian sovereignty, but also on the exercise of national sovereignty understood as the exercise of political power in the national sphere. We observed that these global regimes impose conflicting legal mandates on states, which use approaches and starting points that are diametrically opposed to one another to address the same dispute. Market-oriented international regimes act as forums for challenging social regulations and inhibiting and conditioning the development of social legislation rooted in the constitution in South American countries, as well as in other emerging countries. In this article, we have schematically showed how some of these conflicts present themselves: affirmative action vs. formal equality between national and foreign investors; legal certainty for investors vs. the right to water and access to public services; extractive activities vs. collective cultural rights; freedom of trade vs. protecting cultural diversity; access to medicines vs. ownership of patents.

This is, however, a much more complex and nuanced issue. Further legal investigation is required to describe disputes more precisely and to make visible the main points of contention and the possible connections and overlaps between the different regimes. In this article, we have briefly presented some efforts that have been made to introduce considerations on obligations to protect human rights into economic regimes and the incipient use of hermeneutics that seek to "harmonise" the different legal systems. Nonetheless, we understand that one almost insurmountable element of this contradiction is the difference in expectations on the state's regulatory role in economic relations. In general, the problem arising from autonomous and fragmented global legal pluralism could be presented as follows: some regimes – such as the human rights regime – broaden the public sphere, develop positive state obligations to protect and guarantee rights and demand greater state intervention in the economy and the markets. They also extend the scope of regulatory powers and, consequently, the indirect responsibility of the state for the actions of private actors, including large corporations. Meanwhile, due to their history, actors and logic of intervention, other

regimes – such as the investment regime and the international trade regime – place limitations on state control and regulatory powers, while they extend the freedom of contracts and deregulate markets and economic activity further.

In regards to this contradiction, there are neither agreed rules on the resolution of regulatory conflicts nor international institutions that have been officially assigned the power to settle them.

Various actors, transnational corporations, local affected communities and their global activist networks seek the *most favourable forum* in the constellation of international legal institutions to present their demands and protect their interests. They generally place states in the centre of the conflict – as either duty-bearers or guardians of property and legal certainty – placing them directly in the *crossfire*. In some cases, "amphibious" social and academic activists make the effort to *cross the different forums* and adapt legal interpretations to harmonising principles. Other global debates, such as the one revolving around the processes of sovereign debt restructuring and the abusive practices of investment funds, also bring to light the tension in defining the dominant international regime. Either the private capital market regime will be imposed on local spaces, defined by global economic actors according to the logic of promoting autonomy and denationalisation, or a multilateral regime subject to the norms of public international law will be established in the formal United Nations framework, in which states will recuperate their authority to set the rules of the game.

NOTES

1. According to Stephen Krasner's classic definition, an international regime is "a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations" (Stephen Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," *International Organization* 36, no. 2 (1982): 185). In short, international regimes constitute structures of the international system that govern international and national public policies in different areas, and summon state and non-governmental actors under universally accepted principles and norms.

2. Rodrigo Uprinmy, "Las transformaciones constitucionales recientes en América Latina: tendencias y desafíos", en *El Derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI*, ed. César Rodríguez Garavito (Buenos Aires: Siglo XXI Editores, 2011): 109-37; Raquel Z. Yrigoyen Fajardo, "Constitucionalismo pluralista y pueblos indígenas", en *El derecho en América Latina, Un mapa para el pensamiento jurídico del siglo XXI*, ed. César Rodríguez Garavito (Buenos Aires: Siglo XXI Editores, 2011): 139-59; Víctor Abramovich y Laura Pautassi, "La Revisión Judicial de las Políticas Sociales. Estudio de casos" en *La revisión judicial de las políticas sociales*. Estudio de casos, comp. Víctor Abramovich y Laura Pautassi (Buenos Aires: Editorial Del Puerto, 2009): 279-340; Instituto de Políticas Públicas en Derechos Humanos del MERCOSUR (IPPDH), *Ganar Derechos: Lineamientos para la formulación de políticas públicas basadas en derechos* (Buenos Aires: IPPDH, 2014).

3. Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), *Piero Foresti, Laura de Carli y otros vs. Sudáfrica*, caso n. ARB(AF)/07/1.

4. NAFTA is the acronym for the North American Free Trade Agreement.

5. For a detailed critique of the broad interpretation of the fair and equitable treatment principle and the concept of legitimate expectations of investors in the arbitral precedents of the ICSID from a legal standpoint sustained by the principles of international law, see the Separate Opinion of Arbitrator Pedro Nikken in the decision on the responsibility of the case Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. Y*
La República Argentina, caso n. ARB/03/19, 22 de octubre de 2007.

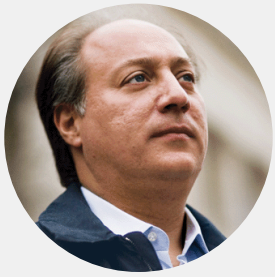
6. David Schneiderman, "Investing in Democracy. Political process and international investment law", *University of Toronto Law Journal*, 60. no. 4 (2010): 909-940.

7. Pia Eberhardt, *Investment Protection at a Crossroads. The TTIP and the future of International Investment Law* (Berlin: Friedrich-Ebert-Stiftung, 2013), accessed July, 2015, http://library.fes.de/pdf-files/iez/global/10875.pdf.

