

Ahmad Ali Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration* (Wolters Kluwer Law & Business, 2015), 192 pp.

International investment law has been criticized for favouring the interests of the investors over those of the host states. International society responded by seeking to introduce duties of investors via codes of conduct. When this failed, academics and arbitral tribunals began to explore other options that could potentially lead to a more balanced approach to investors' rights and obligations. This has led to a number of rulings acknowledging investors' obligations to contribute to the development of the host country, found in the Preamble to the Washington Convention,¹ and to comply with the laws of the host country, found in numerous BITs.² The new public law approach to international investment law, in contrast, does not aim at the establishment of investors' obligations but rather at the restriction of their rights.³ Unlike the private law approach which posits the equality of parties, the public law approach relies on the superiority of the sovereign state in order to claim that the state party should benefit from special privileges and deference in investor-state arbitration.⁴ In this context, Kingsbury & Schill have invited 'arbitral tribunals to draw on public law concepts used in various other international and national courts and tribunals, notably by having recourse to proportionality analysis in order to balance rights and rights-limiting policy choices',⁵ in other words, investors' rights and the public interest. This proportionality analysis, as the two authors explain, has already been applied to some extent by 'tribunals in determining whether departures from investment treaty obligations to protect specified vital interests of the host State are permissible'.⁶

¹ See, e.g., *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Award of 11 Jul. 1997, 37 I.L.M. 1384 (1998); *Salini Costruttori S.P.A. & Italstrade S.P.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/04), Award of 23 Jul. 2001, 42 I.L.M. 62 (2003); *Consortium R.F.C.C. v. Kingdom of Morocco* (ICSID Case No. ARB/00/6), Award of 16 Jul. 2001, paras 58–66; *Joy Mining Machinery Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award of 6 Aug. 2004, para. 53.

² See, e.g., P.M. Protopsaltis, 'Compliance with the Laws of the Host Country in Bilateral Investment Treaties', in *Αίτιος μνήμης Καθηγητού Ηλία Κρίστη: Συμβολές στην επιστήμη του δικαίου και των διεθνών σχέσεων* 583-602 (Sakkoulas, 2015).

³ A. Kulick, *Book Review: Stephan W. Schill (ed.), International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010), 22 EJIL 920 (2011).

⁴ Th. Wälde, in A. Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 106 AJIL 55 (2013).

⁵ B. Kingsbury & S. Schill, *Public Law Concepts to Balance Investor's Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality*, in *International Investment Law and Comparative Public Law* 77 (S. Schill ed., Oxford University Press, 2010).

⁶ *Ibid.*, at 102; cf. X. Han, *The Application of the Principle of Proportionality in Tecmed v. Mexico*, 6 Chinese JIL 644 (2007).

Drawing upon this public law approach, Dr Ghouri's doctoral thesis, *Interaction and Conflict of Treaties in Investment Arbitration*, published earlier this year discusses the applicability of non-commercial agreements, as the author terms human rights, environmental protection, and other similar conventions, in the context of investment arbitration. The author claims that treaties on the environment, human rights, and the like may apply in the context of investor-state arbitration through the resolution of possible conflicts between these agreements and the applicable BITs, not on the basis of the rules established by the Vienna Convention on the Law of Treaties (VCLT) but on the basis of a balance of the different interests and values involved in those agreements and the BITs. This review will present the content of the book before discussing some limits and objections to the arguments advanced therein.

1 THE APPLICABILITY OF NON-COMMERCIAL AGREEMENTS IN INVESTMENT ARBITRATION

In his introductory chapter, Dr Ghouri argues that the investor-state arbitral system does not operate in isolation from other systems of international law. He refers to the need to balance and determine priority between the potentially conflicting obligations that states owe to foreign investors and to their citizens, arising both from commercial agreements, including investment treaties, and from non-commercial agreements that may apply in investment treaty cases. The author claims that investor-state arbitral tribunals, as the central institutions testing the legitimacy of state measures, can strike the balance between these competing obligations by applying international law rules for the interpretation of treaties. He asserts that the VCLT 'equips such arbitral tribunals with the required jurisdiction to take a self-initiated cognisance of rights and obligations arising from non-investment treaties that have direct bearing on an investment dispute'. Tribunals may then consider and apply such non-investment treaties, resolving normative overlaps and conflicts that would arise so as to 'effectively address issues pertaining to the system's legitimacy and develop concrete substantive rules of international investment law that are coherent with other parallel systems existing within international law'.⁷

