



Investment Protection and Other Protected Values

How to Take into Account Human Rights Issues in Investment Arbitration

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Two aspects of the question

Human rights protecting investors' interests

- right to property
- right to fair trial / due process
- liberty and security of person
 - Mondev
 - Tecmed
 - Azurix
 - Saipem
 - ...

Human rights restricting investors' interests

- Governmental measures taken to protect/promote human rights adversely affecting investors' interests
 - ???

Human Rights Protecting Investors' Interests

- Daria Davitti, “On the Meaning of International Investment Law and International Human Rights Law”, *Human Rights Law Review*, vol. 12, 2012, pp. 421-453.
- Timothy G. Nelson, “Human Rights Law and BIT Protection”, *Journal of World Investment and Trade*, vol. 12, 2011, pp. 27-47.
- Pierre-Marie Dupuy et al. eds., *Human Rights in International Investment Law and Arbitration*, Oxford, Oxford University Press, 2009.

Human Rights Restricting Investors' Interests

- Moshe Hirsch, “Investment Tribunals and Human Rights Treaties”, in Freya Baetens ed., *Investment Law within International Law*, Cambridge, Cambridge University Press, 2013, pp. 85-105.
- Andreas Ziegler, “Investment Lawyers are from Mars, Human Rights Lawyers are from Venus”, *Opinio Juris blog*, 4 Oct. 2014: <<http://opiniojuris.org>>
- Susan L. Karamanian, “Human Rights Dimensions of Investment Law”, in Erika de Wet & Jure Vidmar eds., *Hierarchy in International Law*, Oxford, Oxford University Press, 2012, pp. 236-271.
- Patrick Dumberry & Gabrielle Duma-Aubin, “When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration”, *Journal of World Investment and Trade*, vol. 13, 2012, pp. 349-372.
- Yannick Radi, “Realizing Human Rights in Investment Treaty Arbitration”, *North Carolina Journal of International Law and Commercial Regulations*, vo. 37, 2012, pp. 1107-1185.

Legal Techniques to “Use” Human Rights

- *Jus cogens*
- Article 31(3)(c) VCLT
- Article 31(1) VCLT: “ordinary meaning”

Arbitral Jurisprudence?

330. En réalité, les droits de l'homme en général, et le droit à l'eau en particulier, constituent l'une des diverses sources que le Tribunal devra prendre en compte pour résoudre le différend car ces droits sont élevés au sein du système juridique argentin au rang de droits constitutionnels³⁵³, et, de plus, ils font partie des principes généraux du droit international. L'accès à l'eau potable constitue, du point de vue de l'État, un service public de première nécessité et, du point de vue du citoyen, un droit fondamental³⁵⁴. Pour ce motif, en cette matière, l'ordre juridique peut et doit réserver à l'Autorité publique des fonctions légitimes de planification, de supervision, de police, de sanction, d'intervention et même de résiliation, afin de protéger l'intérêt général.
331. Mais ces prérogatives sont compatibles avec les droits des investisseurs à recevoir la protection offerte par l'APRI. Le droit fondamental à l'eau et le droit de l'investisseur à bénéficier de la protection offerte par l'APRI opèrent sur des plans différents : l'entreprise concessionnaire d'un service public de première nécessité se trouve dans une situation de dépendance face à l'administration publique, qui dispose de pouvoirs spéciaux pour en garantir la jouissance en raison de la souveraineté du droit fondamental à l'eau ; mais l'exercice de ces pouvoirs ne se fait pas de façon absolue et doit, au contraire, être conjugué avec le respect des droits et des garanties octroyés à l'investisseur étranger en vertu de l'APRI³⁵⁵. Si les pouvoirs publics décident d'exproprier l'investissement, de traiter l'investisseur injustement ou de façon non équitable ou de lui refuser la protection ou la pleine sécurité promises, tout ceci en violant l'APRI, l'investisseur aura le droit d'être indemnisé dans les termes que le Traité lui accorde.

Agri South Africa v. Minister for Minerals

- The apartheid system placed 87% of the land and the mineral resources in the hands of 13% of the population.
- **MPRDA**: Mineral and Petroleum Resources Development Act (2002)

- Abolishing the entitlement to sterilize mineral rights (i.e. entitlement not to sell or exploit minerals)

<- optimal exploitation of mineral resources to boost economic growth.



