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Human Rights and Environmental Disputes in International Arbitration

Crina Baltag (Managing Editor) (Stockholm University) · Tuesday, July 24th, 2018

Based on the panel discussion moderated at the 30th Annual ITA Workshop and Annual Meeting, with panelists Lorraine de Germiny, Robert Landicho, and Laura Sinisterra.[1)]

While there are more than 3,000 international investment agreements (IIAs), the majority of them fail to provide guidance as to how issues of human rights and environmental protection should be addressed in the context of investment protection and promotion. Correspondingly, arbitral tribunals faced with claims touching upon these issues (or even directly being called to address these issues), are generally reluctant to open the Investor-State Dispute Settlement (ISDS) door to these matters.

In light of the many initiatives attempting to tackle issues of legitimacy and efficiency of the ISDS system,[2)] one challenge that might be addressed is the lack of a proper mechanism to address human rights and environmental claims and counterclaims. Such claims might be dealt with by arbitral tribunals on a presumption of reciprocity "host State ? investor." In fact, some commentaries argue that an efficient ISDS system can only exist if participants are granted both rights and obligations, and, in any case, such rights should be accompanied by proper remedies—including redress for human rights and environmental claims.[3)] As it stands now, arbitral tribunals rarely address human rights or environmental issues, given in particular the jurisdictional and applicable law challenges that arise. These can touch upon issues of the scope of jurisdiction of arbitral tribunals, content of protected rights and even the accountability of investors, the adequate forum, and the participation of third parties in the proceedings.

This post shall discuss briefly how the existing ISDS framework addresses issues of human rights and the environment, before turning to possible solutions to current concerns. As a threshold matter, this post first discusses issues of jurisdiction and applicable law.

Jurisdiction and Applicable Law – How do issues of human rights and environmental law come into play in investment disputes?

No doubt, arbitral tribunals called to discuss issues of human rights and environmental law can do so only if they have jurisdiction to hear claims related to these rights and if the law applicable to the merits covers these matters.

First, in order for an investor or State to raise a claim or counterclaim pertaining to an environmental or human rights issue, the tribunal must have jurisdiction to hear such claims. There are a variety of dispute resolution provisions in IIAs, some offering broader jurisdiction than others, for example, from limiting jurisdiction to the quantum of compensation for expropriation, to jurisdiction over all disputes concerning investments. The more broadly worded the jurisdictional clause, the easier it will be for the claimant to bring in arbitration claims related to environmental and human rights issues.

For example, in *Biloune v. Ghana*, the contract provided for arbitration of "[a]ny dispute between the foreign investor and the Government in respect of an approved enterprise." The tribunal found that it lacked jurisdiction over claims of arbitrary detention of the Syrian investor by state security forces because the words "in respect of" meant its competence was limited to so-called "commercial disputes" arising under the investment contract.[4)]

Similarly, the dispute resolution clause must be broad enough to include counterclaims, reflecting the consent of the parties. At least one investment tribunal has found that a human rights-based counterclaim brought by a respondent State had met the specified requirements, including those of Article 46 of the ICSID Convention providing for the condition that the counterclaim arises directly out of the subject-matter of the dispute. Specifically, in *Urbaser v. Argentina*, Argentina filed a $190 million counterclaim, alleging that the investors had violated their obligations in relation to the human right of access to water. Although the tribunal ultimately rejected the counterclaim on the merits, it deemed the BIT to be worded broadly enough to afford jurisdiction over the counterclaim, and deemed the factual connection between the claim and the counterclaim to be "manifest" since they were based on the same investment and involved claimants' compliance with the concession commitments at issue.[5)]

Second, after surmounting the jurisdictional hurdle, the party raising an environmental or human rights issue must identify a substantive norm, standard of protection, or other obligation falling within the law applicable to the dispute.

In investment arbitration, tribunals generally have broad discretion to determine the applicable law. For instance, Article 42(1) of the ICSID Convention provides that, in the absence of party agreement on the applicable law, the tribunal "shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

Many BITs also contain a list of sources of law for the tribunal to apply, including the BIT itself, the domestic law of the host state, and "principles of international law," or a similar phrase. Often, the question boils down to whether "principles of international law" encompass the human rights and environmental norms at issue.

It appears that there is no consensus on this issue. Some scholars have suggested that human rights are part of the applicable law, as they are a "component of international law."[6)] The *Urbaser v. Argentina* tribunal acknowledged but ultimately did not answer this question.[7)] Other tribunals have

rejected this view, narrowing the reference to "international law" only to international law relevant to the BIT. For instance, third parties applied to make *amicus curiae* submissions in *Von Pezold v. Zimbabwe* regarding the application of indigenous rights, which they argued were applicable by virtue of the Germany-Zimbabwe BIT's reference to "international law." The tribunal found that the "rules of general international law as may be applicable does not incorporate the entire universe of international law such as international human rights law on indigenous peoples—only the international law relevant to the BIT, such as international law standards for "fair and equitable treatment.[8)]

