INTERNATIONAL INVESTMENT LAW AND HUMAN RIGHTS

FABRIZIO MARRELLA*

Introduction

International Investment Law (hereinafter IIL) and International Human Rights Law (hereinafter IHRL) share common roots and a debate about the limits of self-contained regimes, including legitimacy[1].

The 1948 Universal Declaration of IHRL classifies "property" (both domestic and foreign) as a human right[2]. But only IIL has developed rules for the protection of foreign property offering to investors hard law and arbitration to claim compensation in case of breach.

Even if, in some circumstances, investment issues may be addressed before IHRL Courts or even UN Treaty Bodies[3], undoubtedly, the main debate is focused on IHRL issues in the context of investment arbitration, especially when they concern equitable land reform,

* Full Professor of International Law and European Union Law, "Cà Foscari" University of Venice. Member of the Global Council of the Global Campus of Human Rights an Venice International University. Member of the Commercial Law and Practice Commission, International Chamber of Commerce.

[1] See e.g. J. ALVAREZ, *The Public International Law Regime Governing International Investment*, The Hague Pocketbooks, 2011, p. 260 ff.. See also: A. DE NANTEUIL, "Droits de l'homme et arbitrage d'investissement/Human Rights and Investment Arbitration", in *Revue de droit des affaires internationales/International business law journal*, 2023, p. 397-405; F.D. DONOVAN, R. ZAMOUR, "Arbitrating Business and Human Rights disputes: consent to arbitrate and applicable law", in F. MARRELLA, N. SOLDATI (eds.), *Studies in honor of Giorgio Bernini*, Milan, Giuffré-Francis Lefebvre, 2021, p. 387 ff.; U. KRIEBAUM, CH. SCHREUER, R. DOLZER, *Principles of International Investment Law*, 3rd ed., Oxford, OUP, 2022; C. BLAIR, "International Arbitration and Human Rights: Exciting Opportunity or Existential Threat?", in *International Arbitration Law Review*, 2022, p. 85-98; *The Cambridge companion to business & human rights law*, ed. by I. BANTEKAS, M. A. STEIN, Cambridge, CUP, 2021; *Handbook of International Investment Law and policy*, ed. by J. CHAISSE, L. CHOUKROUNE, S. JUSOH, Singapore, Springer, 2021; *Human Rights in International Investment Law and Arbitration*, eds. P.M. DUPUY, F. FRANCIONI, E.U. PETERSMANN, Oxford, OUP, 2009; M. KAMMINGA, M. SCHEININ, *The impact of Human Rights on General International Law*, Oxford, OUP, 2009.

[2] Art.17 of the UDHR: "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property." See also the Preamble and art.2.

[3] See e.g., Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, 31 August 2022, at https://www.echr.coe.int/documents/d/echr/Guide_Art_1_Protocol_1_ENG as well as CESCR, General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24, (10 August 2017).

indigenous rights, right to health, access to water, social rights or environmental protection (1). A further section will highlight the evolving regulatory regime after the UN Guiding Principles on Business&Human Rights (hereinafter UNGPs) (2).

1. INVESTMENT ARBITRATION AND HUMAN RIGHTS: THE GATEWAY ISSUES

The *Metalclad case*[4] represents a classic jurisprudence on these matters. Here, an arbitration tribunal held in favor of the investor against the Mexican government that blocked the investor's project to build a hazardous waste landfill, despite the series of potentially ensuing environmental and IHRL damage. The protection of foreign property has ultimately prevailed over environmental protection considerations.

However, a new trend has recently emerged as evidenced by the famous *Philip Morris v. Uruguay*[5] arbitration. In this case, Uruguay anti-smoking policy measures were challenged through investment arbitration. In a majority decision, the arbitration tribunal dismissed claims made by Philip Morris and upheld the legality of the two tobacco control measures enacted by Uruguay for the purpose of protecting public health. The tribunal accordingly ordered Philip Morris to bear all arbitral costs and to pay Uruguay USD 7 million as partial reimbursement of the country's legal expenses.

Contemporary International Investment Arbitration practice reveals that IHRL issues may intervene at different stages of the arbitration proceedings: at the admissibility stage, invoking IHRL violations of the investor as a counterclaim (1); within the *lex arbitri* (2); at the level of interpretation of the applicable law to the merits (3); through *amicus curiae* participation (4) and finally as contributory negligence in calculation of damages (5).