Dr Ghouri begins his analysis in Chapter 2 with a brief history of the evolution of investment treaties and a description of the mechanics of investment arbitration. Exploring the origins of BITs, he rightly observes that the continuous controversy between developed and developing countries and the resulting uncertainty regarding the content of customary international law on investment protection standards led to the adoption of BITs 'as an attractive alternative to

⁷ A.A. Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration* 9 (Wolters Kluwer Law & Business 2015).

prescribe mutually acceptable substantive rules governing cross-border investments'.⁸ He then goes on to state that BITs and free trade agreements containing investment clauses 'have now effectively transformed' investor-state 'difference of interests into public international law disputes'.⁹ The author describes the main traits of inter-state arbitration with mutual consent after the accrual of the dispute, as well as of investor-state arbitration under investor-state agreements and under BITs, and then explains the reasons for 'the creation of a broadly institutionalised system of investor-state arbitration'.¹⁰ The remainder of the chapter is dedicated to the analysis of the mechanism of investor-state arbitration and the specific characteristics thereof, namely, the absence of a defined set of substantive rules and fundamental principles governing the investor-state relationship. This 'procedure without substance' has, according to the author, 'entrusted greater responsibility on tribunals for the development of investor-state arbitration as a system that protects the rights of foreign investors but also balances their rights with those of the citizens of host States when required'.¹¹

In Chapter 3, the author turns his attention on the substantive and jurisdictional issues of treaty conflicts. Treaty conflicts are defined as conflicting obligations that states have acquired under two treaties which give rise to problems regarding the validity or enforceability of conflicting obligations owed by a state.¹² According to Dr Ghouri, the rules of the VCLT, namely, the *lex posterior/lex prior* rules, the *lex specialis* rule, and the rule on treaties dealing with the same subject matter involving different parties that authorizes political decision, fail to provide an appropriate solution to normative conflicts. In addition, those rules treat different treaties alike thus obscuring their many differences. Because of their differences, the characterization of treaties on the basis of their subject matter, the number of parties involved, and their intended object and purposes cannot serve to determine the hierarchy between them. In contrast, understanding treaty conflicts as interests- and value-conflicts may provide an objective criterion to determine the hierarchy of norms in conflict. Dr Ghouri explains that 'a norm represents a value and a value represents interests in terms of benefits or advantages that an individual or a community derives from a norm'.¹³ Values are 'internalised in the form of norms', and '[o]n the international level, this internalisation is reflected through the development of *jus cogens*, international customs, or by way of incorporating norms in treaties,

⁸ *Ibid.*, at 16.

⁹ *Ibid.*, at 9.

¹⁰ *Ibid.*, at 47.

¹¹ *Ibid.*

¹² *Ibid.*, at 64.

¹³ *Ibid.*, at 52.

each representing a different stage of internalisation process'.¹⁴ Dr Ghouri also observes that tribunals may have extensive jurisdiction to entertain all matters relating to or affecting the subject matter of the treaty. In particular, the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) extends to any legal dispute arising directly out of an investment. Consequently, '[o]nce a State's consent is established, any State measure in respect of human rights or the environment that offsets the legitimate expectations of an investor will bring the dispute within the ICSID's jurisdiction'.¹⁵ However, despite some examples of value-oriented balancing of conflicting treaty norms in the European Court of Human Rights and the World Trade Organization's Panels, international courts and tribunals have developed techniques aiming to avoid rather than resolve treaty conflicts.

An analysis of treaty conflicts in investor-state arbitration is the focus of Chapter 4. The author concludes from the repeated emphasis of the VCLT and the UN Charter on the principles of justice and international law when resolving disputes concerning treaties that 'tribunals must interpret and apply treaties in conformity with the overall framework of international law'.¹⁶ He finds the legal basis for the interaction of investment and non-investment treaties in the principle of systemic integration set out through the references to applicable rules of international law in Article 31(3)(c) of the VCLT, in Article 42(1) of the ICSID Convention and in Article 102(2) of the North American Free Trade Agreement. Examining the consequences of this interaction he concludes that '[t]he principle of systemic integration and the requirements of justice obligate investor-State arbitral tribunals to adopt a process of balancing or readjustment of all rights and obligations arising from the relevant investment and non-investment treaties applicable in the dispute'.¹⁷ Examining the forms of interaction or 'cross fertilisation of investment and non-investment treaties',¹⁸ the author draws a distinction between explanatory and supervisory cross-fertilization of treaties. The first includes cases where both norms of investment treaties and human rights treaties complement one another and the non-investment treaty regime may operate as an interpretative tool and play explanatory and ancillary roles in investment arbitration. The second includes cases where norms of investment treaties and human rights treaties create incompatible obligations for states, meaning that states may be compelled to violate investment treaty obligations in order to protect their citizens' rights to health, safety, and the environment. In those latter cases, human

¹⁴ *Ibid.*, at 56.

