Research: Postdoc in **International Environment Law and Investment Arbitration**

My name is Irina Moutaye, I'm a Russian attorney at law of the Moscow Regional Bar Chamber, practicing international disputes & private international law.

After I had defended my Candidate of science in 2007 and had worked for several years as a practicing lawyer I decided to take a break in order to make a research in Sweden, have an access to the famous international forum with the developed arbitration traditions and share them in Russia.

During my research I had much more: an unlimited access to Riksdag Library, not only familiarization with the Swedish arbitration approach which has allowed to form a unique arbitration culture in Sweden, but also meeting leading Swedish lawyers, diplomats, international law practitioners, professors, interesting people and getting acquainted with the Swedish culture and new friends in Russia and Sweden!

I. Research Part

Topic. My research topic is focused on the global solutions search. Currently the international commercial arbitration practice doesn't have a unified approach as to what to give preference: the system of foreign investment protection or environment.

In fact, this huge practical problem is fundamental for legal scholarship too.

In fact, nowadays there are no ready universal solutions for this problem. This topic is complex because it lies in the intersection of the international private and public international laws.

On the one hand, in today's world there is a significant number of international investment protection agreements including agreements with the "umbrella clause". In accordance with these agreements the expropriation is generally prohibited, including indirect expropriation of the foreign investor property.

On the other hand, international environmental protection agreements are an important part of the modern international law system. These treaties, as well as the national environmental legislation, impose positive obligations on the state. The modern state is obliged to care for the environment and human health. In this regard, the state constantly takes new measures of ecological essence. These measures, inter alia, may be directed to the expropriation.

For example, the restriction of certain technology import, the prohibition of certain operations due to the environmental hazards, the prohibition of construction in recreation zone, etc.

In other cases, the foreign investor can invest in the plant construction a in the state, which operation is subsequently stopped due to the environmental reasons.

Under the umbrella clause, even if investor acts against the law, the state is obliged to pay compensation for expropriation of the investor property.

The first problem is connected with the fact any state measures , in fact, may constitute expropriation of the foreign investor property.

The second problem is connected with the possibility to manipulate these measures trying to usurp another person's property using the environmental rhetoric.

The third problem lies in the special nature of the international environmental law, in principle, being devoid of enforcement mechanism of its norms. National environmental legal regulation is much more efficient, however, its requirements, as a rule, can only be distributed within the territory of the state, while environmental problems generally do not have borders.

In particular, these national environmental legislation requirements are not applied to the neutral territory, for example, in the international waters within the UN Law of the Sea Convention meaning.

In this situation the question arises: whether in such a situation the international commercial arbitration applies the rules of international environmental law in case of dispute in order to determine the parties' rights and obligations and make a decision regarding the merits. After all, international commercial arbitration may be the only entity authorized to enforce these environmental rules by compulsion.

The purpose of my research was to create an explanatory theory how to keep the right balance between the foreign investment protection and environment protection in the modern conditions.

During my research I tried to establish the modern border between the foreign investment protection and international environmental laws.

In particular, my task was to study the trends of the modern arbitration practice, international treaties and national experiences of some countries, aiming at the complete rejection of environmentally hazardous industries (e.g. nuclear power), and its impact on the international investment arbitration.

This began to happen in the conditions of the earlier "umbrella clauses" existence involving an unconditional obligation of the state to pay the compensation for the investor property expropriation.
The trend does exist and the practice of international investment arbitration is changing (gradual shift away from the "umbrella clause" in favor of the nature conservation). However, the reason why it's happening is not readily apparent.

Gradually the trend has been confirmed by the international commercial arbitration practice and recently has become reflected in state's policy and in the texts of international agreements on investments protection.

The first reaction was to have stricter texts of the international investment treaties (often - their projects) for any kind of the environmental protection priority up to its absolute respect to the foreign investments protection. However, the history of the Norwegian BIT development which still has not come into the effect shows that environmental protection absolutization is not an option or at least is not the only way.

