The space between human rights and the right to regulate

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We are thankful for the opportunity provided by *Völkerrechtsblog* and the *Leiden Journal of International Law (LJIL)* to discuss our recent article on the loss-gain frame of investor rights and human rights that we identify in investment arbitration; and we are especially grateful to Oliver Hailes for his close engagement with the article in his comment. Before addressing several issues arising from that helpful response, it is to some extent gratifying to first point out what has not been contested in it. Non-trivially, this is at least the utility of applying insights from behavioural economics and cognitive psychology to problems in international law and policy. Such an approach is still quite new, and although certainly not yet in the mainstream, it is gaining traction through a variety of methods and diverse subfields, including the study of international arbitration and investment arbitrators. It is good to be able to conduct a discussion on the substance of the arguments, moving beyond preliminary (academic) remonstrances that were commonplace not so long ago (e.g., objections to the attempts, through empirical research, to examine how jurists respond cognitively to the law, or to explain judicial preferences in extra-legal terms). Moreover, another issue that can be set aside for present purposes and within this limited space, is acknowledgement of a general normative discontent with the ways in which international investment protection law and practice have impacted upon, and have demonstrated the potential to negatively impact upon, the human rights of local groups of non-investors in host States. This is not key either to our thesis or to Hailes' antithesis, but can be recognized as a shared problem; indeed, without this normative concern, there would be few non-technical reasons to deal with the questions of human rights and investment in international law, that are the crux of this discussion and the LJIL symposium.

Through his lens of choice – the host States' 'right to regulate', a somewhat nebulous concept that has been dealt with in depth both generally, e.g., by Titi, and with more specific regard to human rights, by Mouyal (and her proposed 'duty to regulate' as a bridge between investment law and human rights law) – Hailes engages with the two strands of our article, namely, (1) our jurisprudential analysis of the tendency of arbitral tribunals to use the language of rights with respect to investor claims, without a solid and consistent theoretical basis; and (2) the propensity of tribunals (in our view a consequence of the former observation) to frame investor claims as past endowments lost with certainty, competing (so to speak), with the human rights of non-investors that are framed as uncertain, aspirational future gains. Generally, Hailes partially critiques our doctrinal bid to clarify and specify the nature of the investor-State relationship under International Investment Agreements (IIAs) in Hohfeldian terms, in particular with respect to the right to regulate; and subsequently, regarding our cognitive framing analysis, argues that 'reframing investor-State arbitration through the duty to regulate might escape

the loss-gain frame by avoiding the technical pitfalls of rights talk…'. This latter point is a very intriguing proposition, especially since 'reframing' is precisely one of the strategies that can, if properly designed, overcome cognitive biases in decision-making, especially framing effects associated with Prospect Theory, as developed by Kahneman and Tversky, such as the loss-gain frame we identify in our article. Reframing is also a strategy employed vis-à-vis socio-legal frames, as discussed by Moshe Hirsch in his contribution to the current *LJIL* symposium, also highlighted in this blog debate. Interestingly, Hirsch's recommendations appear to be diametrically opposed to those of Hailes and more in line with ours, i.e., to expand the socio-legal framing of investment arbitration beyond the investor-State dyad, and to explicitly include human rights bearers – a point we return to later in this rejoinder. We briefly address both these strands – the doctrinal and the behavioral – below.

Jurisprudential analysis

Hailes suggests that the Hohfeldian immunity/disability relationship (one of the possible specifications we propose (p.97)) is inapt to describe some standards of investment protection such as fair and equitable treatment (FET). We respectfully disagree. In this paradigm, the investor is 'immune' from conduct of the State in breach of the treaty obligations or relevant customary international law, through the ability to vindicate their claim in ISDS. Correlatively, a State is 'disabled' from engaging in conduct that constitutes a breach of FET, be it failure to act in accordance with the investor's legitimate expectations, failure to regulate reasonably, failure to act with due process, etc. To be sure, the immunity/disability relationship is, as noted, only one path to be pursued in specifying the nature of investor claims as rights (which indeed may vary depending on the substance of the treaty or customary obligation). We are not wedded to a particular analysis, merely highlighting the need for greater analytical clarity.

Thus, in a footnote to our article (fn. 18) we characterised the State's 'right to regulate' as a (limited) 'privilege' in the Hohfeldian sense. A privilege is a legal permission to engage in conduct. The jural correlative of a privilege is a 'no-right': because the State has a privilege to regulate, the investor has no-right to rely on the coercive powers of the State (here, at the level of international law, the relevant analogue would be recourse to ISDS) to prevent or remedy an act done pursuant to this privilege. The concept of a privilege helps to shed light on the proposition that government action properly falling within the right to regulate is arguably beyond the purview of State liability. Conceiving of the right to regulate as a privilege is further illuminating because it illustrates the boundaries of investors' ability to rely on ISDS to vindicate a claim of mistreatment: where the State is exercising its (residual) right to regulate, the protections of the treaty may simply not be engaged and hence no remedy is owed. Going one step further, there is no analytical incompatibility between the right to regulate (as a privilege of the State) and the characterisation of the investor's position as an immunity vis-à-vis the State's disability, because the right to regulate is carved out from the investment treaty obligations themselves. Investment tribunal decisions take the right to regulate as a point of departure – a baseline – but do not permit a State to, for example, regulate contrary to an express commitment of regulatory stability.