¹⁵ *Ibid.*, at 98–99.

¹⁶ *Ibid.*, at 106.

¹⁷ *Ibid.*, at 112.

¹⁸ *Ibid.*, at 115.

rights and environmental rights treaties can effectively play a supervisory or corrective role in the interpretation of investment treaties and in the normative development of international law. Yet the author acknowledges that apart from a few exceptions, tribunals ‘occasionally applied non-investment treaties when they deemed appropriate for determining investors rights’ whereas ‘the direct application of non-investment treaties on investor-State disputes is still to come’.¹⁹ Finally, the author investigates the problem of resolution of normative conflicts within the international investment treaty system, namely, of conflicts between two provisions of the same investment treaty dealing with different subject matters and conflicts on the concept of investment arising between BITs and the ICSID Convention. In that respect, he observes the tendency of tribunals to designate ‘the development-oriented ICSID Convention as ‘basic’ treaty on investment protections as compared to investor-oriented BITs’.²⁰

The final chapter of the book is dedicated to a particular (and peripheral) problem, namely, investment treaty conflicts in the context of the European Union (EU). The conflicts in question arose since the Treaty on the Functioning of the EU (TFEU) established by the Treaty of Lisbon (2007) included foreign direct investment in the exclusive common commercial policy of the EU.²¹ The author explores the views of the European Court of Justice (ECJ) on conflicts between the TFEU and the intra- and extra-EU BITs concluded by the EU Member States, as well as between the TFEU and the Energy Charter Treaty (ECT). He also examines the investor-state arbitral tribunals’ views on the TFEU–BITs and TFEU–ECT conflicts. The author observes that arbitral tribunals have treated both intra- and extra-EU BITs as autonomous instruments securing ‘investor’s procedural right to international arbitration granted in the investment treaties’,²² before concluding that termination of intra-EU treaties will not necessarily deprive investor-state tribunals of their jurisdiction to hear intra-EU investment cases, since ‘other legal bases, such as BITs’ survival clauses, remain available to arbitral tribunals’.²³

2 LIMITS TO THE APPLICABILITY OF NON-COMMERCIAL AGREEMENTS IN INVESTMENT ARBITRATION

The idea of application of environmental, human rights, and other similar treaties in the context of investor-state arbitration is, of course, not new. Dr Ghouri himself refers to the *SPP* case

¹⁹ *Ibid.*, at 137.

²⁰ *Ibid.*, at 148.

²¹ According to the TFEU, ‘[t]he common commercial policy shall be based on uniform principles, particularly with regard to ... foreign direct investment’ (TFEU (2007), Art. 207(1)).

²² Ghouri, *supra* n. 7, at 175.

²³ *Ibid.*, at 176.

where an ICSID Tribunal, already in 1992, had observed that after the inclusion of the pyramid fields in the inventory of property to be protected by the UNESCO Convention ‘the Claimants’ activities on the Pyramids Plateau would have become internationally unlawful’.²⁴ Ben Hamida also had claimed in the past in relation to ICSID arbitration that references to the principles of international law in the provisions on applicable law of various national and international investment protection instruments authorize arbitrators to apply international treaties on environmental protection, human rights, corruption, and working conditions.²⁵ Dr Ghouri, however, is the first to have explored in depth this territory and has managed to analyse most of the problems related to the application of the rules of the VCLT in modern complex international treaties, the main aspects of the interaction between the treaties in question and the BITs, as well as the TFEU–BITs and TFEU–ECT conflicts. For this alone, the book deserves our full attention. This is not to say that this pioneering work is free from drawbacks. A number of the points raised by the author are highly controversial. He claims, for example, that BITs ‘have played a pivotal role in this enormous flow of foreign investment’,²⁶ although numerous scholars have contested the effects of BITs on the canalization of foreign direct investment.²⁷ In addition, he fails to fully integrate his interesting analysis of the TFEU-BITs and the TFEU-ECT conflicts into his central argument on cross-fertilization of investment and non-investment treaties and on the obligation of arbitral tribunals to balance the relevant rights and interests involved.

The primary difficulty with Dr Ghouri’s study, however, lies in the inherent limits of the topic itself, i.e., the limited scope of application of environmental, human rights, and other similar treaties in the context of investor-state arbitration. Dr Ghouri mentions a number of cases in which arbitral tribunals have applied other treaties in order to clarify the content of a particular principle or rule (explanatory cross-fertilization of treaties), as well as in order to determine whether measures depriving the investor of his rights to his investment were taken

²⁴ *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award on the Merits of 20 May 1992, paras 156–57.

