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International Investment Law and Human Rights

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INTERNATIONAL INVESTMENT LAW AND HUMAN RIGHTS

Eric De Brabandere

I. Introduction

[1] The interaction between international investment law and human rights has gained momentum over the past decades. This is not only the consequence of certain decisions of arbitral tribunals which have directly addressed this interaction, but also stems from the general trend towards re-thinking the entire international investment law and arbitration regime.

[2] International investment law consists of rules and norms of general international law and treaty law which are geared towards the promotion and protection of foreign investment. Most contemporary → treaties require host states to accord foreign investors and investments fair and equitable treatment ('FET'), full protection and security ('FPS'), national treatment ('NT') and most favoured nation treatment ('MFN') and prohibit direct and indirect expropriations unless certain strict conditions are met, and some of these standards are also customary law or derive from customary standards (→ customary international law). Alongside protection standards, investment treaties very often contain direct access for foreign investors to international arbitration against the host state of the investment for violations of an investment treaty's standards, with certain variations as to the conditions under which such access can be effectuated. At first glance, international investment law and human rights thus seem to be relatively separate fields of international law and both fields have evolved quite independently from one another. Yet, there is a certain proximity between the protection to foreign investors offered under international investment treaties (and customary international law), and the protection existing under human rights treaties: both aim to offer – in substantive and (as regards → access to justice) procedural terms – specific rights to non-state entities in order to give a certain form of protection for these non-state entities from acts of the state. However, beyond the common thrust of both sets of norms, the interaction between international investment law and human rights has mostly been discussed, and in fact becomes relevant, in the context of the normative interaction between human rights norms and investment law norms.

[3] While foreign investment can generally be beneficial to the respect for and the progressive realization of human rights through its contribution to economic development, the interlinkage between human rights and foreign investment has more often than not been discussed in the context of the conflicts that may arise. Such conflicts may arise between a state's obligation to ensure respect for human rights and the rights of the nationals of the host state to those entitlements on the one hand, and the foreign investment and the protection offered to foreign investors through – mainly – bilateral investment treaties (BITs) concluded between the host state and the home state of the foreign investor, on the other hand. The specific nature of foreign investment projects results in the fact that it is more likely that foreign investment will have an impact on economic and social rights, such as the right to health (→ health, right to) and the right to water (→ water, right to).

[4] The normative and other forms of interaction between these two legal fields however is complex and also unsystematic. This entry will first map the legal framework applicable to international investment law and human rights. It will then look at the relevance of human rights in international investment law by looking at both the inter-connectedness of human rights and international investment law, and the conflicts that arise between norms in both regimes. Finally, this entry will evaluate the current state of affairs and offer some insights into recent trends.

II. The Relevance of Human Rights in International Investment Law

[5] The relevance of human rights in international investment law is firstly constituted by the obligations of foreign investors to respect human rights, which in itself is not directly linked to the specific regulation of foreign investment. Rather it conforms to the general rules and principles governing obligations of → non-state actors. Secondly, international investment treaties partly contain references to human rights, most notably in relation to specific obligations that foreign investors have in respect of human rights. Finally, in respect of international investment arbitration, some brief discussion is necessary on the possibility for arbitral tribunals established under international investment treaties to effectively take account of human rights. Mention will also be made to human rights issues raised by → *amicus curiae*, and so-called 'legality requirements' which may limit the reliance by foreign investors on investment treaties and arbitration of investments which breach international human rights law.

1. The Obligation of Foreign Investors to Respect Human Rights

[6] Since the beginning of the 21st century, numerous avenues for increasing the accountability of corporations have been explored in the legal literature and several international instruments have been adopted in an effort to regulate the conduct of non-state actors, in particular the conduct of transnational corporations in the human rights sphere. The following is limited to setting out the main principles in light of the specific nature of international investment law.

