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Regime Interaction in Investment Arbitration: Crowded Streets; Are Human Rights Law and International Investment Law Good Neighbors?

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Globalization has diversified the actors, institutions, norms, and instruments on the international legal stage. With diversification comes increased specialization and, in turn, organization around so-called regimes. The notion that international legal regimes can exist autonomously has long been refuted; indeed, each regime draws from general international law to some degree. If regimes are not autonomous, then how do they interact?

Here, we briefly consider the interaction between two such regimes, international investment law ("IIL") and international human rights law ("IHRL"). We argue that 'interaction' should be conceived broadly, which contrasts with the prevailing view of interaction as synonymous with conflict.

In this post, we provide a four-part model for defining the interactions between IIL and IHRL. First, IIL and IHRL interact at a foundational level with regard to what each regime seeks to protect—foreign investors under IIL and individuals under IHRL. Second, they interact in the context of investment treaties and, narrowly, the drafting of preambular text and operative provisions. Third, they interact—and perhaps conflict—at various stages in international disputes. Fourth, and finally, they increasingly interact in procedural contexts, such as ISDS reform efforts.

1) Interactions in Relation to Fundamental Protections

IIL is defined by a system of protections for investors in their bilateral business relationships with foreign governments. Investors may be individuals but, given the quantum of investment in typical foreign direct investment projects, they are more likely to be legal entities, such as corporations, established under the auspices of the corporate legal structure of a foreign jurisdiction. In contrast, IHRL is defined by a system of protections for individuals—more specifically, the various legally prescribed rights that attach to all human persons on the international plane.

As such, IIL and IHRL establish fundamentally different protections. Even where an investor under IIL is an individual, the protections that attach are specific to that individual *qua* investor, not as a human person in the sense of fundamental rights under IHRL. Many foreign direct investment projects directly or indirectly impact human rights, yet individuals *qua* human persons have no recourse under IIL through which to seek remedies. Correspondingly, an investor has no recourse under IHRL by which to seek remedies because human rights do not attach to investors.

Nonetheless, IIL and IHRL do overlap to a degree regarding certain human rights. For example, the right to property is foundational to both IIL and IHRL. Similarly, the right to due process plays an integral procedural role in dispute resolution and is protected under both regimes. This is of course only a small subset of the numerous rights under IHRL, but it does evidence an integral interaction.

2) Investment Treaties

As we have detailed elsewhere, IIL and IHRL can and do interact in the context of investment treaty drafting across both preambular text and operative provisions. Regarding preambular text, references to human rights are increasingly common, such as affirming the parties' *"commitment to the respect for human rights"*. In contrast with this broad, open-textured language, some investment treaties directly reference specific instruments in the preamble, such as to affirm the parties' commitment to the principles in the Universal Declaration of Human Rights. While the practical effect of such references is debatable, articles 31 and 32 of the Vienna Convention on the Law of the Treaties (VCLT) indicate that preambular text may at the very least inform the interpretation of operative provisions.

Regarding operative provisions, interactions become rather more complex. Interactions may occur in the context of investor responsibilities, such as striving to conduct business in accordance with the OECD Guidelines. They may further occur in the context of general exceptions, such as carving out measures taken for the maintenance of "public order" or to protect human life or health. They may further still occur in the context of provisions seeking to preserve regulatory autonomy, where such provisions have the effect or maintaining regulatory "space" for domestic policymaking in service of fulfilling State obligations regarding human rights.

3) International Investment Disputes

IIL and IHRL can and do interact in the context of disputes. This occurs at all stages in the proceedings, as well as in the context of third-party participation. This graphic illustrates these complexities, which are in turn discussed below.

a) Jurisdiction

Where human rights considerations may be at play in a dispute, the first question that a tribunal must resolve is whether it has jurisdiction to even consider such issues. As highlighted by the tribunal in *Strabag v. Poland*, the burden to establish a tribunal's jurisdiction – while ultimately subject to a tribunal's own satisfaction – will fall on the party alleging a breach of human rights by its counterparty.

The wording of the dispute resolution clause will determine whether human rights norms are within the scope of a tribunal's jurisdiction and, relatedly, whether they may permit counterclaims based on human rights. As affirmed by the Tribunal in *Gavazzi v. Romania,* a narrowly worded dispute resolution clause will not permit consideration of human rights issues.

