Balancing Investors' and Host States' Rights – What Alternatives for Treaty-makers?

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The quest for a viable balancing of investors' and host states' rights has always been the core issue of the law of foreign investment. Within the realm of customary international law, the opposition between concepts advocated by capital-exporting countries – such as the acquired-rights doctrine or the Hull formula – and those defended by capital-importing states – such as the Calvo doctrine or the concept of "new international economic order" – demonstrates the long history of the difficulties to find common ground on this fundamental question. Attempts to negotiate multilateral investment agreements have repeatedly been hampered by the opposition of those states who wish to obtain maximum investment protection and those who are concerned about their "policy space". The failed negotiations within the OECD in the 1960s and the 1990s, within the UN between the 1970s and the 1990s, and within the WTO at the beginning of the twenty-first century are striking examples of the difficulties in agreeing on clear-cut rules in this regard.

Nevertheless, two apparently asymmetrical evolutions have occurred in the past. First, although sometimes arguing for large policy space in multilateral forums, many capital-importing states – competing for foreign investments – concluded bilateral investment treaties (BITs) based on the Abs–Shawcross model with no explicit exceptions aimed at safeguarding the home-state's interests. Second, some capital-exporting-countries, such as the USA and Canada, have come to find themselves in the role of defendants in investment claims and, consequently, added policy-space exceptions to their BITs. Even though the opposition between capital-exporting and capital-importing states remains strong on these issues within most of the bilateral negotiations, one may wonder whether it still is as insurmountable as it was during the last century. The difficult question, however, is how to break down a compromise on the balance of the investor's and the host state's rights in black-letter law within an investment protection treaty. As with every exception

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to a system of established rights to the benefit of one party, it must be ensured that the exception cannot be used or abused by the other party for purposes that would undermine the spirit of the treaty. So what can treaty-makers do to balance the investor's and the host state's rights in a way that would be satisfactory for all the parties concerned?

Should investment protection treaties stick to the time-tested Abs–Shawcross model and only grant investor's rights, while leaving it up to the national law of the host state to defend the state's public interest as long as this national law conforms to the terms of the treaty? This classic approach based on the interplay between national and international law could function well if doubt were not cast on it by diverging interpretations of the same facts and investment protection standards by different arbitral tribunals. It remains to be seen whether this problem can be solved by more stringent recourse to commonly accepted rules of interpretation by arbitral tribunals.

In the meantime, would it be beneficial to describe in more detail how the parties to an agreement understand the terms contained therein? For example, some recent treaties tie the fair and equitable treatment clause to the international minimum standard known in customary law or specify that the finding of an indirect expropriation requires a fact-by-fact inquiry which takes into account a number of listed factors, such as the character of the government action and the investor's expectations. Do such specifications make it really easier for arbitral tribunals to come to shared conclusions when striking the balance between the investor's and the state's interests in a specific case?

Alternatively, would it be sufficient to exclude some sectors deemed particularly important for the state from the scope of application of investment treaties or to rely on so-called emergency clauses to safeguard the state's essential interests? But what can states do when new sectors become particularly important owing to the evolution of public policy? Have emergency clauses been interpreted and applied in a satisfactory and harmonious manner by recent arbitral tribunals to safeguard the state's essential interests?

What about the inclusion of generally worded exception clauses such as those contained in some North American treaties or in the recently proposed Norwegian draft model BIT? Aren't these too circular to provide for clear answers when it comes to weighing the host state's interests against those of the investor? Would it make it easier for arbitral tribunals to rely on a GATT Article XX-style exception clause as is provided for by the ASEAN Framework Agreement on Investment or the latest Canadian Model BIT?

These are only some of the questions which treaty-makers face when it comes to organizing the trade-off between the investor's and the host state's rights within the terms of an investment protection agreement. They are discussed in more detail elsewhere in this volume.

It seems that all of the proposed alternatives have some advantages and some disadvantages. It appears, however, that the balancing of the investor's and the host state's interest can only partly be made in abstract terms and always depends on the specific facts of a given situation. The application of an abstract rule of law to such a factual situation then often implies the recourse to general legal principles, such as the rule of good faith, the respect of legitimate expectations and the principle of proportionality. This is where individual convictions and preferences can come into play, with the result of diverging jurisprudence depending on the appointment of different arbitrators. Until now, for the investment-law regime, the choice has been made to renounce to a WTO-like appeal system, which may be able to guarantee some coherence in the weighing of the host state's and the investor's interests by the development of compulsory methodological rules and an institutional memory. But even with a highly institutionalized dispute-settlement system, as in the area of world trade law, decisions implying a general concern such as the protection of the environment have led to sharp criticism from nearly all of the stakeholders involved. For the time being, investment-treaty negotiators will have to continue their quest for the best terms for striking a fair and predictable balance between the rights and interests of foreign investors and host states. Further academic research and discussion, such as in the chapter by Lars Markert, will be highly appreciated.