8. In recent years, some studies have developed sound arguments based on international law and the legal obligation of the investment regime's arbitration panels to take into account the obligations of national states to protect human rights when examining the key principles of fair and equitable treatment and indirect expropriation. It is not a question of exempting states from complying with international obligations due to domestic laws, but rather of making the various international sources compatible with one another. This kind of analysis can also be seen as an exercise of interlegality that seeks to change aspects in the investment regime's approach to make it permeable to the principles of the human rights regime and safeguard the state's flexibility to exercise its sovereignty and regulatory powers so it can protect civil and social rights. For more on this, see: Juan Pablo Bohoslavsky and Juan Bautista Justo, *Protección del derecho humano al agua y arbitrajes de inversión* (Santiago: CEPAL, 2010).

9. In a later case, regarding the renationalisation of drinking water services in Tanzania, a group of organisations presented themselves as amicus curiae to explain the human rights implications of the case. The final ruling did not assess whether a relationship exists between the fundamental right of access to drinking water, the termination of the agreement and the investor's rights. See: Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), *Biwater Gauff vs. Tanzania*, caso n. ARB/05/22, laudo del 24 de julio de 2008.

10. Santos calls them "transnational trade regulation", which he sees as the expression of the rebirth of a new lex mercatoria as "global capitalism's own law". He describes this new law as a kind of non-state law, and an important field of private justice, which involves international trade arbitration systems, the WTO and other more or less concealed institutional process through which transnational trade relations are conducted. (Boaventura de Sousa Santos, *Toward a New Common Sense: Law Science and Politics in Paradigmatic Transition* (New York: Routledge, 1995)).
11. Gunther Teubner, "Regímenes Globales Privados: ¿Derecho Neoespontáneo y Constitución Dual de Sectores Autónomos?, en *Estado, Soberanía y Globalización*, de Gunther Teubner, Saskia Sassen y Stephen Krasner (Bogotá: Siglo del Hombre, 2010).
12. See: Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal*, S.A. Y La República Argentina, caso n. ARB/03/19, febrero 2007. Submission as a friend of the tribunal by the Center for Legal and Social Studies (CELS), the Civil Association for Equality and Justice (ACIJ), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria Unión de Usuarios y Consumidores, and the Center for International Environmental Law (CIEL). For a detailed critique of the broad interpretation of the fair and equitable treatment principle, a comprehensive interpretation of the right to the stability of the regulatory framework at the expense of state regulatory powers, and the inadequate use of the "legitimate expectation of investors" as a reasonableness standard, one can consult the Separate Opinion of Arbitrator Pedro Nikken on the Suez c. *Argentina* case.
13. See, for example, Corte IDH, *Caso del Pueblo Saramaka vs. Surinam* 2007; Corte IDH, *Cuatro Comunidades Indígenas Ngöbe y sus Miembros*, 2010; Corte IDH, *Caso Comunidad Indígena Sawhoyamaxa vs. Paraguay*, 2006, the IACHR considered, obiter dictum, that Paraguay could not invoke a BIT to justify an activity that violates the American Convention (which, in this case, violated cultural and economic rights to an indigenous collective territory). By doing so, it gave, to a certain extent, priority to human rights obligations over the foreign investment treaty.
14. The International Financial Institutions (IFIs) also have guidelines and operational policies on these issues: for example, World Bank guidelines on the projects it funds. A similar experience with overlapping forums was when social, trade union, indigenous and environmental organisations made submissions to the World Bank Inspection Panel, which is in charge of supervising the bank's own policies and norms, and the Compliance Advisor Ombudsman of the IFC. In this forum governed by the international financial institution's regime, the activists translated conflicts of rights into potential violations of the bank's operational policies and guidelines. They argued that the supervision of the entity's local agents during the implementation of programs and projects funded by the bank was flawed. In its tortuous way, the panel has examined cases on: population displacement and environmental damage caused by infrastructure projects; agrarian reform plans and problems of access to land; the underfunding of social programs guaranteed by structural adjustment loans; the inadequacy of state processes for the consultation and participation of local affected communities; lack of transparency of projects, among other issues (See: Dana Clark, Jonathan Fox y Kay Treackle, *Derecho a exigir respuestas. Reclamos de la sociedad civil ante el Panel de Inspección del Banco Mundial* (Buenos Aires: Siglo XXI Editores, 2005).
15. See: Víctor Abramovich, "Autonomía y Subsidiariedad: El Sistema Interamericano de Derechos Humanos frente a los sistemas de justicia nacionales," en *El Derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI*, ed. César Rodríguez Garavito (Buenos Aires: Siglo XXI Editores, 2011): 211–230; César Rodríguez Garavito, "Navegando la Globalización: un mapamundi para el estudio y la práctica del derecho en América Latina," en *El Derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI*, ed. César Rodríguez Garavito (Buenos Aires: Siglo XXI Editores, 2011): 69–86; César Rodríguez Garavito, *Etnicidad.gov: Los recursos naturales, los pueblos indígenas y el derecho a la consulta previa en los campos sociales minados* (Bogotá: Editora Dejusticia, 2012).
16. See: John Jackson, William Davey, Alan O Sykes, *Legal Problems of International Economic Relations. Case, Materials and Text* (Minnesota: West Group, 1995).
17. Paul Nelson and Ellen Dorsey, "New Rights Advocacy in a Global Public Domain", *European Journal of International Relations*, 13, n. 2 (2007): 187-216.



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