Agri South Africa v. Minister for Minerals

MPRDA

Section 2 [objects of the Act]

(c) [to] promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa

Section 3

- (1) Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.
- (2) As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may [...] grant [...] mining right [...].

Section 5

- (4) No person may [...] mine [...] without [...]
 - (c) notifying and consulting with the landowner or lawful occupier of the land in question.

Agri South Africa v. Minister for Minerals

Constitution of the Republic of South Africa

Section 25

(2) Property may be expropriated only in terms of law of general application:

- (a) for a public purpose or in the public interest; and
- (b) Subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

Agri South Africa v. Minister for Minerals

Plaintiff: Agri South Africa (Agri Suid Afrika)

- an association representing the interests of commercial farmers

“The very enactment of the MDRPA constituted an expropriation.”



Agri South Africa v. Minister for Minerals

High Court, North Gauteng, Pretoria, Judgment of 28 April 2011 [du Plessis J], para. 77.

in issue, I must make a few remarks about it. Counsel for the defendant and counsel for the *amicus* made much reference to the objects of the MPRDA, to the fact that it seeks to redress the effects of past racial discrimination and to the fact that its objects and its regulatory scheme are internationally accepted.⁸⁶ As I have said, deprivation of property is a legal fact resulting from an act, administrative, judicial or legislative. The object of the act in question may be of limited relevance to determine whether the interference was sufficiently substantial to qualify as a deprivation. From the judgments in **FNB**⁸⁷ and **Mkontwana**⁸⁸ it is

Agri South Africa v. Minister for Minerals

Supreme Court, Judgment of 31 May 2012 [Wallis JA], para. 85

private source. In my view it was the former. That being so the MPRDA is merely the latest in a long line of legislation and statutory instruments in South Africa that affirms the principle that the right to mine is controlled by the State, and allocated to those who wish to exercise it. The right to mine remains, as it has always been, ever since mining became an important part of the economy of South Africa, under the control of and vested in the State, which allocates it in accordance with current policy. That being so the first requirement of an expropriation, namely that there be a deprivation of property, is not established insofar as the right to mine is concerned. That right was never vested in the

Agri South Africa v. Minister for Minerals

Constitutional Court, Judgment of 18 April 2013 [Mogoeng CJ]

[65] Incidental to the problems sought to be addressed through the MPRDA is the inequitable distribution of land stemming from our unpleasant past. The historical inextricable link between landownership and mineral rights ownership equally explains why the vast majority of black people do not have access to the mineral and natural resources of our land. The determination of expropriation, in a matter like this, cannot therefore be merely surgical or mechanical. A fine balance must be struck between the interest of those deprived by the MPRDA, and the need to create jobs, grow the economy through the expanded development of the mining industry and open up opportunities for those sought to be made fellow partakers in the equitable access to mineral resources, brought into being by the MPRDA.

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[68] The MPRDA is the legal instrument through which Sebenza was deprived of its coal rights. This therefore is a compulsory deprivation. The custodianship of this and other mineral and petroleum resources is, in terms of the MPRDA, vested in the state on behalf of the people of South Africa. The critical question is, however, whether this deprivation, the assumption of custodianship and the power to grant others what could previously have been granted only by holders, means that the state acquired ownership of rights to these mineral and petroleum resources. The answer is no.

Agri South Africa v. Minister for Minerals

- **High Court**
 - Expropriation. Objectives are irrelevant.
- **Supreme Court**
 - No deprivation. No need to examine objectives.
- **Constitutional Court**
 - Deprivation, but no expropriation.
Objectives are relevant?

How would investment tribunals find?

- FET
 - due process / procedural fairness
 - transparency
 - non-discrimination
 - non-arbitrariness
- (Indirect) Expropriation
 - ...

Hamamoto, "Requiem for Indirect Expropriation: On the Theoretical and Practical Uselessness of a Contested Concept", *PILAGG e-series/IA/1*, École de Droit, Sciences Po de Paris, 2013, pp. 1-28.
<<http://blogs.sciences-po.fr/pilagg/pilagg-e-series/>>

Agri South Africa v. Minister for Minerals

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