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Rudall, J.T.P.

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Recent Interactions between Investment Protection, Environmental Concerns and Human Rights: New Emulsion or Still Immiscible?

*Jason Rudall**

Introduction

Some have used the metaphor of oil and water to describe the interaction of non-investment issues like human rights (or the environment) and the international investment law regime.¹ Indeed, the purpose of this metaphor is to highlight how certain things just don't mix: they are immiscible. However, as has also been observed, oil and water can in fact be mixed through the use of special substances called emulgators,² which allow for the creation of new emulsions. I suggest that new legal emulgators can be found in the interaction between investment law, human rights and the environment. In particular, I intend to explore certain treaty provisions that set out explicit human rights or environmental obligations for foreign investors as well as recent jurisprudence in investor-state dispute settlement where such non-investment issues have been considered.

The Evolving Substance of International Investment Agreements

I will first turn to international investment agreements (IIAs). Several preambular provisions of IIAs, which should reflect the object and purpose of a treaty, now contain references to environmental protection, labour rights or economic or sustainable development, alongside the more traditional objectives such as promoting reciprocal investment or mutually beneficial

* Assistant Professor of Public International Law, Leiden University.

¹ Mehmet Toral and Thomas Schultz, 'The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations', in Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, and Claire Blachin (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law, 2010), 577-602.

² Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', 60 (2011) *International and Comparative Law Quarterly* 573-596, 573-574.

economic activity.³ Others explicitly recognize the connection that exists between investment and poverty reduction, job creation, or human development.⁴

Beyond the preambular language, specific substantive provisions of a number of recent IIAs are also given to the protection or promotion of human rights, environmental governance or sustainable development.⁵ Some IIAs require proactive behavior on the part of foreign investors in respecting such norms.⁶ Indeed, they provide that investors must protect the environment and respect human rights in both the workplace and their local community, as well as manage and operate their investments in a manner that is consistent with environmental, labour or human rights standards that are binding on the host or the home state.⁷ Furthermore, they add that where there is a difference in such standards in the home or the host state, the investor should abide by those standards that are higher.⁸ Others place an obligation on investors to contribute to the economic, social and environmental progress in host states and to ensure the latter's development.⁹

³ See, for example, Preamble, Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, 19 February 2008; Preamble, Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, 9 January 2013; Preamble, Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, 9 September 2012.

⁴ Preamble, Agreement for Cooperation and Investment Facilitation between Brazil and Mozambique, 30 March 2015.

⁵ For a detailed exploration of such provisions, see Laurence Boisson de Chazournes, 'Changes in the Balance of Rights and Obligations: Towards Investor Responsibilization' 111 (2017) *Proceedings of the ASIL Annual Meeting* 53.

⁶ See, for example, Article 18(2), Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, 3 December 2016; Article 14(2) Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, 19 December 2008; Articles 13 and 15, SADC Model BIT 2012; Article 24, Draft Pan-African Investment Code 2016; Article 12, India Model Bilateral Investment Treaty (BIT), 2016. On the impact of the Morocco-Nigeria BIT, 2016, see Tarcisio Gazzini, 'The 2016 Morocco-Nigeria BIT: An Important Contribution to the Reform of Investment Treaties', 8(3) *Investment Treaty News*, September 2017.

⁷ See, for example, Articles 13, 14, 15, 16, and 22 SADC Model BIT 2012; Articles 19(2)-(3), 20(1), 22, 24, and 37(3), Draft Pan-African Investment Code; Article 12(1)-(2), India Model BIT 2016

⁸ See, for example, Article 15(3), SADC Model BIT, 2012.

⁹ See, for example, Article 22(3), Draft Pan-African Investment Code, 2016.

Several IIAs require investors to conduct a social and/or environmental impact assessment of the investment prior to its establishment.¹⁰ Further still, investors can be required to make their environmental and social impact assessments available to the local community and to affected interests in the host state.¹¹ Finally, investors may be obliged to apply the precautionary principle to their environmental and social impact assessment and this must be clearly articulated in the environmental and social impact assessment itself.¹²

In preserving the regulatory power of host states regarding environmental and human rights protection, some IIAs safeguard against a relaxation of such standards. For example, such agreements may stipulate that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures and will oblige parties to refrain from waiving or derogating from such measures to attract investment.¹³ Similarly, other BITs may encourage state parties to strive to continually improve environmental or human rights legislation.¹⁴

A number of IIAs also make reference to corporate social responsibility that foreign investors should abide by. Where these standards are augmented over time, foreign investors should abide by the higher level standards.¹⁵ Others make reference to socially responsible practices or encourage investors to adopt principles in their internal policies that address labour standards,

¹⁰ See, for example, Article 14(2), Morocco-Nigeria BIT, 2016; Article 12, Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, 19 December 2008.