[7] Traditionally, human rights obligations are addressed to states and were intended principally to regulate the relations between individuals and the state. The state not only bears a duty to respect the human rights of the individuals on its territory, but also has a duty to ensure that private actors, including foreign investors, do not violate those rights (→ respect – protect – fulfil). This has been explicitly included in Article 2 of the 1966 → International Covenant on Civil and Political Rights (ICCPR). The essential public/private divide of human rights has also been dealt with by the UN Human Rights Committee (HRCttee) in its General Comment No 31 (2004), in which the Committee explicitly emphasized that the primary responsibilities remain with the state. There is however a visible trend towards human rights obligations for corporations (→ transnational corporations), but so far, this trend has yet to result in any firm confirmation of a direct international law-based responsibility for corporations. On 10 August 2017, the Committee on Economic Social and Cultural Rights issued its General Comment No 24 (2017) on State obligations under the → International Covenant on Economic, Social and Cultural Rights in the context of business activities. General Comment No 24 remains focused in essence on the obligations of *states* rather than obligations of foreign investors under international law.

[8] Since the primary obligation to respect and ensure respect for human rights lies with the host state, foreign investors cannot be said to be the direct holders of human rights obligations under international law. The obligations of foreign investors are essentially based on domestic law. There is however a large quantity of non-binding instruments, such as the → Global Compact, the → International Labour Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (TDP), the OECD Guidelines for Multinational Enterprises, and most recently the → Guiding Principles on Business and Human Rights (UNGP).

[9] Human rights obligations for foreign investors have only rarely been included in investment treaties themselves. While some recent investment treaties contain pertinent provisions, which will be discussed in section IV, the inclusion of references to human rights obligations of foreign investors or broad provisions on and reference to the responsibility of transnational corporations in investment treaties has already been discussed for many years. A notable attempt to include a direct reference to human rights obligations of corporations was the Multilateral Agreement on Investment (MAI) proposed by the → Organisation for Economic Co-operation and Development (OECD) in 1998. The draft of the MAI contained a provision

which was based on the 'association' of the treaty with the OECD Guidelines on Multinational Enterprises to that agreement (Art X MAI Draft Consolidated Text). Certain investment treaties have incorporated human rights obligations of foreign investors through clauses which contain obligations for states to 'encourage' investors operating in their territory to voluntarily comply with CSR standards, including human rights (*e.g.* Art 810 Canada-Peru Free Trade Agreement).

[10] The arbitral tribunal in *Urbaser v Argentina* (2016) explicitly addressed, based on a general appraisal of human rights obligations of non-state actors, whether foreign investors have any 'obligations' in respect of human rights law. The tribunal noted that 'international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce', referring to the above-mentioned UNGP (para 1195). Then, the tribunal noted that the several initiatives taken on the international level in fact are not 'on their own, sufficient to oblige corporations to put their policies in line with human rights law', and that a contextual approach is necessary to assess the existence of any non-state human rights obligation (para 1195). Whether foreign investors have any 'obligations' in respect of human rights law, either as a matter of general international law or treaty law, gains specific relevance and importance in the context of counterclaims, which will be addressed in section IV.2.

2. Human Rights Law before International Investment Tribunals

[11] There is general agreement that human rights may come into play as a matter of the applicable law in treaty-based investment arbitrations (see de Brabandere [2014] at 122ff; Dumberry and Dumas-Aubin [2012] at 360-365). Absent any specific human rights-related provision in the treaty itself, explicitly declaring human rights law applicable as a part of either domestic or international law, investment treaties usually contain broad applicable law clauses referring to the application of domestic law, and/or international law. Consequently, it cannot be excluded, as a matter of principle, that arbitral tribunals can engage with human rights law.

[12] However, a link must here be made with the limited jurisdiction of arbitral tribunals established based on an investment treaty. The direct access of foreign investors to investment treaty arbitration is accepted because it is part of the protection offered to the investor for claims arising out of the investment. As a consequence, the competence of the arbitral tribunal is in principle *limited* to the types of disputes as defined and limited by the agreement of the state party to the treaty granting jurisdiction. If the jurisdiction of the tribunals is limited to 'investment disputes', the *scope* of the tribunal's jurisdiction does not extend to other types of disputes. This principle has been illustrated in the *Biloune v Ghana* (1989) case, which concerned the arrest and detention for 13 days of a foreign investor who was eventually deported to Togo. The tribunal noted that its jurisdiction under the agreement between the investor and the host state was limited to disputes relating to an investment, and hence that it was not competent to deal with every human rights violation of the foreign investor (para 203).