Three Categories of Cases

There are three distinct categories of cases in which arbitral tribunals have dealt with issues of human rights and environmental protection:

a. Investor-State Decisions where Claimant invoked human rights principles. International investment law and international human rights law, having the same historical roots, may touch on issues of procedural and substantive due process, and investor-State tribunals have made reference, by analogy, to human rights norms and binding obligations set forth in the International Covenant on Civil and Political Rights (ICCPR) or other conventions. Substantive due process violations have been addressed through the "fair and equitable" (FET) and/or the "full protection and security" standards. In particular, in applying the legitimate expectations test, a State's binding human rights obligations, as set forth in relevant treaties that have been incorporated into municipal law or otherwise have effect, have been deemed **relevant** in shaping both positive and negative expectations of investors. In *Al Warraq v. Indonesia*, the tribunal held that "the Claimant did not receive fair and equitable treatment as enshrined in the ICCPR for the above reasons…."[9)]

b. Investor-State Decisions where Respondent State invoked an investor's alleged non-compliance with environmental law/human rights law, making claims for compensation inadmissible, or subject to reduction under "contributory fault" principles. To justify actions taken against an investor, a state may rely on an investor's alleged non-compliance with local or international human rights or environmental laws. In *S.D. Myers v. Canada*, Canada relied on the alleged non-compliance of investor with local environmental laws. In *Aven v. Costa Rica*, Costa Rica raised the defense that investors did not follow local environmental laws, justifying measures taken against investors or, alternatively, giving rise to a defense of "unclean hands." Similarly, in *Cooper Mesa Mining v. Ecuador*, the Tribunal took into account that the claimant had resorted to recruiting and using armed men to use force against civilians and held that the claimant's contribution to its own injury was at least 30%.

c. Inter-State or Commercial Arbitrations where human rights principles/environmental law is part of the subject-matter of the dispute. The types of cases in the third category, dealing with commercial and inter-state arbitration where the subject matter of the dispute involves human rights or environmental law issues, are wide-ranging. For example, the *Iron Rhine Arbitration (Belgium v. Netherlands)* involved activation of the Iron Rhine railway, and the entitlement of the Netherlands to insist on Dutch laws pertaining to environmental impact studies. The tribunal held that the environmental impact studies required under Dutch law were applicable to the reactivation of the Iron Rhine, so long as it did not amount to a denial of Belgium's right of transit or rendered the exercise by Belgium of its right of transit unreasonably difficult. Likewise, environmental

issues often form the subject matter of the dispute in commercial cases: in the cases between *Romania and Energy Group OMV (Austria)* (ICC), OMV claimed that the Romanian government failed to reimburse expenses for decontamination of historically polluted locations, which had been privatized, given that the environmental clean-up was provided for in the parties' contract.

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Finally, considering the immediate solutions available for addressing concerns related to the protection of human rights and environment within the ISDS system, two suggestions can be put forward: (1) amending the language of IIAs to better address human rights and environmental issues, and (2) developing a binding international legal framework through which corporate conduct in violation of human rights or environmental law might be taken into account. These two suggestions are discussed below.

The New Generation of IIAs

The new IIAs entered into force or recently signed, as well as the proposed drafts, appear to take a positive approach towards addressing human rights and environmental issues. These new IIAs acknowledge at least an obligation on investors to make and maintain their investments in accordance with the host State laws and regulations, and that, although recognizing the importance of foreign investments, host States should not relax their labour, public health, safety or environmental measures only to attract such investments.[10] Other IIAs, such as the new draft of the Dutch Model BIT, contain more incisive provisions, such as allowing arbitral tribunals, when deciding on the amount of compensation, to take into account "non-compliance by the investor with its commitments under the UN Guiding Principles on Businesses and Human Rights, and the OECD Guidelines for Multinational Enterprises."[11] States, as main stakeholders of the ISDS system and of investment law can adopt suitable approaches when negotiating or renegotiating their IIAs and address their direct concerns about the protection of human rights and the environment within their territory or concerning their nationals.

Binding Corporate Social Responsibility?

Corporations have become, alongside states, actors in the field of public international law. While most human rights treaties impose obligations upon States, not non-State actors, like corporations, the latter are often guilty of or, at least, complicit in human rights abuses, including violations of environmental law. A 2006 UN interim report regarding corporate violations of human rights noted that human rights abuses take place mostly in low-income countries, with weak governance and a low rule of law index (and high rates of corruption), with most allegations of the worst corporate abuses occurring in the extractive sector.

As mentioned, while States have a duty under international law to protect human rights, corporations arguably have a reciprocal responsibility to respect those rights. This view goes hand in hand with the recognition that States are no longer the sole actors or participants in the field of public international law. The responsibility of corporations to protect human rights results from/may be found in various guidelines of corporate social responsibility, including the 31

"Guiding Principles" prepared by the UN Special Representative in 2011 on "Business and Human Rights." There are also various codes of conduct, including the UN Global Compact, the 2011 OECD Guidelines for Multinational Enterprises, and industry-specific codes of conduct such as "The Voluntary Principles on Security and Human Rights" for the extractive sector. Although commendable, these initiatives represent soft law and corporations are not bound to follow them.