¹¹ Article 12, Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, 19 December 2008.

¹² *Ibid.*

¹³ Ad Article 3, Protocol of the Agreement between the Swiss Confederation and the United Mexican States on the Promotion and Reciprocal Protection of Investments, 10 July 1995; Article 7, Agreement between the Belgium-Luxembourg Economic Union and the Government of the Republic of Mozambique on the Reciprocal Promotion and Protection of Investment, 18 July 2006.

¹⁴ Article 7, Agreement between the Belgium-Luxembourg Economic Union and the Government of the Republic of Mozambique on the Reciprocal Promotion and Protection of Investment, 18 July 2006.

¹⁵ See, for example, Chapter III, Obligations and Duties of Investors and Investments, Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, 19 December 2008.

the environment, human rights, community relations and anti-corruption.¹⁶ These provisions have the effect of bringing certain existing international law norms and standards on such matters into the investment treaty arena.

As for holding private investors accountable for the manifold provisions discussed above, certain procedural tools are also emerging in IIAs. A relatively small number of international investment treaties contain provisions on counterclaims, which we will see shortly have been availed of by states to make certain non-economic claims in recent case law. Such express provision for counterclaims has the effect of removing any doubt that tribunals may hear these claims.¹⁷ Combined with explicit substantive provisions on human rights and environmental protection in IIAs, a firm legal basis is emerging to hold corporations accountable for violations of non-investment concerns.¹⁸

Related Developments on Business and Human Rights

The abovementioned developments are occurring as an intergovernmental working group has been mandated to “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” in the form of a treaty on business and human rights.¹⁹ That said, the most recent draft suggests there will be no direct corporate human rights obligations under the treaty. There is, however, a preambular reference that “... all business enterprises ... shall respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur”. The substantive provisions

¹⁶ See, for example, Article 9, Investment Cooperation and Facilitation Agreement between Brazil and Malawi, 25 June 2016; Article 16, Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, 9 January 2013.

¹⁷ Article 28(9), COMESA Investment Agreement provides a clear example and sets out that “a Member State against whom a claim is brought by a COMESA investor ... may assert as a defense, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations ...”. Articles 19 and 29(19), SADC Model BIT make similar provision, as does Article 43, Draft Pan-African Investment Code.

¹⁸ Markus Krajewski, ‘Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice’, 15 April 2018, <https://ssrn.com/abstract=3133529>.

¹⁹ UN Human Rights Council, Resolution 26/9 (2014), para. 1.

of the treaty do encourage the strengthening of corporate liability under domestic law, including through procedural mechanisms.

Further, General Comment No. 24 of the Committee on Social, Economic and Cultural Rights was published in August 2017 on State obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the context of business activities.²⁰ In it the Committee directs that states consider whether any obligations under investment treaties they may enter into would conflict with those they are committed to under the ICESCR, and should refrain from joining such treaties where they find that there may indeed be a conflict. Moreover, it encourages states to conduct human rights impact assessments prior to entering into investment agreements and to insert provisions that explicitly refer to their human rights commitments and that investor-state dispute settlement mechanisms can take human rights into consideration when they interpret the provisions of investment treaties.²¹

Further still, the Hague Rules on Business and Human Rights Arbitration are, at the time of writing, out for public consultation and due for final publication on 10 December 2019. Taking the UNCITRAL Arbitration Rules as a starting point, the Hague Rules have adapted the former to be more tailored to the matters that may be faced in business and human rights disputes.²² They address, for example, giving an arbitral tribunal more power over interim measures,²³ more appropriate evidentiary procedures,²⁴ strengthening transparency and third-party participation,²⁵ as well as provision for remedies that are better suited for business and human rights disputes.²⁶

Human Rights and Environmental Issues in the Jurisprudence of Investment Tribunals

²⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, 10 August 2017, E/C.12/GC/24.

²¹ *Ibid.*, para 13.

²² Draft Hague Rules on Business and Rights Arbitration, <https://www.cilc.nl/cms/wp-content/uploads/2019/06/Draft-BHR-Rules-Final-version-for-Public-consultation.pdf>.