Investment tribunals do not have the mandate to determine human rights claims as independent claims. In *Biloune v. Ghana*, for example, the tribunal ruled that the parties agreed to *"arbitrate only disputes in respect of' the foreign investment"* and, therefore, *"lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights."*

b) Applicable Law

Interactions in the context of the applicable law become even more complex. The applicable law will determine *which* human rights a tribunal may consider. As emphasized by the tribunal in *Siemens v. Argentina*, a tribunal is not obligated to examine human rights, even if it can do so, if it does not view human rights as directly impacting the core issues of the dispute.

If a tribunal decides to examine human rights, it has discretion to decide which human rights norms, obligations, or instruments apply and what weight is to be ascribed to them, perhaps most notably illustrated by the tribunal in *Urbaser v. Argentina*. As illustrated by confusion over the deliberative weight given to such matters by the tribunal in *Yukos v. Russia*, even if a tribunal introduces human rights norms, obligations, or instruments, it is not always fully clear what role they play in the final decision.

c) Merits and Damages

Certain human rights norms might also be implicated indirectly during the merits and damages phases, even if a tribunal may not expressly refer to it as a human rights norm.

During the merits phase, tribunals commonly rely on interpretative techniques, such as Article 31(3)(c) of the VCLT, which permits a tribunal to consider *"any relevant rules of international law"* (often referred to as *"systemic integration"*). As in *Urbaser v. Argentina*, this may permit consideration of human rights norms, obligations, or instruments. The exact scope of such an interpretative process is subject to a tribunal's discretion. Furthermore, certain human rights norms like the right to property, right to a fair trial, and due process considerations may be considered by tribunals more readily as being directly relevant to a tribunal's mandate under investment agreements, as underlined by the annulment committee in *Tulip v. Turkey*.

During the damages phase, investor conduct might also be a basis for a tribunal to reduce damages awarded through the doctrine of *"contributory fault"*, as discussed in a partial dissenting opinion in *Bear Creek v. Peru*. This may be significant where the conduct implicates human rights obligations like the right to water.

d) Third-Party Participation

The role of third parties, such as indigenous communities affected by investment projects, has been contentious. Traditionally, such third parties could not participate in an investor-state arbitration. This has now changed with the acceptance by many investment tribunals of *amicus curiae* submissions.

While tribunals have accepted *amicus curiae* submissions, this is ultimately subject to a tribunal's discretion and subsequent reliance by the tribunal on such submissions is not fully certain. Tribunals also greatly limit the role of *amicus* not permitting attendance to the hearing or accessing files of the case, as in *Philip Morris v. Uruguay*. While *amicus* submissions do permit greater access, the interaction between human rights and investment arbitration is probably mixed.

4) Procedural Issues in the Reform Process

As we have written earlier, there have been three notable ISDS reform efforts: (i) UNCITRAL Working Group III, (ii) the amendment to ICSID Rules, and (iii) the European proposal of a multilateral investment court. All these reform efforts are focused on the procedural issues, such as reducing costs and time of arbitration, increasing transparency, and allowing greater *amici* participation.

While these efforts will not address contentious substantive issues in investment disputes, such as the right to water or the right to health, they will promote certain human rights considerations. For example, by focusing on procedural improvements to ISDS, such efforts advance fundamental IHRL protections within the IIL regime beyond the right to property, such as the right to trial, access to justice, and due process. While only relative to a narrow subset of procedural rights, such efforts further reflect an incorporation of IHRL into IIL.

Conclusions

We have argued that regime interaction, especially between IIL and IHRL, is complex and stretches beyond a narrow view of interaction as only occurring in the context of disputes. A broader view, as we have delineated, surfaces the connective tissue between the two regimes and provides a rubric for assessing the perceived tensions between them. If regime interaction is a fundamental reality of the increasing diversification of international law—and we would argue that it is—it is necessary to define the contours of these interactions, so as to consider how best to generate alignment on the international legal plane between the actors, institutions, norms, and instruments of each regime.

That said, interactions between IIL and IHRL have been strained. If interactions are to become more commonplace, we would argue that efforts should be devoted to identifying shared goals regarding investment treaty drafting, as well as more robust involvement of human rights experts in relevant investment disputes. Because both regimes draw from general international law, the foundation no doubt exists for pursuing more harmonious interactions.

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This entry was posted on Wednesday, January 12th, 2022 at 8:30 am and is filed under Arbitration Institutions and Rules, Human Rights, International arbitration, Investment Arbitration, Regime Interaction, Regime Interaction in Investment Arbitration
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