[13] The tribunals in the joined cases of *Bernhard von Pezold and Others v Zimbabwe* and *Border Timbers v Zimbabwe* (2012) also refused the extension of the claims to include human rights, based on its limited jurisdiction. In this case the additional 'claim' was made by an *amicus curiae*, but the principles reiterated by the tribunals in relation to their limited jurisdiction are highly relevant, and also distinguish between the applicable law and the jurisdiction of an investment tribunal (see para 60 of the award). A decision along the same lines was reached by the tribunal in *Rompetrol v Romania* (2013), in which both parties had extensively relied on and discussed the possible application of the → European Convention on Human Rights (ECHR). There seemed to be agreement that the ECHR as such did not apply directly to the dispute in question. In particular, the tribunal explained that its sole function was to decide a legal dispute arising directly out of an investment 'and to do so in accordance with "such rules of law as may be agreed by the parties"' (paras 170ff). The tribunal further argued that any complaint that a claimant or related party may

have in relation to possible breaches of the ECHR should be submitted to the dispute settlement system established under the ECHR.

[14] Finally, it should be added that investment tribunals are also in principle required to decide a case based on the submission of the parties. Also, arbitrators are bound by the applicable laws as defined by the parties and are prohibited from deciding *ultra petita*. It has been argued that tribunals in principle *can* but are not under an *obligation* to consider arguments not raised by the parties:

> from the material before it, the parties in their arguments before the Tribunal do not appear to have expressly identified and argued the questions set out above, which would provide an explanation for why the Tribunal did not expressly address them. A Tribunal is not required to address expressly every argument put by a party, and a Tribunal is therefore certainly not required to address arguments that have not been put by parties (*Enron v Argentina* [2010] para 375)

If human rights arguments are not raised by the parties, the tribunal is therefore not always in a position to effectively take human rights arguments into account.

3. 'Legality Requirements' and Human Rights

[15] Another important aspect of the legal framework governing human rights and international investment are the so-called 'legality requirements', which indirectly create an obligation on foreign investors to conform to and respect the domestic laws of the host state – including the applicable human rights obligations. When such a clause is included in an investment agreement, the non-respect of the domestic laws enacted by host states as part of their obligation to protect human rights may – depending on the precise formulation of the treaty – impact the admissibility of claims based on the treaty, or the existence, for the purposes of the treaty, of a covered investment.

[16] At present, many international investment treaties contain so-called 'legality requirements' or 'in accordance with the law' provisions, *i.e.* provisions which require the foreign investor to comply with the laws of the host state. A typical example can be found in Article 1 of the French Model BIT. Certain investment treaties contain a separate clause to this effect, such as Article 12 of the Uzbekistan-Kazakhstan BIT. A number of tribunals have over the past years also read such a requirement into investment treaties even in the absence of such a clause (see *e.g. Plama v Bulgaria* [2005] paras 143-144; *Phoenix Action v Czech Republic* [2009] para 107; *Hamester v Ghana* [2010] para 124).

[17] The general idea behind such clauses is to bar the application of the treaty to investments made in breach of the host state's legislation, and as a consequence bar an arbitral tribunal from establishing jurisdiction to hear a claim based on an 'illegal' investment. So far, examples where human rights as part of a 'legality requirement' have been applied are very scarce. However, when human rights have been integrated in the host state's domestic law, and human rights obligations thus apply to corporations and individuals as part of the domestic law of the host state, a breach of such human rights obligations – as a matter of domestic law – by a foreign investor may result in a denial of the application of the BIT to the investment and hence a lack of protection of the investor.

4. Use of Human Rights in the Interpretation of Investment Protection Standards through Treaty Interpretation

[18] Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), which requires to take into account in → treaty interpretation 'any relevant rule of international law applicable in the relations between the parties', also known as the so-called principle of 'systemic integration', is an interesting provision when it comes to the interpretation of investment protection standards in light of the host states' international human rights obligations. It will however be of little avail in solving genuine conflicts between treaty obligations since Article 31(3)(c) VCLT is a principle for the *interpretation* of treaties. However, it will allow attempts to reconcile both sets of norms instead of looking at human rights and investment protection norms as opposing each other. To that extent, Article 31(3)(c) VCLT may in certain situations provide the necessary framework for integrating human rights in the interpretation of certain BIT provisions. This can be the case notably in interpreting provisions such as fair and equitable treatment and the rules relating to indirect expropriations.