²³ Article 26, *ibid.*

²⁴ Articles 27, 28 and 30(3), *ibid.*

²⁵ Articles 24 *bis* and 33-38, *ibid.*

²⁶ Article 40, *ibid.*

Human Rights in Investor-State Dispute Settlement

*Urbaser v. Argentina*²⁷ was the first case in which an investment tribunal accepted jurisdiction over a counterclaim on human rights. In that case, the Tribunal determined that there was a sufficient factual connection between the initial claim and the counterclaim.²⁸ This is a much more liberal approach than has been taken in previous awards, which have required a legal connection between the claim and counterclaim.²⁹ Moreover, the Tribunal in *Urbaser* rejected the argument that it could not accept jurisdiction for a human rights claim.³⁰

During the merits, the Tribunal was of the view that the BIT at issue did not constitute a ‘closed system’.³¹ As a result, the state was entitled to invoke legal obligations beyond the treaty. The Tribunal also rejected the argument that the Claimant, being a non-state entity, could not be bound by human rights obligations. The Tribunal emphasized that human rights and labour standards were applicable to public and private actors, although it seemed to suggest that the character of commitment may be different for public and private actors respectively.

Interestingly, 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”.³² It also said that it can “no longer be admitted that companies operating internationally are immune from becoming subjects of international law”, although it cautioned that certain soft law instruments were not “on their own sufficient to oblige corporations to put their policies in line with human rights law”.³³ The Tribunal referred to the Universal Declaration of Human Rights as well as the International Covenant on Economic, Social and

²⁷ *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, Award, ICSID Case No. ARB/07/26, 8 December 2016.

²⁸ *Ibid.*, para 1151.

²⁹ See, for example, *Saluka Investments BV v. The Czech Republic*, Decision on Jurisdiction over the Czech Republic’s Counterclaim, UNCITRAL, 7 May 2004.

³⁰ *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, Award, ICSID Case No. ARB/07/26, 8 December 2016, para. 1154.

³¹ *Ibid.*, para. 1191.

³² *Ibid.*, para. 1195.

³³ *Ibid.*

Cultural Rights and the ILO's Tripartite Declaration of Principles in explaining that they should be taken into consideration through Article 31(3)(c) VCLT in the interpretation of the BIT.³⁴

The Tribunal went on to explain that, as regards the right to water, it “entails an obligation of compliance on the part of the state, but it does not contain an obligation for performance on part of any company providing a contractually required service”.³⁵ Such an obligation was, according to the Tribunal, “distinct from the state’s responsibility to serve its population with drinking water and sewage services”.³⁶ Unless there is domestic provision for this kind of obligation, the Tribunal ultimately considered that ensuring the right to water is not incumbent upon corporations. As such, in this case, there was no obligation regarding the right to water for Urbaser.

In the 2017 award *Bear Creek v. Peru*, a tribunal decided that Peru had indirectly expropriated the investment of a Canadian mining company by revoking a licence granted to them as they sought to operate a silver mine in Peru.³⁷ However, in his partial dissenting opinion, Arbitrator Philippe Sands observed that the investor’s behaviour in causing social unrest among local communities should have been accounted for in the calculation of compensation. Having reference to ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, Sands was of the view that “the fact that the Convention may not impose obligations directly on a private foreign investor as such does not, however, mean that it is without significance or legal effects for them”.³⁸ Referring to the *Urbaser* tribunal’s engagement with human rights considerations, Sands noted “[t]he same considerations apply in the present case in relation to the requirements of the ILO Convention 169, and in particular its Article 15 on consultation requirements”.³⁹ For Sands, the investor had not obtained a social licence to operate as it failed to consult with the local population and establish trust. As a result, he opined that the damages awarded to Bear Creek should be mitigated in light of its contributory fault.

³⁴ *Ibid.*, paras 1198, 1200-1203. For an insightful analysis of the Tribunal’s reasoning on this point, see Eric de Brabandere, ‘Human Rights and Foreign Direct Investment’, in Markus Krajewski and Rhea Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar, 2018).

³⁵ *Ibid.*, para. 1208.

³⁶ *Ibid.*

³⁷ *Bear Creek Mining v. Peru*, Award, ICSID Case No. ARB/14/21, 30 November 2017.

³⁸ *Ibid.*, Partial Dissenting Opinion of Philippe Sands, para. 10.

³⁹ *Ibid.*, para 11.

This case did not involve a counterclaim but nevertheless brings into sharp focus that corporations are under increasing scrutiny as far as their compliance with international human rights norms are concerned.

Environmental Protection in Investor-State Dispute Settlement

Counterclaims have been used by states in connection with environmental obligations as they have been with matters involving human rights, and have led to the award of compensation for environmental damage in a number of cases. In fact, more broadly, the last few years has seen a marked trend in the award of such compensation.⁴⁰ In *Burlington Resources v. Ecuador*, an ICSID tribunal ordered the payment of \$41 million in compensation for environmental damage caused by the Claimant, following Ecuador's counterclaim to enforce certain environmental obligations.⁴¹ It did so on the basis of Ecuadorian national law but the approach adopted by the Tribunal is, nevertheless, of note. In particular, the Tribunal assessed the harm caused and reparation cost at each of the sites in the oil field exploited by the Claimant and even made site visits.

