



# **The Concept of Soft Law in Investment Arbitration**

**Aloysius Gng  
AIA-CEPMLP, Brussels  
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# Outline

What is Soft Law

The Emergence of the Market State

The Rise and Criticisms of Investment Arbitration  
and its Implications for Soft Law

Some Empirical Analysis

Human Rights

Public policy

Procedural Aspects of Soft law in Investment  
Arbitration

Conclusion

# What is Soft Law?

Soft law is nebulous, contradictory and oxymoronic

Refers broadly to the 'rules of conduct' without 'legally binding force' but which have 'practical effects'.



# What is Soft Law?

(1) "emerging norms or principles which may be adopted either formally or as a matter of practice

[; (2)] rules which may not have a binding effect or be fully enforceable, but nevertheless possess some discernible legal status or effect on international law

[; and (3)] a transitory phase in the evolution of norms with vague content and imprecise scope."

# What is Soft Law?

But because of the inherent complexity of soft law, its meaning must be decided on a case by case approach and that considerable exceptions abound.

The definition here is therefore merely a working definition to define the analytic and empirical framework in this analysis.

# The Emergence of the Market State

Market State: “[t]he State will maximise the opportunity of its citizens”

Emergence of BITs thus can be perceived as a unique facet of the workings of the Market State

Over 2600 BITs involving over 179 countries and over 200 known arbitral awards

Global investments continue to grow despite the current economic climate

# The Emergence of the Market State

The use of Soft Law is a function of the Market State

Market State increasingly delegates State functions to Non State Actors

Non State Actors lacks legislative legitimacy

Market State supports and abides the market rules

# The Rise and Criticisms of Investment Arbitration and its Implications for Soft Law

Like soft law, investment arbitration has had its own struggles over perceptions of legitimacy

Three Key issues:

the issue of inconsistent awards

the 'incestuous' relationship

the ideological aversion

# Rise and Criticisms

First criticism: suggests that arbitral tribunals render inconsistent awards, and lacks a hierarchically ordered legal system as there has been no review of these awards

National courts does not always account for the complex and diverse international needs

Soft law: accounts for market rules (*lex mercatoria*), the notion of arbitral precedent

# Rise and Criticisms

Second: ‘incestuous’ relationship between those who act frequently as advocates and the “appointment-hungry” arbitrators

Soft law: conflict of interests rules, interviewing arbitrators guidelines, etc to ensure procedural integrity

# Rise and Criticisms

Third: ideological or emotional aversion of private investor-enforceable disciplines against the sovereignty of host states.

The emergence of the Market State and the pro-market policies – to follow market rules

# Some Empirical Analysis

Notion of soft law in investment arbitration is related to a broad range of complex issues.

For the ease of this analysis, one will examine and divide the influence of soft law into two aspects, substantive and procedural.

By reason of the time constraint, there are two substantive aspects that one will examine here, the issues of human rights and public policy

# Human Rights

Soft law and human rights is well acknowledged in their modern development

Both IA & HR emphasis on the enhanced protection of individuals, including (and according to some critics only) that of the investor.

Investment arbitration however, also addresses the asymmetric relationship between sovereign states and individuals

NAFTA Chapter 11, "...a human rights treaty for a special-interest group"

# Human Rights

Increasingly, perhaps through criminal law,

Human Rights issues: 1. natural resources such as access to water, i.e., “right” to water

2. the protection of indigenous peoples

# Human Rights: Glamis Gold

Quechan Tribe submission: soft law instruments that their rights are protected, *inter alia*, by the 1966 International Covenant on Civil and Political Rights, the 1972 UNESCO World Heritage Convention, the 1989 ILO Convention concerning Indigenous and Tribal Peoples, and the Inter-American Convention on Human Rights

# Human Rights: Glamis Gold

But Soft law instruments:

not usually self-executing and do not have direct effect

inter-state nature and do not bind the parties in the dispute.

Private parties are seldom at liberty to invoke them in the dispute

Obligations are frequently vague

# Human Rights: TECMED

ICESCR comments -cited, it was not relied upon in the subsequent arguments

Article 2: “undertakes to take steps” ...“to the maximum of its available resources” and “achieving progressively”

# Public policy

International public policy (“ordre public”), distinguished from domestic public policy, and investment arbitration are inextricably linked

Include a broad range of fundamental rules

In the enforcement of awards - Article V.2 (b) of the New York Convention states that “the recognition or enforcement of the award would be contrary to the public policy of that country.”

# World Duty Free Company Limited

“143. In order to render more effective this general condemnation, a number of international conventions were concluded during the last decade. The first was... Organisation for Economic Cooperation and Development on 21 November 1997.”

“145. For its part, the General Assembly of the United Nations adopted, on 16 December 1996, a Declaration against Corruption and Bribery in International Commercial Transactions...”

# Inceysa Vallisoletana

“225. To define the generally recognised principles and rules of International Law to which the BIT refers, it is useful to consider the provisions set forth in Article 38 of the Statute of the International Court of Justice, which reads as follows... Without attempting to define what the general principles of law are, the Tribunal notes that, in general, they have been understood as general rules on which there is international consensus to consider them as universal standards and rules of conduct.”

# Inceysa Vallisoletana

“245. International public policy consists of a series of fundamental principles that constitute the very essence of the State, and its essential function is to preserve the values of the international legal system against actions contrary to it. [Footnotes omitted]...”

“252. In light of the foregoing, not to exclude Inceysa’s investment from the protection of the BIT would be a violation of international public policy, which this Tribunal cannot allow. Consequently, this Arbitral Tribunal decides that Inceysa’s investment is protected by the BIT because it is contrary to international public policy.”

# Desert Line Projects

“157 Although the present case does not involve an investment in natural resource, it seems relevant to observe that the 1962 United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources provides that agreements with foreign investors should be respected insofar as they are “freely” concluded; GA Res. 1803, 17 GAOR, Supp (No. 17) 15, UN Doc. A/5217. The drafters may have been particularly, but the principle is naturally applicable without discrimination. Indeed, it should hardly be necessary to point out that where consent is vitiated, it is a universal norm that the agreement cannot be enforced against the victim of coercion.”

# Procedural Aspects of Soft law in Investment Arbitration

Little “hard law” exists on the specifics of gathering evidence and hearing argument.”

E.g., arbitrators conduct proceedings

But also seen as the judicialisation perceived to constrain arbitral autonomy

But careful reading suggests otherwise:

“all appropriate means...”: ICC Arbitration Rules, Art. 20.

“widest discretion to discharge [their] duties”: LCIA Arbitration Rules, Art. 14.2

“whatever manner [the tribunal] considers appropriate...” :UNCITRAL Rules, Art.18; AAA International Rules, Art. 16.

# Procedural Aspects of Soft law in Investment Arbitration

Divergent cultural baselines

Not so Soft: IBA Guidelines on Conflicts of Interest

May ameliorate the 'incestuous' relationship and an ideological aversion.



# Conclusion

The Market State - encouraging working with the market, is setting and abiding the rules of the market

Soft law instruments governing a wide array of rules and norms and the normative framework therefore need to take account of these developments.

# Conclusion

Arbitral tribunals used the soft law instruments as both 'general support' but also to fill a lacuna.

It is submitted that more research is simply needed to understand the legitimacy and basis for investment arbitral tribunals to base their decision and to accord soft law obligations