1.1. Admissibility of claims and counterclaims

The first intersection between IIL and human rights, may be found in objections to a tribunal's jurisdiction or the admissibility of claims. Counterclaims allow host States to respond

[4] *Metalclad Corporation v. United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000. The arbitrators were: Prof. E. Lauterpacht (President), Mr. B. Civiletti and Mr. J. L. Siqueiros.
[5] *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7. The arbitrators were: Prof. P. Bernardini (President), Prof. J. Crawford and Prof. G. Born (dissenting).

to legal action against them by challenging the investor's wrongful conduct for alleged breaches of IHRL standards such as gross violations of environmental rights and social rights.

In a number of so-called Argentina cases, even if the State claimed that it acted to protect its citizens' human rights, the response by different arbitration tribunals seems inconsistent and rather confused but the relationship between IIL and human rights has become clearer over time.

More recently, in *Urbaser v. Argentina*[6], the Arbitration tribunal accepted jurisdiction over Argentina's counterclaim that the private investor had breached the human right to water, dismissing the investor's argument that the observation of its IHRL responsibilities fell outside the scope of the tribunal's jurisdiction. The scenario here was that of a corporation which was a shareholder in a concessionaire for the distribution of water and servicing of sewage treatment in Buenos Aires as part of the country's water privatization plans.

The defendant State maintained that *Urbaser* had failed to respect IHRL by failing to provide the necessary minimum level of investment to ensure that its operations were successful and ensured the respect for the human right to water.

The arbitration tribunal concluded that Article X of the 1991 Spanish-Argentine BIT was sufficiently broad so as to include counterclaims by Argentina, even though the basis for its counterclaims was IHRL Law. In particular, the *Urbaser* Tribunal observed that :

> "the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of May 23, 1969, and that Article 31 § 3 (c) of that Treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties.' The BIT cannot be interpreted and applied in a vacuum. The Tribunal must certainly be mindful of the BIT's special purpose as a Treaty promoting foreign investments, but it cannot do so without taking the relevant rules of international law into account. The BIT has to be construed in harmony with other rules

[6] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic,* ICSID Case No. ARB/07/26, Award (8 December 2016). The composition of the arbitral tribunal was the following: Prof. A. Bucher (President); P. J. Martínez-Fraga, Prof. I. Brownlie then replaced by Prof. C. A. McLachlan. See also, *inter multos*, *Phoenix Action Ltd v The Czech Republic,* ICSID Case No ARB/06/5, Award, 15 April 2009, p.78. where the arbitrators articulated a limit to investor protection where "the most fundamental rules of protection of human rights", are at stake, like investments made "in pursuance of torture or genocide or in support of slavery or trafficking of human organs".

of international law of which it forms part, including those relating to human rights". (para 1200).

At the same time, the *Urbaser* tribunal held that BIT-based investor-state arbitrations do not exist exclusively for the benefit of investors and disagreed that the human right to water is a duty that may be borne solely by the State. It maintained that the principle "according to which corporations are by nature not able to be subjects of international law and therefore not capable of holding obligations" had "lost its impact and relevance" (para 1194).

The tribunal consequently admitted that "the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights" (Para 1199).

Clearly, when human-rights based counterclaims are admissible, they may be a deterrent for IHRL abuses as well as the abuse of the arbitration process.

1.2. IHRL as part of the applicable procedural law

IHRL apply to arbitral proceedings *per se*, for example in relation to due process, the impartiality and independence of the tribunal. IHRL Courts, such as the European Court of Human Rights, exercise some supervision of arbitrations related to their jurisdiction and will ultimately enforce IHRL that arise within the conduct of such proceedings[7].

1.3. IHRL considerations resulting from the applicable law to the merits

In some cases (*Técnicas Medioambientales Tecmed, SA v United Mexican States* , ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para 122 and *Azurix Corp v Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras 311–312), Tribunals have drawn on IHRL in interpreting and applying norms invoked by states, such as the proportionality principle, the police powers doctrine, denial of justice and other public interest or regulatory-based exceptions and defenses.

[7] See e.g. W. GAO, *"The ECHR in action: its applicability and relevance for arbitration",* in *The International Journal of Human Rights*, 2022, pp. 1608-1629.

In addition to that, many investment treaties contain provisions limiting the scope of the State's *offer of arbitration* to situations where the investment has been made "in accordance with host state law", and some tribunals have found that, absent such wording, there is even an implicit obligation upon investors to conduct their affairs lawfully – according to domestic law - in order to qualify for international investment substantive protections. An objection commonly raised by Governments is that claimants procured the investment through corruption, or the investment was otherwise linked to corrupt activities.

