Implications of International Trade and Investment Agreements for Water and Water Services: Some Responses From Other Sources of International Law

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Tasks

- Relevance of trade and investment treaties to water and water services

- Possible roles of other sources of international law on key issue of enforcement of investor rights through the investor-state process
Investor protections post-investment

- Apply equally in water services and non-service sectors
- Create international rights to:
  - National treatment
  - Most-favored nation treatment
  - Fair and equitable treatment
  - No expropriation without compensation
- Concept of “legitimate expectations of the investor”
- Impacts on host governments, communities
  - Loss of policy space, flexibility
  - Pressures not to regulate - “regulatory chill”
  - Changes in water rights can be challenged by foreign investors
- Investor-state arbitrations to enforce rights (secretive, conflicts)
  - Potential for $100M plus awards, based on costs and lost profits
Other International Law Sources

- What other sources of international law might be relevant to application of investment treaties in investment disputes?
- Not as a value neutral question: goal to better balance in the application of these agreements

- Customary international law
  - Interpretation of investment treaties
  - As additional applicable law

- General principles of law as relevant international law
  - Principles relating to formation of contracts
  - Principles relating to execution of contracts
  - Principles relating to government regulatory measures

- Treaty law
  - International law on sustainable development
  - Human rights law
  - Transboundary water agreements
Customary international law

- Rules applied by states because they believe they are legally bound to do so
- Origin of investor protections in CIL

Used to interpret agreements
- Broaden the purpose to “pro development”
- Reattach interpretations to the rights of states
  - E.g.: police powers C.I.L. exception to rights on expropriation

Used to add new dimensions, context
- Especially to reverse direction of “legitimate expectations of investors”
  - E.g., Customary law against transboundary water pollution binds all states
  - Must condition expectations of investors
General principles of law, intro

- Principles of law common to national legal regimes, major legal systems (common law, civil law, Islamic law, etc.)
- Imported into international law to fill gaps, advance new international law principles

Role in arbitration must be targeted:
- Defense against an investor claim: specific to the claim
- “Legitimate expectation of the investor” and rights of host states can be defined against general principles of law

Role against a stabilization clause more difficult
- Harder to use general principles to fill gaps if foreseen
General principles of law formation of contracts

- Can they be used to nullify contracts and/or transfer some liability to investor?
  - Corruption: against “ordre publique internationale”, “clean hands”
  - Duress, Undue influence
  - Misrepresentation, Non-disclosure
  - Abuse of right, Abuse of position
  - Constructive knowledge
  - Unconscionability

- Water contracts: context of negotiation
  - World Bank pressure, what role did water companies play?
  - Contract negotiation: who represented Argentina?
  - Complicity of investors in seeing problems of lack of regulatory capacity?
  - Investors had high expertise in field, more than states to assess economic viability
  - Issues around stabilization contracts specifically?
General principles of law: execution of contracts

Can they be used to nullify claims and/or transfer some liability to investor?
- Good faith performance by investor
- Corruption (ongoing)
- Duress, Undue influence, abuse of position (renegotiation)
- Misrepresentation, Non-disclosure in implementation of responsibilities under contract
- Constructive knowledge
- Unconscionability

Water contracts: context of implementation
- Poor economics leading to more favourable renegotiation?
- Use of corporate transfer pricing practices to inflate losses
- National economic crisis?
General principles of law: rights of government to regulate

- Constructive notice under legislation that governments will regulate; or due to regulatory nature of host state (Methanex)
- International law duty to regulate in public interest on environment, labour, human rights, etc.
- Knowledge of investors of best practice worldwide and international standards as a basis for proper expectations, challenge to stabilization clauses
- Knowledge of weakness of regulatory frameworks in developing countries as basis of constructive notice
- E.g., no money ever paid under US Clean Air, Water Acts in compensation
International Treaty Law as a source of law

- Human rights, recognized as possible in Aguas Argentinas v Argentina, amicus curiae decision, 2005, para 19
- International environmental law, recognized in Maffezini v. Argentina
- Conditions reasonable expectations of investors, global context for reasonable measures
- International development agreements, labour treaties, transboundary water treaties, etc
Summary

- Other sources of international law can be made relevant to investor-state claims.
- Can draw on limited number of existing claims for citations, precedent.
- But also on good corporate practice, corporate social responsibility principles, international standards as part of good investment practice.
- International law principles do lend support to this.