Using the duty to regulate paradigm as a normative instrument to foster inter-disciplinarity in international investment law and human rights debate

By:

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The problem with a cross-disciplinary research approach towards the IIL and human rights debate

Scholars tend to participate in the International Investment Law (IIL) and human rights debate using a thorough knowledge and expertise of their respective legal disciplines. In addition, they frame this discussion within the paradigms privileged by each legal community. Nevertheless, the problem with cross-disciplinarity in research and discourse is that IIL and human rights

scholarship subordinates “the other” field of research to its own approaches and methods and in doing so, both reduce its counterpart’s receptiveness towards the IIL reforms they consider appropriate depending on their understanding of what IIL should be.

Since tailoring our research methodologies according to the audience we target in our analysis is essential to counter this phenomenon, I address IIL and human rights scholars engaging in this debate as my target audience and contend that doctrinal analysis, in spite of its limitations, remains a suitable methodology to speak to both legal communities and promote the required inter-disciplinarity in research and discussion.

Within the realm of existing reform approaches seeking for an accommodation of private and public interests, recent developments in human rights and IIL doctrine already allow to prompt a reconceptualization of IIL in ways that this IEL discipline recognises and thus integrates the human rights-based duties of states at stake in the interpretation and application of international investment agreements (IIAs). In light of the above, this entry puts forward the adoption of the “duty to regulate” paradigm as a rhetoric and normative tool that facilitates inter-disciplinarity in this debate.

The rhetoric function of the “duty to regulate” paradigm

Few contributions have already acknowledged the need for inter-disciplinarity in the IIL and human rights debate by suggesting normative tools that synthetize investment and human rights discourses. Yet, the disadvantage of these proposals may arguably lie in failing to clearly specify which human rights states’ obligations are at stake in investor-state dispute settlement (ISDS) in terms that are well-established in IIL. For instance, the concept of states’ regulation is pervasive in IIL scholarship and is generally employed to highlight the potential constraints that investment treaty protection may have over the exercise of this sovereign *right*.

However, since human rights law demands from states to regulate in mandatory terms, exchanging the term “right” with the concept “duty” (commonly used to define, for instance, the different types of legal obligations

arising from the International Covenant on Economic, Social and Cultural Rights, ICESCR) in connection to states' regulation definitely depicts the necessary paradigm shift needed in IIL and human rights scholarship. This is to emphasise on the fact that states' regulation of foreign investment is compulsory and not discretionary and that potential tensions between IIL and HRL are real rather than apparent because of HRL's demands might directly counter states' compliance with IIAs.

The normative function of the "duty to regulate" paradigm

In addition to a rhetoric function, the "duty to regulate" paradigm has a normative purpose. On one hand, it highlights which positive human rights obligation of host states found their regulatory duties in the investment context and how these normative demands under human rights doctrine openly oppose to what states shall generally protect under IIAs. On the other, it permits distinguishing whether ISDS deals with respondent states' regulatory needs on questions of their investment treaty obligations and thereby find ways through which IIL could integrate this states' duty.

Under human rights treaties, states parties shall ensure the rights protected in the respective conventions, what entails the fulfilment of negative and positive obligations. The later type of obligations addresses all functions of states' government. Taking the example of the ICESCR, the obligation to prevent third parties' interference with the enjoyment of human rights is what founds the duty to regulate since states are required to adopt any legislative or executive measure that is appropriate to prevent foreign investors' abuses. Appropriate measures may include, inter alia, taking direct regulation or even intervening in economic sectors, to revoking licenses or any privilege awarded to foreign investors if they fail to observe ESC rights. Nevertheless, adopting any of these regulatory actions certainly affect investors' treaty rights and generally lead to the submission of investment treaty claims. Hence, the issue becomes whether dealing with respondent states' regulatory needs on questions of their investment treaty obligation form part of the incipient accommodation of private and public interests in recent cases.

The high-profile *Urbaser v Argentina* case provides preliminary answers to this question that goes beyond the issue of investors' human rights obligations.

Likewise other tribunals, the *Urbaser v Argentina* tribunal initially endorsed the view that foreign investors should frame their legitimate expectations in light of host state's domestic laws and policieswhen dealing with alleged breaches of the fair and equitable treatment (FET). In then proceeded to draw an equivalence between investors' economic interests and the respondent state's regulatory needs. In its view, claimant investors' provision of drinking water services served to ensure that Argentina fulfils its obligation to ensure population's access to water and to take all measures to that effect. Building on this approach, the regulatory expectations of respondent states could play a key role in the determination of the legitimacy of claimant investors' expectations. Both the legitimacy of states and investors' expectations could be reviewed against the mandatory features of goods or services developed in case law to which right-holders are particularly entitled under an ESC right and that states aim to ensure by means of foreign investors' investment. This case thus shows that is not totally excluded to bolster an incorporation of states' duty to regulate in tribunals' review of alleged breaches of IIAs.

To sum up, endorsing the "duty to regulate" paradigm is an initial step to foster inter-disciplinarity in the IIL and human rights debate. It puts IIL and HRL on the same level and promotes cross-fertilization while maintaining their corresponding normative distinctions. Although this proposal mainly centres on the role of states as guarantors of human rights, the duty to regulate paradigm also has the advantage of reviewing whether respondent states were unwilling or unable to regulate in furtherance of human rights in concrete cases. In this regard, it is important to keep in mind in this discussion that foreign investors are expected to respect human rights and that involving those affected by foreign investment activities is essential in light of the state capture's phenomenon.

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