²⁵ W. Ben Hamida, *L’arbitrage Etat-investisseur cherche son équilibre perdu: Dans quelle mesure l’Etat peut introduire des demandes reconventionnelles contre l’investisseur privé?*, 7 Int’l L. Forum 262 (2005).

²⁶ Ghouri, *supra* n. 7, at 47.

²⁷ M. Sornarajah, *The International Law on Foreign Investment* 177–178 (Grotius Publications, Cambridge University Press, 2010); *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* 109–457 (K.P. Sauvant & L.E. Sachs eds, Oxford University Press, 2009); T.W. Wälde, *International Investment under the 1994 Energy Charter Treaty, Legal, Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, 29 JWT 15 (1995); J.W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 Int’l Law. 673–674 (1990).

by the state in order to abide by its other international obligations (supervisory cross-fertilization of treaties). In contrast, to the best of our knowledge, arbitral tribunals have never applied such other treaties in order to establish obligations of foreign investors. The reason for that is, of course, rather obvious: most of these treaties do not impose direct obligations on individuals. Even in the *World Duty Free* case in which the tribunal found ‘[i]n light of domestic laws and international conventions relating to corruption ... that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy’,²⁸ it relied on the general principles of English and Kenyan law to rule on the illegality of the claimant’s conduct.²⁹ In view of the limitations above, the question to ask here is whether states can use the defence of conflicting international obligations to avoid payment of compensation due for takings of property. In other words, the question is who should bear the cost of measures taken by the state in fulfilment of its other international obligations.

BITs answer this question unequivocally in favour of the investor. Indeed, most treaties condition the legality of an expropriatory measure, amongst others, upon serving a public purpose and being accompanied by appropriate, namely, prompt, adequate, and effective, compensation.³⁰ To that Dr Ghouri replies with his balance of interests’ test, evaluating interests arising from the applicable investment and non-investment treaties and, in particular, investor’s interests and public interests. But what could be the effect of a prevailing public interest on the state’s obligation to compensate the investor expropriated? Ranjan observes the strange situation where public purpose is used in order to determine whether the foreign investment has been expropriated: ‘on the one hand the treaty requires that foreign investment should not be expropriated unless there is public purpose and accompanied by compensation, and, on the other hand, the argument that regulatory measures tantamount to expropriation would not give rise to a claim for compensation if adopted for public purpose.’ Public purpose can therefore be used only as a criterion to determine the legality of the expropriation and not the existence of expropriation per se.³¹ As a result, assuming that a public purpose is one that serves a public interest, a prevailing public interest will have no incidence on the existence of expropriation per se and will only be of relevance for the determination of its legality.

²⁸ *World Duty Free Co. Ltd. v. Republic of Kenya* (ICSID Case No. ARB/00/7), Award of 4 Oct. 2006, para. 157.

²⁹ *Ibid.*, para. 179; cf. B. Poulain, ‘La conformité de l’investissement au droit local dans le contentieux investisseur – État’, 2007/4 *Les Cahiers de l’arbitrage*, *Gaz. Pal.* of 15–15 Dec. 2007 at 42.

³⁰ R. Dolzer & Chr. Schreuer, *Principles of International Investment Law* 100-101 (Oxford University Press, 2012).

³¹ P. Ranjan, *Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Appraisal*, 3 *Cambridge J. Int’l & Comp. Law* 869 (2014).

In his introduction, Dr Ghouri answers instead that the use of value-oriented reasoning ‘would lead to achieving a balance in determining the amount of compensations payable to foreign investors for violations by the host States of investment treaty rights when such violations are directly attributable to conflicting non-investment obligations’.³² Similarly, elsewhere he claims that:

the determination of the amount of compensation remains a legal question requiring a principled approach ... the choice of method should depend upon the motives behind a State’s act and its intended aims and objective ... the investor-State tribunals can use their choice of valuation method wisely in order to balance the investor’s interests against the conflicting public interests.