Nevertheless, as mentioned, the notion that corporations have a responsibility to protect human rights is also increasingly found in IIAs. For instance, the 2017 intra-Mercosur agreement provides that investors have a "best efforts" obligation to respect the human rights of the people involved in investment activities. Other IIAs concluded in 2016-2017 reflect a trend towards generally affirming the importance of respecting human rights, including the right to a clean environment. For example, the 2017 amendment to the Canada-Chile investment chapter in their FTA provides that:

> "The Parties reaffirm their **commitment** to internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by the Parties, including the OECD Guidelines for Multinational Enterprises, and **each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate these standards**, guidelines and principles into their business practices and internal policies. These standards, guidelines and principles address issues such as labour, environment, gender equality, human rights, community relations, and anti-corruption."

As explained above, where a corporation appears before an investment arbitral tribunal to vindicate its rights, the lawfulness of its conduct may be tested against its responsibility to protect human rights. Violations of human rights by corporations could be deemed contrary to international law and/or international public policy and thus deprive the tribunal of jurisdiction and/or render the claims inadmissible. In *Phoenix Action v. Czech Republic*, the tribunal held that "[t]he purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments **made in violation of the laws of the host State or investments not made in good faith**, obtained for example through misrepresentations, concealments or corruption… In other words, the purpose of international protection is to protect **legal and bona fide investments**… In the Tribunal's view, States cannot be deemed to offer access to the ICSID dispute settlement to investments **made in violation of their laws**…"

The UN is currently contemplating a binding treaty on Business and Human Rights and it appears that it has secured the support of the EU. In the 2018 Annual Report on the implementation of the common commercial policy, the European Parliament highlights the expected engagement of the EU Member States in the deliberations within the UN regarding this proposed Treaty.[12)]

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Young ITA is pleased to launch the annual **Young ITA Writing Competition and Award "New Voices in International Arbitration"**, as a unique opportunity for young professionals to contribute actively to the research of international arbitration The Competition is open to

practitioners and students who are members of Young ITA. The papers must be submitted via email to ita@cailaw.org under subject line “Young ITA Competition” by on or before January 2, 2019. For more information, please visit the webpage of Young ITA where you can find more information. Alternatively, please feel free to send an email to the Young ITA Thought Leadership Chair, Dr Crina Baltag, at crinabaltag@gmail.com. The Competition is organized with the *support of Wolters Kluwer*.

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References

?1 This post is a summary of the first panel discussion of the Young ITA Roundtable, 30th Annual ITA Workshop and Annual Meeting: Multiple Proceedings, Multiple Parties, and International Arbitration: What a Tangled Web We Weave, 20-22 June 2018, Dallas, Texas, USA, moderated by Dr. Crina Baltag (University of Bedfordshire, Young ITA Thought Leadership Chair); and with panelists Lorraine de Germiny (LALIVE); Robert Landicho (Vinson & Elkins LLP, Young ITA Communications Chair); and Laura Sinisterra (Debevoise & Plimpton LLP, Young ITA Mentorship Program Chair). The views expressed in this article are those of the author alone.

?2 See, (i) the new generation of IIAs, in particular the FTAs signed by the EU, but also the new models of BITs; (ii) the amendment process of the ICSID Arbitration Rules; (iii) the mandate of the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) in assessing the concerns with the ISDS system and in finding possible solutions to address them; (iv) initiatives of other institutions and organizations in dealing with particular issues relevant in the context of investment protection and promotion and arbitration, such as the drafting of a set of Business and Human Rights Arbitration Rules, the establishment of an International Court for the Environment, and even a UN Treaty on Business and Human Rights.

?3 Jose Daniel Amado, Jackson Shaw Kern and Martin Doe Rodrigues, *Arbitrating the Conduct of International Investors*, Cambridge University Press 2018, p. 5.

?4 *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability of 27 October 1989, 95 ILR 184, 202.

?5 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, paras 1217 et seq.

?6 Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Dupuy et al. eds. 2009) 82, 84–85 (for BITs containing composite choice of law clauses including international law, "human rights, as a component of international law, are part of the applicable law.").

?7 *Urbaser v. Argentina*, para. 1204: "Beyond these sources of law, it remains to be examined, in light of the openly framed provision of Article 31 § 3(c) of the Vienna Convention, whether other parts of international law may be relevant in the instant case. This leads to the question whether the human right to water and sanitation as part of the general notion of human rights is pertinent in the instant case…."

?8 *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 of 26 June 2012, paras 39, 57.

?9 *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award of 15 December 2016, para. 621.

?10 Iran-Slovakia BIT, 2017, arts. 2 and 10.

?11 Draft Dutch Model BIT, art. 23.

?12 EU Parliament, Annual Report on the implementation of the common commercial policy, 30 May 2018, para. 16.

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