In a separate but connected case, *Perenco v. Ecuador*,⁴² Ecuador argued through a counterclaim that the Claimant had caused environmental damage in the amount of \$3 billion by polluting parts of the Amazon rainforest. The Tribunal observed that “[p]roper environmental stewardship has assumed great importance in today’s world” and “that if a legal relationship between an investor and the State permits the filing of a claim by the State for environmental

⁴⁰ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (Compensation)*, ICJ General List No. 150, 2 February 2018; *Burlington Resources v. Ecuador*, Decision on Ecuador's Counterclaim, ICSID Case No. ARB/08/5, 7 February 2017; *Perenco v. Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, Interim Decision on the Environmental Counterclaim, ICSID Case No. ARB/08/6, 11 August 2015.

⁴¹ *Burlington Resources v. Ecuador*, Decision on Ecuador's Counterclaim, ICSID Case No. ARB/08/5, 7 February 2017.

⁴² *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, Interim Decision on the Environmental Counterclaim, ICSID Case No. ARB/08/6, 11 August 2015.

damage caused by the investor’s activities and such a claim is substantiated, the State is entitled to full reparation”.⁴³

Recognizing the difficulty in appraising the value of such damage and criticizing the testimony of the parties’ experts, the Tribunal in that case appointed its own independent environmental expert to assist with the task.⁴⁴ Having reviewed all of the evidence put forward by the parties and the Tribunal-appointed expert, the Tribunal was of the view that Perenco would likely be liable for causing environmental damage. As such, in its Interim Decision, the Tribunal declined to decide the specific aspects of the counterclaim but suggested it would do so in the final decision.

In *David Aven et al v. Costa Rica*, a tribunal found that the Claimants had breached environmental laws in Costa Rica and that Costa Rica had justifiably interfered with a tourism project investment on the grounds of environmental protection.⁴⁵ The Tribunal was of the view that Costa Rica did not act in an arbitrary way and had not violated the DR-CAFTA. The Claimants had damaged the environment and Costa Rica had acted to protect the wetland at risk. Moreover, the Tribunal went on to find that counterclaims for environmental damage could be established under the DR-CAFTA but ultimately rejected Costa Rica's counterclaim for procedural reasons.

The Tribunal noted that “environmental law is integrated in many ways to international law, including DR-CAFTA”⁴⁶ and that while it was for states to implement appropriate environmental law, foreign investors were also subject to particular obligations in relation to the environment as set out under the treaty at hand and international law. Moreover, the DR-CAFTA provides that investors are under an obligation to comply with measures taken at the national level for environmental protection.⁴⁷

Concluding Remarks

⁴³ *Ibid.*, para. 34.

⁴⁴ *Ibid.*, para. 587.

⁴⁵ *David Aven et al v. Costa Rica*, Award, DR-CAFTA Case No. UNCT/15/3, 18 September 2018.

⁴⁶ *Ibid.*, para. 737.

⁴⁷ *Ibid.*, para. 739.

These developments in the investment protection framework suggest a greater appreciation for human rights and environmental matters in investor-state arbitration. The recent jurisprudence highlights how such norms may be taken into account, as well as signalling gaps that remain to be filled. For example, despite their recent appearance in a number of cases, uncertainties persist around the practice of counterclaims. Whether these need to be explicitly provided for in a treaty and the extent to which the counterclaim should be connected to the principal claim are matters that need to be clarified. This is the reason that their explicit provision in international investment instruments, as has been the case with the COMESA Investment Agreement, the SADC Model BIT and the Draft Pan-African Investment Code for example, helps to bring clarity for states and investors alike.

In a similar way, treaties having human rights and environmental obligations for investors is the most promising way to allow investment tribunals to consider such matters. Other avenues may be through domestic law or contractual obligations that become internationalized via an IIA's legality requirements or applicable law clause and the VCLT's systemic integration provision.⁴⁸

While the practice remains in its early stages and somewhat sporadic, the combination of explicit treaty provisions on human rights and the environment, evolving business and human rights instruments, the use of counterclaims, and tools for the calculation of environmental damage all seem to be potentially effective emulgators for mixing investment and non-investment issues. It will now be for law-makers and tribunals to perfect the emulsion.

⁴⁸ de Brabandere, 'Human Rights and Foreign Direct Investment', *op. cit.*