This confirms my assumption that the current model for resolving such disputes should not be an absolutization of one of the values (investment protection or environment protection), but the search for the new balance between these two values.

In order to determine the change source and thus to make the international investment arbitration practice clear and predictable it was necessary to test the legal facts and all international investment relationship elements so as to assess whether the role of the traditional approach to the legal structure of the international investment relationship is changing, and if so, how the role of its legal structure elements is changing in the modern world and how all these elements are still relevant to the modern investment dispute resolution.

I was faced with the following questions.

1. Are the universal standards of international investment arbitration applicable to the disputes arising from the international environmental law in the context of investment protection?

My conclusion: I came to the conclusion that they are. Until I have seen the conceptual changes of international investment arbitration universal standards with respect to the environmental disputes compared with all other categories of disputes.

The expropriation claim legitimacy still requires a timely and effective compensation, the opportunity to defend the investor's rights in court, non-discrimination, integrity, protection of socially useful values.

The basis of the international commercial arbitration award shall be the estimation of all these factors in every case. However, the specific requirements for the involved parties' behavior have changed due to the objective reasons.

In particular, my analysis of arbitration proceedings and their doctrinal assessment have showed that these changes are associated primarily with the state's right to regulate and the principle of good faith. For example, the principle of good faith has spread not only in the state but also to the foreign investors; in particular in the current conditions it is hardly correct to maintain the investor's 'forum shopping', carried out in order to manipulate the system of foreign investment protection.

Since the legal expropriation can be made only on the law basis, we are currently experiencing a revision period of the state's law to regulate certain issues like liberalization of the state action (a departure from the "umbrella clause") and any other pertinent obligations investor due diligence as trends of the legal regulation in the particular state.

This applies not only to the environment but also to the other "socially useful purposes". It was the most notable in cases where the "socially useful purposes of the state" were announced to support the healthy lifestyle of the citizens (quitting smoking), environmental well-being concerns, etc.

But this does not eliminate the test of legislation compliance with all other criteria: legality, integrity, judicial protection right and others. At the moment we cannot say definitely that the publication of any environmental regulation will automatically lead to the compensation for the affected investors.

This is due to the fact that now there is a lot of opportunities for investors to predict the appearance of environment regulation as a result of the law availability and publicity, strengthening the role of the state positive obligations towards its citizens ("the protection of social benefits") and to the revision (in the direction of extension) of the "right to regulate the border ".

Question 2. As a social virtue, does environment protection have some privileged position in the hierarchy of social values in comparison with other public values?

My answer is: No. Despite a marked tendency to expand the state's rights in regulating the environmental issues, it is impossible to give any of the social welfares the certain privileged position universally in relation to the others in terms of its legal remedies.

Each rule in different situations has a different content. Sometimes the environment protection may cause harm to the human health or social disasters, and sometimes not. Sometimes the damage can be repaired, but in other cases the damage will be irreparable. Elucidation of the social benefits hierarchy in relation to each other must always be carried out within specific relationship to their specific consequences.

Periodic return to the revision of the legal relationship structure related to the foreign investments protection is caused by the dynamic changes in the social relations, new opportunities and priorities and new regional policy.

But this does not mean that important traditional approaches developed by the doctrine of public law must be leveled.

Question 3. In what part of the current standard implementation of international investment has the relationship changed?

Answer. It can be argued that the standards for evaluating investment relations between the state and the foreign investor vary in part with regard to the revision (in the direction of extension) of the state's right to legal regulation. Nowadays in some cases the government has the right to implement it without compensation to the investor.

Question 4. Do the rules on environment protection have status of public policy (within the private international law meaning)?

Answer: It seems that they still don't despite some attempts to approve this in literature. Arbitration practice doesn't confirm the public policy status of these rules and the arguments, though constantly reinforce their argument, most are too bold in the part of the public policy general idea development. In this regard it is important for public policy to have an internal (in the sense of national private law) and external (in the sense of private international law) value.