[19] In the recent award of the tribunal in *Philip Morris v Uruguay* (2016), the tribunal was concerned with the argument by Philip Morris that the imposition of a plain-package tobacco legislation violated the obligation to fair and equitable treatment. Uruguay argued that it had a margin of appreciation in respect of the acts or measures it could take to protect public health. The tribunal held that

> changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment 'outside of the acceptable margin of change. (para 423)

[20] It is noteworthy that the tribunal had earlier pointed out that the provision of the BIT 'must be interpreted in accordance with Article 31(3)I of the VCLT requiring that treaty provisions be interpreted in the light of "[a]ny relevant rules of international law applicable to the relations between the parties," a reference "which includes [...} customary international law"' (para 290), and that 'protecting public health has since long been recognized as an essential manifestation of the State's police power' (para 291). The human rights obligations of Uruguay in this case can thus function as an interpretative tool to give content to the specific standards of treatment contained in investment treaties. It is also noteworthy that the Award in this particular case makes extensive reference to the *amicus curiae* submissions made by the World Health Organization ('WHO') and the WHO Framework Convention on Tobacco Control ('WTO FCTC'), and the Pan American Health Organization ('PAHO') especially in relation to the (paras 391ff).

5. Human Rights Law and Investment Protection Standards

[21] As mentioned in the introduction, human rights protection and international investment law are closer than first may appear and share some common features: both frameworks have given non-state entities direct access to an international dispute settlement system and aim at protecting non-state entities from state power. It is probably for that reason, that one occasionally finds arguments invoked by investors in the context of invest-state arbitration which are based on human rights provisions of regional and international human rights instruments or on the jurisprudence of human rights courts such as the → European Court of Human Rights (ECtHR). It is noteworthy that arbitral tribunals have thus recognized that they do not operate in an exclusive legal regime. References to human rights courts' decisions show the close relation between both branches of law.

[22] For example, in *Tecmed v Mexico* (2003), the Tribunal relied on decisions of the ECtHR to determine the proportionality of acts of the state in order to assess their expropriatory nature (para 122). In *Toto v Lebanon* (2009), the claimant had relied on the case law on due process of the ECtHR and had also referred to Article ICCPR which contains the right of to an equitable trial (para 144). The references to the ECtHR were considered by Lebanon to be 'irrelevant', since Lebanon is not a member of the → Council of Europe (para 150) and the Tribunal discarded for that reason the relevance of the ECHR. However, the Tribunal did accept that decisions of the HRCttee are relevant 'to interpret the scope of Article 14 of the ICCPR.' (para 159). The Tribunal thus discussed several cases of the HRCttee in its analysis of the question whether court delays are in breach of the requirement of a fair hearing (paras 160ff).

[23] At the same time, as explained in Section II.2, tribunals established based on an investment treaty in principle have a limited jurisdiction. As a consequence, the reliance on case law of human rights courts to interpret investment protection standards should not be conflated with the extension of an investment claim to a claim for breaches of human rights as such. The case *Rompetrol v Romania* (2013), in which both parties had extensively relied on and discussed the possible application of the ECHR, has already been discussed above (see Section II.2.) Another example is *Spyridon Roussalis v Romania* (2011), in which the investor had claimed violations of the fair and equitable treatment, the full protection and security and the non-impairment standards of the Treaty, as well as of Article 6 of the ECHR and of Article 1 of the First Additional Protocol to the ECHR (para 10). The Tribunal however considered that the investment treaty offered a 'higher and more specific level of protection […] to the investors compared to the more general protections offered to them by the human rights instruments' (para 312). The Tribunal as a consequence considered that the BIT cannot serve as 'useful instrument for enlarging the protections available to the Claimant from the Romanian State under the BIT' (*ibid*).