We agree with Hailes that the right to regulate may have other dimensions: some are privileges and some are powers (and some may even be immunities, as discussed below). It is also correct that Hohfeldian relations are between only two legal persons and cannot monolithically account for triadic or quadratic relationships (host State, home State, investor, host State population). However, one act (the State's conduct in relation to the investor and vice versa) may affect multiple legal relationships, relevantly the relationship of the investor and the host State with the latter's population.

Giannakopoulos has suggested that the right to regulate is a *power* in the Hohfeldian sense, as have Davison and Emerton in the context of the regulation of intellectual property. Hohfeld tells us that a power means the legal ability to change the structure of the legal relationship – the power to create rights and impose duties. The correlative of a power is a liability, which is the possibility that one's legal relationship will be changed when another person uses their power or the subjection of the other person to the exercise of the power. The depiction of the right to regulate as a power elucidates that an investor is liable to the prospect that their legal relationship will be changed when the State exerts its power.

However, States' power to alter their legal relationship vis-à-vis investors exists only in a limited sense, provided that they do not breach FET (for example) in doing so. This in turn highlights the inherent problem with the concept of the right to regulate, which at the end of the day is hollowed out where investment tribunals impose stringent standards of conduct on host States. While the starting point in international law is that in the absence of international commitments to the contrary, the State enjoys an untrammelled right to regulate – otherwise thought of as the 'regulatory space' of the State – some of this power, this space, is foregone when a State enters an IIA. Reliance on the idea of the right to regulate in this way is reminiscent of treaty provisions that affirm states' regulatory power through measures "otherwise consistent with this [Agreement]" (such as Article 9.16 of the CPTPP), which are by some accounts potentially meaningless in that they subject the State's regulatory power to the provisions of the treaty and, where relevant, to their interpretation by tribunals.

The analytical waters of viewing the right to regulate as a right in doctrinal terms, are further muddied when one considers its position in treaty exceptions and the customary state of necessity, as Giannakopoulos has suggested One wonders whether characterizing exceptions as permissions rather than defences, as one of us has previously proposed, would change the characterisation of the right to regulate – and if so, how. All this is to say that while we are categorical about the need to better flesh out the characterization of the architecture of rights in IIAs and ISDS, including the 'right to regulate' we are less categorical about one particular such characterization.

Problems of focusing on the 'right to regulate'

We now move on from the more doctrinal and analytical 'rights talk' issues to the behavioral framing questions, focusing on Hailes' suggestion that reframing of ISDS human rights concerns (of host-State non-investors) through the lens of the 'right to

regulate' could shift arbitrators' conceptions towards a 'normative priority' for human rights. As noted, this suggestion is quite attractive. We would mention, however, the following few weaknesses and obstacles towards its realization.

First, we wonder if this would at all constitute a reframing and not an undesirable regression in terms. The 'interaction of investor claims and the State's right to regulate' that Hailes refers to is in many respects the standard structural framework that continues to pervade debates over IIAs and ISDS, most crudely (yet fundamentally) along the lines of 'pro-State/pro-investor' binarities (bringing in a host of other types of contested biases, including affiliation bias). Indeed, as we believe we demonstrate in the article, the arbitrators' natural starting point is the adversarial relationship of the litigating parties – the claimant/investor and the respondent/host State. If anything, the shift in framing should be towards a more tangible legal presence of the host-State non-investors – perhaps akin to what Professor Philippe Sands argued in his partial dissent in *Bear Creek vs. Peru*, in a particular legal and factual construct, with respect to indigenous peoples rights under ILO Convention No. 169, and indeed closer to some of our recommendations and those of Moshe Hirsch.

Second, reverting to the more intuitive, traditional, investor claim vs. regulatory space frame of mind (while side-lining the concerns of host-State non-investors) could perhaps mitigate, but would not obviate, the cognitive loss-gain frame. The governmental act of regulation, even of expropriation, has the optic of a gain, real or potential – otherwise, why has the host State acted so? – whereas the investor claim, by definition, is one of a loss. Hence, reverting to the State-investor frame does not solve the structural cognitive imbalance.

Third, Hailes is essentially suggesting that the host State's right to regulate can be assimilated to the human rights of the non-investors in the host State, perhaps as a proxy for them. The legal construction that Hailes proffers in this regard is refreshingly both more explicit and more elegant than what is found in most of the arbitral decisions that we survey in the article. It is not, however, a panacea, and to some extent is merely a reformulation of some of the problems that we highlight, as noted above. The additional problem for human rights, especially with the introduction of the tentative idea of a 'duty to regulate', is that the right to regulate is not legally, functionally or empirically linked to the realization of host-State, non-investor human rights. State regulatory space can be analysed without direct reference to human rights, and indeed, the right to regulate under investment law, if not adjusted normatively, includes capacities to violate human rights, as a double-edged sword.

Fourth and finally, we must recall who it is that actually does the framing in arbitration: private parties' and government counsel, and the arbitrators themselves. In other words, it is the decision-makers who both design the decision frame and make their decisions within it – what in other circumstances could be termed as 'negotiated choice architecture'. Tversky and Kahneman in 1981 noted the difficulty in tackling framing effects when the frames are 'determined partly by the formulation of the problem and partly by the norms, habits and personal characteristics of the decision maker'. In other words, even if reframing to the right (or duty) to regulate

could potentially be effective in addressing non-investor human rights, who would 'bell the cat' and turn it into practice? Not the arbitrators; not the counsel bent on winning the case; certainly not the investors; maybe the host governments, but they don't necessarily have an ex ante interest in human rights, to say the least. Perhaps the affected non-investor parties?

Once again, we thank Hailes, the *Völkerrechtsblog* and the *Leiden Journal of International Law* for the opportunity to further elaborate on our article.