Sharing these values can confirm more reliably the evidence of this approach applicability in the first case and the non-applicability in the second one.

I would like to continue developing this important issue when reading for my doctorate in Russia.

Also, I had pleasure to make several presentations in big conferences like Kiel University trade law conference and annual Juris Diversitas conference.

The peculiarity of Sweden (Swedish Bar) is their elegant simplicity with the willingness to help researchers who are not connected with them. Not just practicing lawyers but the top lawyers in Sweden helped me conduct my research and shared their views and experiences.

I am grateful to the partner of Vinge Johan Gernandt, Vinge attorney Klara Håstad, the partner of Fylgia Kristoffer Sparring, the attorney of Lindahl Ginta Ahrel, Bird

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Also, I am grateful to Said Mahmoudi, the professor of Stockholm University for his expert evaluation of a number of environmental law issues and Hans Corell, who generously shared his views on the Arctic problems.

2. Personal

In addition to my main topic, I have made a number of observations in Sweden regarding the rights, law, lawyers and life in Sweden.

The first one relates to the contribution of Sweden to the of world law development. There is no doubt that Sweden has already made and continues to make significant contributions to the world of law.

I believe that the Swedish experience has not been appreciated in Russia yet. In some cases, this experience is significantly different from the number of legislative approaches of other European countries (e.g., regulation of freedom of speech, which has a long history in Sweden, the regulation of gender equality, the activities of Parliament, the legal regulation of social issues, the criminalization of the sexual services purchase, etc.).

I believe that the legislator possesses great courage for taking such legislative steps against the background of many European approaches . In case of Sweden, I believe these positions are correct, noteworthy and may be borrowed.

Reviewing the similar institutions in Russia and Sweden it is hard not to notice the presence of the so-called "false analogies" between Russian and Swedish law. Here is an example of the recent Russian legislative developments.

New edition of the Russian law prohibits owning media for foreigners. Swedish law prohibits being the editor in chief for the foreigner.

But when claiming that Russian prohibition is very similar to the foreign one, it’s important to know that in Sweden this rule is not applicable to EU citizens or residents of Sweden. Also, it’s possible to own a media legal person for everybody, if this legal person is registered not only in Sweden, but in any EU country.

So, the new Russian law, as I think, initially aimed at trying to further limit the freedom of speech and diversification of information sources. In general, a comparison of Swedish and Russian laws is extremely informative and is an inexhaustible source of comparative legal research and legislation improvement

I was fortunate enough to meet many interesting people in Sweden who gave me a warm welcome and were sincerely interested in my work. It's difficult to mention all of them in this report. Sometimes by chance, I met quite extraordinary people in Sweden, such as diplomats, who were keenly interested in international law and who shared their expertise with me. For example, at one private gathering, I ran into Hans Blix!

Also many thanks to such public figures as Fredrik Wadstrom and Alex Voronov, Michael Sohlman and Disa Håstad for their attention and help, and a nice pastime together.

I like to mention the Swedish traditions of, which I observed during my internship.

Swedish people love to be friends with their neighbors what is now completely unacceptable in Moscow. I took part in the 125th anniversary celebration of the house in which I lived in Södermalm. Swedes invented a quiz (with questions that could not be answered even by the old-timers)! It was really touching to see all people trying to unite and cheer as well as to have the opportunity of spending the evening with Mrs. Prosecutor who lived in the same house.

Generally people in Sweden are very good-natured and soft. This is a very pleasant.

I will use the gained experience for further research and practical work. In terms of personal relationship and much of what I have seen in Sweden, I think it was a lesson.

To my Swedish friends I'd like to say:

Tack så mycket, kära vänner för er snälla service och vårt samspel! Jag är glad att införas till er och jag önskar er lycka till i alla dina planer! Hoppas att vi ses i Ryssland inte en enda gång.

Du är alltid välkommen hit!