In the first of a series of updates highlighting issues likely to grow in prominence in investment treaty disputes, we look at corporate human rights impacts. In light of the ever-increasing importance of ensuring businesses’ respect for human rights in the course of their operations, as reflected in the concretisation of investors’ obligations in legislation and treaties, human rights issues are set to arise in investment treaty arbitration with greater frequency.

The business and human rights landscape continues to evolve rapidly, driven largely by the range of measures aimed at enforcement of the UN Guiding Principles on Business and Human Rights (the UNGPs). More and more states are introducing hard legal requirements aimed at requiring businesses to protect human rights. This includes legislation on specific issues (such as modern slavery), human rights reporting requirements and obligations to conduct due diligence (such as France’s Duty of Vigilance Law, which requires French companies of a certain size to prepare annual vigilance plans detailing the steps taken to safeguard against human rights and environmental violations). The EU has indicated it plans to table legislation making environmental and human rights due diligence mandatory, and negotiations also continue towards a global UN treaty on business and human rights that would require signatory states to impose legally binding obligations on corporations in the human rights arena.

At the same time, the role of arbitration in business human rights disputes is expanding. Specific submission agreements and treaties such as the Accord on Fire and Building Safety in Bangladesh protect human rights and make provision for arbitration of disputes, and the Hague Rules on Business and Human Rights Arbitration tailor the UNCITRAL rules for specific use in proceedings of this nature. The domestic courts of numerous jurisdictions are also clarifying and expanding their jurisdictional reach over claims regarding the conduct of corporations in relation to human rights, both at home and abroad.

The increase in legal proceedings with a business human rights angle across a number of fora – and the accompanying regulatory and reputational risk to businesses – is therefore not in doubt. In parallel, alleged breaches of environmental and human rights standards by investors have given rise to counterclaims by states in arbitrations brought by foreign investors, over which tribunals have accepted jurisdiction. For instance, in the 2017 case of Urbaser v. Argentina, the tribunal accepted in principle that corporations could be subjects of international law (including by reference to the UNGPs). It went on to assert jurisdiction over Argentina’s counterclaim that Urbaser failed to provide the necessary level of investment to ensure respect for the human right to water, considering this was sufficiently factually linked to Urbaser’s main claim. Other tribunals have been willing to limit the damages recoverable by investors due to failures in relation to environmental or human rights standards (e.g. in Bear Creek Mining Corporation v. Peru and Occidental Petroleum v. Ecuador).

Nevertheless, a state’s ability to bring counterclaims in a given arbitration has remained conceptually uncertain, since investment treaties – which are concluded between states – generally confer rights (rather than obligations) on investors. Tribunals’ jurisdiction over counterclaims is therefore usually dependent upon specific wording in the particular treaty or other factors indicating the investor’s consent to arbitration. There are a number of ways in which
the increased legislative and regulatory focus on business human rights may help states overcome these structural challenges and allow human rights issues to filter into investment treaty disputes.

First, most counterclaims in investment treaty arbitrations to date have involved alleged breaches of free-standing national laws by the investor. For instance, in *Aven v. Costa Rica*, the applicable Free Trade Agreement required investors to comply with environmental measures taken by the host state, which the tribunal considered in principle enabled counterclaims for breaches of national measures. As such, the emergence of national laws imposing requirements for businesses operating in the jurisdiction to respect human rights may well increase the scope for counterclaims in investment arbitrations where it appears applicable standards have been breached. To that end, potential respondent states should be alive throughout the life of high-value investment projects as to the investor’s conduct and respect for human rights in its execution of its investment. States would be well advised to ensure any issues are well documented so that, should a dispute arise, it has the requisite evidence at its disposal to consider whether a counterclaim should be brought.

A second and related possibility is an increase in objections to a tribunal's jurisdiction or the admissibility of claims. Many investment treaties contain provisions limiting the scope of the state's consent to arbitration to situations where the investment has been made in compliance with applicable laws, and some tribunals have found that, even absent such wording, there is an implicit obligation upon investors to conduct their affairs lawfully in order to benefit from substantive investment protections. An objection commonly raised by states is that the investor procured the investment through corruption, or the investment was otherwise tainted by corrupt activities. Again, the promulgation of national legislation requiring corporate compliance with human rights standards increases the potential for jurisdictional or admissibility-related arguments based on adverse human rights impacts associated with an investment.

Third, there is a strong movement towards the rebalancing of states and investors' respective rights and obligations in modern investment treaties. A number of states have terminated their existing treaties and are seeking to negotiate agreements with express provisions aimed at securing investors' respect for environmental, social and human rights norms in order to secure protection. For example, the 2019 Netherlands Model bilateral investment treaty (BIT) includes a specific requirement that “[i]nvestors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights”. Although it is unclear how this would impose obligations directly upon investors, such a clear provision, if adopted in future Dutch treaties, would certainly make it more difficult for investors to argue human rights issues were not relevant to the tribunal's determination (whether as regards the main claim or any counterclaim). This is particularly the case if it were included alongside the various provisions of the Model BIT aimed at encouraging contracting states to strengthen their legal frameworks and ensure access to effective remedies for victims of human rights violations.

Another possible mechanism in treaties is provision for damages to be reduced – for instance, the India Model BIT directs tribunals to reduce damages to reflect "mitigating factors" which can include "any unremedied harm or damage that the investor has caused to the environment or local community or other relevant considerations regarding the need to balance public interest and the interests of the investor". It is easy to envisage tribunals being willing to use provisions such as this to reduce damages as a result of human rights impacts where there is a factual nexus.

So, given the increased likelihood of their conduct in relation to human rights impacting upon their ability to rely upon investment treaty protections, what should investors in foreign jurisdictions do to manage this kind of risk? The UNGPs themselves – founded upon a framework of “protect, respect and remedy” – offer a helpful starting point for businesses seeking to navigate this tricky area. The measures that investors need to take to mitigate risks will evidently be context specific, but may well include:

- adopting and implementing appropriate human rights policies and procedures, ideally at a global/group level.

Corporations cannot rely upon the "corporate veil" to distance themselves from impacts of their foreign subsidiaries'
Given the dynamic relationship between the protection of foreign investment and human rights, investors wishing to rely upon investment treaty provisions should fully integrate human rights considerations into their investment decisions and operations. The volume of new legislative requirements across numerous jurisdictions means businesses will have to keep these matters under constant review to manage legal and reputational risk.

Similarly, there are points for potential respondent states to bear in mind as a result of this changing landscape, particularly where investment treaties are being renegotiated. This may present opportunities to hold investors to stricter account for their human rights impacts in the host jurisdiction (for instance, by strengthening existing requirements to comply with applicable laws and/or inserting express obligations to respect internationally recognised standards).

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