

Kluwer Arbitration Blog

Introduction of Labour Standards in Investment Arbitration

Akshay Sewlikar (Linklaters) · Tuesday, March 18th, 2014 · Linklaters

The recent Bangladesh factory disaster has brought the plight of labourers in developing countries to the forefront in the international arena. Reforms in the labour legislations in Bangladesh have been demanded, which could lead to the implementation of stricter labour standards in the country. This could possibly lead to investment arbitration claims against Bangladesh, if stricter labour laws cause substantial losses to the multinational companies. However, the question of labour standards in investment arbitration has very rarely been examined, either by investment tribunals or by academicians. This post tries to examine how labour standards could be considered in investment arbitration. It first looks at the provisions related to labour standards in investment treaties. It then moves on to examine how investment tribunals could possibly apply labour standards in cases that arise before them.

There are very few instances where investment arbitration treaties refer to labour standards. One of the most recent examples of such a treaty provision is the U.S. Model BIT, which provides that Parties should ‘*not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws*’ [Art. 13(2), U.S. Model BIT]. A similar language is used in a number of other BITs such as the Belgian Model BIT and the Japan-Switzerland Free Trade Agreement. From the treaty provisions, it becomes evident that the language used in treaties is largely aspirational and does not create any binding obligations on States. One notable exception to this general rule is the US-Colombian BIT, which provides that the States should adopt the fundamental labour principles declared by the International Labour Organization (“ILO”).

Thus, tribunals would be faced with considerable difficulty in considering the violation of labour standards in any case that might arise before them merely on the basis of treaty provisions. An alternate method would be required to impose labour standards in investment arbitration cases. In the absence of substantive provisions in BITs, the same can be achieved through an interplay of human rights and labour standards. The ILO’s 1998 Declaration on Fundamental Principles and Rights at Work recognized four rights fundamental to all workers. These rights are known as ‘Core Labour Standards’ and are considered a component of human rights by a number of scholars. In addition to these Core Labour Standards, other labour rights such as minimum wages, safe working conditions etc. are also considered to be a component of human rights [Virginia Mantouvalou, *Are Labour Rights Human Rights?*].

As these labour standards are a component of human rights, tribunals could apply them in investment arbitration cases in certain instances. Human rights jurisprudence has been considered by investment arbitration tribunals in a number of cases. For e.g. in *Tecmed v. Mexico* [ICSID Case

No. ARB(AF)/00/2], the tribunal relied on human rights jurisprudence to come to interpret the extent of the right to property in expropriation claims before it. A human rights aspect was also considered in a few recent instances such as *Biwater Gauff v. Tanzania* [ICSID Case No. ARB/05/22]. Although the tribunals failed to apply human rights in these cases due to a number of reasons, these cases indicate that tribunals have started considering human rights aspects in a number of instances. Even scholars such as Bruno Simma and Christoph Schreuer have argued for the inclusion of human rights in investment arbitration for a number of reasons. As labour standards fall within the ambit of human rights, tribunals could rely on them under human rights jurisprudence, wherever applicable.

Such an interpretation could be used in order to reduce the Respondent liability in cases where the claims have arisen due to a change in the municipal labour legislations. Claims might arise when States seek to implement higher labour standards through amendments, causing losses to the investors. Tribunals could use labour standards as a component of human rights to reduce the liability of the State in such situations. Further, this approach could also be used to bar claims by investors by applying the doctrine of clean hands, in cases where a violation of labour standards is clearly established.

Considering the significance of labour standards, it becomes necessary to examine the means through which such standards can be introduced in investment arbitration. One such method is the introduction of labour standards through human rights, even in investment arbitration cases. It needs to be noted that the manner in which investment tribunals would consider such cases cannot be predicted. The application of labour standards in investment arbitration would depend on the approach of each tribunal. However, tribunals could consider such an approach in cases which deal with labour issues.

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