Some IIAs are designed to limit the scope of investor's protection by means of clauses making the treaty benefits conditional to certain facts. While tribunals have held that respondent States bear the burden of proving that the elements of a "denial of benefits" clause have been satisfied, it is equally true that States may increase IHRL protection by crafting such clauses in IIAs. Hence, a conduct by any investor in violation of IHRL may receive the sanction of the same treaty which has invoked.

1.4. *Amicus curiae* submissions

Amicus curiae briefs are the traditional gateway for IHRL defenders to introduce sustainable development, the environment, IHRL and governmental policy in any dispute settlement mechanism.

Today, *amici curiae* submissions are often made by NGOs, by individuals, and even international organizations such as the European Union. *Amicus* briefs must, however, relate concretely to the dispute. One of the key goals of *amicus* intervention has been to ensure that tribunal decisions take into account IHRL obligations and/or take into account the perspective of right-holders impacted by the decision.

After a long debate, the capacity for a third party to participate as *amicus curiae* in an Investment Arbitration has been recognized by the ICSID Rules of Procedure for Arbitration Proceedings (in the current 2022 version, see art.67 on Submission of Non-Disputing Parties) as well as in the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

As the tribunal in *Biwater v. United Republic of Tanzania,* (ICSID Case No. ARB/05/22) made clear, the ICSID Arbitration Rules expressly regulate two specific types of participation by non-parties, namely the filing of a written submission and the attendance at arbitration hearings. The Tribunal must consult both disputing parties involved in the arbitration and neither party has a veto right with respect to the granting of such an application.

1.5. IHRL considerations on calculation of damages

Other arbitration tribunals have limited the damages recoverable by investors due to failures in relation to environmental or IHRL standards. Here, arbitrators have considered IHRL issues to assess the value of compensatory damages claimed by investors. This was the case, for example, in *Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No ARB/14/21, Award, 30 November 2017).

Here, Peru had revoked a Decree which awarded the Canadian investor Bear Creek a concession to construct a silver mine. Bear Creek initiated arbitration proceedings under the 2008 Canada-Peru Free Trade Agreement and the tribunal found that Peru indirectly expropriated the land promised to Bear Creek. Ultimately, it reduced recoverable damages claimed by Bear Creek, from US$522m to just US$18m., due to Bear Creek's *contributory fault* to the social unrest and the resulting predicament faced by Peru.

2. INVESTMENT-RELATED TREATY BASED HUMAN RIGHTS PROVISIONS: THE EVOLVING REGIME

2.1. Putting IHRL into IIAs

One regulatory solution is to have a multilateral treaty on Business&Human Rights. Hence, on October 28, 2022, UN Member States concluded negotiations over a third revised draft of a proposed treaty on Business&Human rights. Its future is still uncertain.

At the other end of the spectrum, some Governments are negotiating new bilateral or regional IIAs with more carefully drafted treaty clauses requesting investors to respect environmental, social and IHRL norms. Investment protection is thereby conditional on each investor's conduct in this respect. For example, art.7 (1) of the 2019 Netherlands Model 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, environmental protection and labor laws".

Canada, for example, since 2010 has attempted to include sustainable development objectives in its BITs with both developed and developing states including labour, the environment, human rights, community relations, and anti-corruption.

Art. 26.3 of India Model BIT instead directs tribunals to reduce damages to reflect mitigating factors, including ‘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’.

2.2. The Hague Rules on Business and IHRL Arbitration

The UNGPs’ Pillar III contemplates arbitration as a potential mechanism to increase access to remedies for victims of human rights abuses.

On 12 December 2019, The Hague Rules on Business and Human Rights Arbitration have been launched. They establish a fairer procedural framework for arbitration between victims and corporations, between business partners, and between third party beneficiaries and corporations.

When they are chosen as the body of rules governing the arbitration, they provide tailored provisions on evidence gathering taking into account the problem of victims’ lack of financial resources.

Conclusion

Classic investment arbitration case law and old generation IIAs did not typically envisage IHRL obligations on investors, leaving arbitrators ill-equipped to address IHRL arguments. Today, the UNGPs have provided a dynamic International Law framework promoting new generation of IIAs as well as a peculiar form of Business & Human Rights Arbitration. All in all, the current regime is gradually evolving in order to fine tuning both the protection of investors’ rights and the regulatory space of States, in view of a common achievement of sustainable development objectives.