After a brief analysis of the distinctions between different forms of compensation, he concludes that ‘[i]nvestor-State tribunals can use these distinctions as a balancing technique and for the just settlement of investment disputes minimising the burden on public purse resulting from legitimate State act aimed at the protection of public interest’.³³ Finally, he claims that ‘[i]n investor-State arbitration, primary remedy is compensation’ and the integration of the process of ordering conflicting norms or balancing conflicting interests ‘provides tribunals with an effective mechanism for balancing conflicting rights and obligations through adjustments in the amount of compensation payable to foreign investors’.³⁴ In other words, Dr Ghouri proposes the payment of a reduced compensation in the case of expropriation on account of a conflicting international obligation of the state. But, as Dr Ghouri himself implicitly admits,³⁵ appropriate compensation is the minimum of compensation that the investor is entitled to receive for any lawful expropriation of his property. And even if this were not so, one can wonder how this reduced compensation is to be calculated. Dr Ghouri rightly (albeit implicitly) admits the difficulty of this exercise. Having observed that ‘there are no mandatory criterion to determine the amount of compensation and calculations depend on the facts of each case’,³⁶ he explicitly avoids ‘the detailed discussion on the rules for calculation of compensation’.³⁷

Apart from this difficulty, this exercise is also likely to encounter a serious objection that Dr Ghouri does not ignore; namely, that:

³² Ghouri, *supra* n. 7, at 9.

³³ *Ibid.*, at 45–46.

³⁴ *Ibid.*, at 112–13.

³⁵ ‘[M]ost investment treaties require States to pay compensation for expropriation of foreign investor’s investment even if expropriation resulted from a regulation to protect public interest’ (*ibid.*, at 113).

³⁶ *Ibid.*, at 113.

³⁷ *Ibid.*, at 114.

the foreign investor is not responsible for the conflicting treaty obligations that his home and host States have acquired. States might have concluded a treaty, containing obligations that conflict with a foreign investor's rights under an investment treaty, after the investor had proceeded with the investment activity and had made all or some investments.

In such cases, the author concludes:

a foreign investor may become an innocent 'victim' of the acts of State that might otherwise be legal under international law. Where the investor's investment followed all legal requirements and procedures of domestic laws of the host State or is based on an investor-State agreement ... duly made with the host State, such investor cannot be responsible if by allowing the investment or by making the agreement, the host State has violated its other treaty obligations that were not known to foreign investor at the time of making investment. In such situations, a host State may be liable to defraud foreign investor, and denial of payment of compensation would result in unjust enrichment of the host State and unjust settlement of dispute.³⁸

What is then left is investor's knowledge or even involvement in the illegality, cases usually already covered by other provisions of BITs and international investment agreements.³⁹

In view of those limitations, one may wonder whether this balance of interests, which relies upon the theoretical construct of interest- and value-conflicts, may not be achieved instead through the proportionality analysis which has essentially the same goal, namely, to balance investors' rights and the public interest, by merely claiming that abiding by a conflicting international obligation of a state is a legitimate government purpose, thus satisfying the requirements of the first step of the analysis.⁴⁰ The proportionality analysis claims to leave the VCLT intact⁴¹ and has already been applied by some tribunals.⁴² Yet, its use in BITs' interpretation has been rightly criticized, amongst others, for conferring power on 'party-appointed arbitrators who are not embedded in the political and social system of the communities whose disputes they decide and have inadequate knowledge of the overall legal, political and social context related to the dispute'⁴³ 'to take policy-driven decisions' or for 'legitimizing juridical law-making',⁴⁴ as well as for violating the clear textual language of the BITs and thus not being 'in consonance with the customary rules on treaty interpretation'

³⁸ *Ibid.*, at 113–14 (footnotes omitted).

³⁹ See *supra* n. 2.

⁴⁰ Kingsbury & Schill, *supra* n. 5, at 86.

⁴¹ *Ibid.*, at 78.

⁴² See *supra* n. 6.

⁴³ Ranjan, *supra* n. 31, at 862.

⁴⁴ Kingsbury & Schill, *supra* n. 5, at 102–3, *passim*.

codified in the VCLT.⁴⁵ Those criticisms, of course, apply also to Dr Ghouri's balance of interests' test.

In addition to the above, Ranjan rightly explains in relation to the limits on the right of the host state to regulate for *bona fide* public purpose affecting the rights of foreign investors, that the disproportionate effect test invoked by the proponents of the proportionality principle 'would defeat the very purpose of having expropriation provisions in BITs' by allowing host states to shift 'the burden of realising public purpose onto foreign investors alone'.⁴⁶ In that respect, Dr Ghouri's reference to the avoidance of the foreign investor becoming 'an innocent 'victim' of the acts of State that might otherwise be legal under international law'⁴⁷ subscribes to the criticism of the proportionality analysis and the public law approach to investor-state arbitration in general, rather than to its support.

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⁴⁵ Ranjan, *supra* n. 31, at 867.

⁴⁶ *Ibid.*, at 870.

⁴⁷ Ghouri, *supra* n. 7, at 113–14.