III. The Interactions between Human Rights and International Investment Law

1. The Inter-Conditionality of Human Rights and Investment Law

[24] The link between international investment law and human rights has been often viewed as one of inter-conditionality in the sense that respect for human rights is paramount in order to attract foreign investment. The general idea is that respect for the → rule of law and human rights attracts foreign investment, which in turn generates economic growth and thus contributes to social development. This has also been recognized by the → World Bank (World Bank [2012] at 25), the UN General Assembly (UNGA, *Res A/67/97* [2013] Preamble para 5), and the UN Secretary-General (UNGA, *Delivering Justice* [2012] para 26).

[25] When looking at the other side of this inter-conditionality, that is the influence of foreign investment on the respect for human rights generally, foreign investment commonly is considered a catalyst for economic and social development through positive spill over effects of foreign investment (Bettwy [2012] at 250).The underlying idea here is in conformity with the broad premise that foreign investment generates economic growth and social development (Bermejo Carbonell and Werner [2018]).

[26] For example, the right to water (→ water, right to) may be positively influenced by foreign investment. It has been argued that the privatization of and foreign investment in the water distribution sector has generally had positive effects and spill overs on service coverage and the quality of the water (Fay and O Morrison [2007] at 42).

[27] At the same time, the right to water also is most frequently invoked when considering the (potentially) negative effects of foreign investment, in that foreign investment may result in difficulties in ensuring respect for (certain) human rights on the domestic level.

2. Conflict between Human Rights and International Investment Law Norms

[28] When signing and ratifying investment treaties, states do not necessarily fail to take into account their human rights obligations. Indeed, there is no *a priori* incompatibility of human rights obligations and investment protection obligations, although a state can be confronted with a clear conflict of obligations in a particular situation. One cannot overlook the fact that in certain situations a specific investment activity can result in a negative effect on the social and economic situation within the state (see *e.g.* UNCHR Interim Report [year] para 25).

[29] In the context of human rights, the vast majority of the instances in which human rights and foreign investment have been in conflict relate to the rights to water and health and the rights of → indigenous peoples. Based on the human rights to water and health, certain states have suspended or terminated concessions and lease contracts, leading to claims brought by the investor for the alleged breach of the investment contracts and applicable investment treaties. A recurrent type of disputes before international investment tribunals relates to the privatization of public services such as water supply, sewage systems and waste management (eg *Biwater Gauff v Tanzania* [2008]). Regulations and laws adopted by host states in the exercise of their public authority in order to ensure respect for human rights can in such cases at times enter into conflict with certain provisions of investment treaties or investment contracts which states have negotiated and signed with foreign investors. Tribunals have mostly confirmed that obligations under human rights and those under international investment treaties are not necessarily 'inconsistent, contradictory, or mutually exclusive' (*Suez v Argentina* [2010] para 262), although conflicts may arise, *in concreto*, between a state's obligations in respect of (economic and) social rights and its obligations towards the foreign investor. More often than not, in such cases, the human rights obligations of states will be relevant as a defence to responsibility, rather than as norms that would trump a state's obligations under applicable international investment treaties.

[30] In relation to foreign investment in the agricultural sector, the Food and Agriculture Organization (FAO) has also noted the risk of displacing indigenous peoples and hence the potential of a negative impact on their → land rights (indigenous peoples) (FAO [2009]) (→ land grabbing). But the question of the impact of foreign investment on the rights of indigenous peoples exceeds the agricultural sector. In *Glamis Gold, Ltd. v United States* (2009), a case brought under the NAFTA and decided under the UNCITRAL arbitration rules, a Canadian investor brought a case against the United States in which it claimed that certain regulatory measures constituted a breach of the United States' investment obligations under the NAFTA. The investment consisted of rights in relation to the exploitation of gold mine concessions in California, which was according to Claimant harmed by the adoption of measures restricting the operation of the mines (amongst others requiring backfill and restoration of the site) in order to protect Native American religious and cultural heritage sites. The Claimant's claim was in the end denied, but importantly the Quechan Indian Nation, whose sacred sites and traditions were affected by the mining activities, was allowed to make an amicus curiae submission. However, the Tribunal in the end did not discuss the submission made by the Quechan Indian Nation, explaining that:

> inasmuch as the State Parties to the NAFTA have agreed to allow amicus filings in certain circumstances, it is the Tribunal's view that it should address those filings explicitly in its Award to the degree that they bear on decisions that must be taken. In this case, the Tribunal appreciates the thoughtful submissions made by a varied group of interested non-parties who, in all circumstances, acted with the utmost respect for the proceedings and Parties. Given the Tribunal's holdings, however, the Tribunal does not reach the particular issues addressed by these submissions. (para 8)

[31] Another example is *South American Silver v Bolivia* (2018), which also related to mining concessions in areas which were principally inhabited by Indigenous communities. After accusations by the Indigenous communities that the investor had committed 'abuse of authority, contaminated, disrespected the indigenous authorities, deceived, threatened community members and it was responsible for the rape of women from the community' (para 114), Bolivia intervened and reached an agreement with the Indigenous communities which reversed the ownership of the Mining concession. The adoption of a 'Reversion Decree' triggered a claim by the investor for expropriation. Bolivia justified its acts by arguing that it was based on its 'duty to ensure respect for the rights of the Indigenous Communities' (para 472). The Tribunal accepted that the 'Reversion Decree' was taken for 'the protection of human rights – the right to life and the right to peace, both expressly mentioned in the Reversion Decree – and the protection of the communities and the *ayllus* against the difficulties resulting from the Project' (para 461). However, the Tribunal did find a breach of the requirement to provide compensation as established under Article 5 of the Treaty.

3. Human Rights as Defences to International Responsibility

[32] In essence, a state can assert that the protection of human rights function as a form of 'necessity', which precludes the wrongfulness of the breach of the investment treaty, either as matter of treaty law ('non-precluded measures clauses') or through the application of the general rules on → circumstances precluding wrongfulness under the ILC Articles on State Responsibility (→ state responsibility).

[33] In *Suez v Argentina,* one of the arguments raised by Argentina was that the impossibility to guarantee the right to water of its nationals constituted a state of necessity. The tribunal acknowledged that Argentina was in a state of necessity, but since it had contributed to the development of the state of necessity, it was barred from claiming it as a defence under the strict conditions set by the ILC Articles on State Responsibility (*Suez v Argentina* [2010] paras 257-265). In *Sempra v Argentina* (2010), which related to investments in two natural gas distribution companies and the adoption by Argentina of a number of measures in the context of the economic crisis it was facing, the tribunal recognized the potential conflict between human rights obligations and investment obligations. The tribunal recognized that the question 'raises the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners' (para 332). However, when assessing whether the constitutional order and the survival of the state were imperilled by the crisis, and whether therefore it could constitute 'necessity' under customary international law, the tribunal held that 'the constitutional order was not on the verge of collapse' (*ibid*). Similar reasoning was employed by the tribunal in *Biwater Gauff v Tanzania* ([2008] para 515).

[34] Other tribunals, however, have accepted that certain measures were 'necessary' but have not in general referred to specific or general human rights obligations of the state in that respect (see, *e.g.*, *LG&E v Argentina* [2006] paras 226-234; *Continental v Argentina* [2008] paras 180ff; *Urbaser v Argentina* [2016] para 716).

[35] Tribunals clearly have responded differently to such claims, but they have not excluded as a matter of principle that human rights could be invoked to exclude the wrongfulness of a breach of an investment treaty and that host states which are bound by human rights norms and obligations under international investment agreements can be faced with a conflict of obligations. However, there does not seem to be much willingness on the side of arbitral tribunals to extensively engage in the discussion on whether and under which circumstances a state's human rights obligations can successfully be used as a circumstance precluding the wrongful breach of an investment treaty.

IV. Trends and Prospects

1. Human Rights Obligations of Foreign Investors in International Investment Treaties

[36] While the idea of incorporating references to human rights obligations of foreign investors in an investment treaty is not new, as discussed in section II, a recent type of clause that can be found in certain investment treaties contains clearer references to *obligations* of foreign investors. The → Southern African Development Community (SADC) Protocol on Finance and Investment stipulates that 'foreign investors shall abide by the laws, regulations, administrative guidelines and policies of the Host State' (Art 10 Annex on 'Co-Operation on Investment' SADC Protocol on Finance and Investment). A similar clause was included in Article 13 of the Investment Agreement for the COMESA Common Investment Area and imposes a generally worded obligation on COMESA investors and their investments to 'comply with all applicable domestic measures of the Member State in which their investment is made'. A further sophistication of such provisions can be found in Article 15.1 of the 2012 SADC Model BIT, and Articles 19-24 of the Draft Pan-African Investment Code (PAIC) relating to corporate social responsibility, obligations relation of natural resources, and business ethics and human rights, and Articles 12-13 of the India Model BIT. However, the clauses included in these model treaties have not yet been inserted in subsequently negotiated investment treaties. Moreover, most of the treaties discussed remain limited in number and have not yet entered into force. Yet, they do show a gradual inclusion of specific human rights norms and principles in international investment treaties which have typically been closed to such considerations.

2. Host State Human Rights Counterclaims

[37] The increased inclusion of human rights obligations of foreign investors in investment treaties needs to be linked to the question whether the obligations for foreign investors could be invoked by the host state as counterclaims.

[38] Several examples discussed in the preceding paragraphs mainly operate as a confirmation of the obligations of foreign investors to comply with domestic law, including human rights law, which as such is a non-controversial proposition. Yet, the inclusion of clauses referring to the obligations of foreign investors under domestic law are not entirely neutral confirmations of already existing obligations. To a certain extent, if couched in mandatory terms, these provisions 'internationalize' the – mainly – domestic obligations of foreign investors.

[39] The reason to include such provisions in investment treaties needs to be related to the possibility of counterclaims by the host state. The COMESA agreement for instance provides that 'a Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages' (Art 28.9). A similar provision may be found in the SADC Model BIT (Arts 19 and 29.19).

[40] The explicit compliance requirement with the domestic legislation has the advantage of incorporating the domestic law obligations of foreign investors into the treaty, and thus render such obligations part of the law to be applied by a tribunal faced with a treaty claim. It thus enables the presentation of a treaty-based counterclaim. In contrast to *Urbaser*, where the tribunal had to appraise the obligations of the foreign investor only in relation to a 'contractual' counterclaim by Argentina, whereby Argentina had argued that the obligations of the investor in relation to the right to water derived from domestic law and the contract, and based on the broadly worded dispute settlement clause in the treaty, such clauses have the benefit of making clear both that a tribunal has the competence to hear a counterclaim and that the domestic

obligations of the investor form part of the law to be applied by the tribunal in assessing the merits of the counterclaim.

V. Conclusion

[41] The link and interaction between human rights and international investment law has shown to be complex. Globalization of the world economy has resulted in an expansion of corporate activity in foreign states, which have privatised many areas of the public sector and of public activity and transferred the management of such activities to foreign investors, which have been offered protection via different standards of treatment in order to facilitate such investments. As a result, the impact of foreign investors on the public health and human rights generally has increased.

[42] The contemporary legal framework governing human rights and international investment law is comprised of the general responsibility for human rights of the host state and the rules and norms governing the responsibility of corporations. Yet more specifically in relation to international investment law, human rights obligations as such can play an important role as well, either as the law to be applied by the tribunal taking into account the jurisdictional contours of its mandate, as 'legality requirements' which may provide respondent states with an argument to deny foreign investors who have breached human rights protection under the treaty, or as part of the interpretation of investment protection standards.

[43] On the relevance of human rights in international investment law, I have noted the interconnectedness of human rights and international investment law. This implies not only an interdependence between both legal fields, but also a potential conflict in the application of the obligations of states under both norms. In that case, states have mostly invoked their human rights obligations as defences to state responsibility.

[44] This entry has also looked at recent trends in international investment law, which show not only an increased reliance on and inclusion of human rights provisions and investor obligations in that respect in investment treaties, but also growing attention to the possibility for the host state to initiate counterclaims based on human rights violations by the foreign investor. While it remains to be seen whether such provisions will in effect make it to binding international treaties and be relied upon in proceedings between a state and a foreign investor, they are evidence of an increased recognition of the interplay between both legal fields.

ERIC DE BRABANDERE

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