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Carving Out a Role for Human Rights in International Investment Law

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The public health burdens that have been imposed on governments by Covid-19 serve as an important reminder of the importance for states to be able to regulate public health as well as other human rights issues. Commentators are already describing the myriad of investment arbitration claims that states may expect to face for their acts in handling the Covid-19 crisis. By carving out a role for human rights in international investment law, states can ensure that protection of human dignity, not property interests, will continue to be their ultimate objective.

Introduction

The public health burdens that have been imposed on governments by Covid-19 serve as an important reminder of the importance for states to be able to regulate public health as well as other human rights issues. Certainly, the right of states to protect their nationals' human rights is underscored in the United Nations (UN) Declaration of Human Rights as well as in other international human rights [instruments](#). Yet at the same time, whereas these instruments stress the importance for states to protect human dignity, many states are also party to international investment agreements (IIAs), which stress the need for states to protect property, namely foreign investment. This can lead to [conflicts](#) of law when a state's IIA obligations impinge, narrow, or constrain state obligations to protect human rights.

Commentators are already describing the myriad of investment arbitration claims that states may expect to face for their acts in handling the Covid-19 crisis. As one commentator has noted, states should be [mindful](#) in enacting measures to address the health repercussions of Covid-19 since, in doing so, they risk being in breach of their IIA obligations. Another has helpfully provided a list of [defenses](#) states can rely upon to overcome any potential IIA breaches. Yet what is clear is that states must tread a careful path in protecting public health in light of their IIA obligations since, as one scholar has [aptly noted](#), the protection of foreign investment is well-delineated as the rule, while human rights protection tends to be treated as the exception.

We already know that Covid-19 is having a disproportionate [impact](#) on the most vulnerable persons and the extant problems of IIAs may be exacerbating the human rights implications of the global pandemic. At a time where states have to make difficult decisions, that will inevitably harm economic goals of foreign investors, in order to save the lives of its nationals, the inherent flaws of the [IIAs regime](#) become clearer and we are reminded that the time for reforming international investment law to better account for human rights is long overdue.

It may be too late to ensure states are safely protected from their IIA obligations in order to preserve their public health regulatory functions in relation to Covid-19. However, with scientists predicting [further](#) pandemics in the future, and states continuing to need to protect their peoples' human rights, it is a prudent time to envision how international investment law could forge a future in which human rights is not treated as an exception but as part of the rules.

References

One method for including a broader rule for human rights in IIAs is to include references to it, for instance, in a preamble or objective. The [preamble](#) to the Cape Verde-Hungary bilateral investment treaty (BIT) stipulates, for example, that the agreement seeks “to ensure that investment is consistent with ... the promotion and protection of internationally and domestically recognised human rights”. References to human rights in IIAs could also relate to state commitments not to lower human rights standards to encourage investment or by prescribing the state's right to regulate measures relating to human rights. These references to human rights do not create any human rights obligations, per se, but they may be useful in guiding interpretations of other provisions of the treaty.

Human rights can also be included in IIAs as exception provisions. Borrowing from the General Agreement on Tariffs and Trade (GATT) [article XX](#) language, some [treaties](#) exempt the host state from its IIA obligations in order to protect human, animal or plant life or health or to protect public security, public morals or to maintain public order. Other IIAs create more specific exemptions, such as the Egypt-Mauritius [BIT](#), which provides that nothing in the Agreement shall prevent the state parties from taking measures to fulfill its obligations to protect public health.

Some states are taking an even more proactive approach by carving out human rights regulation entirely from certain standards of treatment. The Association of Southeast Asian Nations ([ASEAN](#)) - [India Investment Agreement](#), for instance, provides that measures taken by a state party to pursue a legitimate public purpose, including the protection of public health, will not be considered a violation of national treatment obligations. Inclusion of this type of language removes a state's bona fide health regulations entirely from the scope of its national treatment obligations under an IIA (see, for instance, the [Morocco-Nigeria BIT](#)). The [China-Australia free trade agreement \(FTA\)](#) goes even further by removing all measures for legitimate public welfare objectives – including public health, public morals, and the environment – from the scope of investment arbitration altogether. However, the arbitration of these issues is allowed if the issues are accepted as discriminatory.

The China-Australia FTA approach is particularly noteworthy because it not only exempts all human rights-oriented regulation from investment arbitration, but it takes an even-handed approach in doing so. More specifically, it builds in a protection device to ensure that states cannot rely on such a provision as a guise for protectionism or for other non-legitimate purposes, thereby discouraging state abuse of such a provision. It does this by enabling foreign investors to challenge the bona fides of a state's human rights regulation to a panel of host state parties acting jointly. If after 120 days from the request of consultation, there is no determination by the panel, the claimant can bring the claim to arbitration. In this way, it strikes a reasonable balance between protecting the interests of foreign investors and preserving a state's right to regulate human rights.

Investor Obligations

A second approach to including human rights in IIAs is to introduce human rights obligations for foreign investors. The state's need to regulate human rights issues may become less cogent in instances where the foreign investor is independently encouraged to respect human rights. Some IIAs have already introduced such obligations for investors although the approaches used are very different.

One [set](#) of IIAs, for example, takes a soft approach, only recommending that states encourage foreign investors to voluntarily incorporate human rights responsibility. This approach neither obliges state parties to regulate foreign investors nor mandates foreign investors to respect human rights.

A second set of IIAs have introduced more stringent investor obligations. These can require, for example, foreign investors to develop "[best efforts](#)" to respect human rights. Such an approach confirms that foreign investors have human rights responsibilities but enable them to self-regulate how they and their investments will comply with such responsibilities.

A third set of IIAs have taken an even more stringent approach, introducing binding legal obligations for foreign investors. The [Morocco-Nigeria BIT](#), for example, specifies that investors shall uphold human rights in the host state, act in accordance with core labor standards, and not manage or operate investments in a manner that circumvents international environmental, labor and human rights obligations. Similarly, the Economic Community of Western African States ([ECOWAS](#)) Supplementary Act on Common Investment Rules for the Community stipulates that investors shall uphold human rights in the workplace and in the community and shall manage and operate their investments without breaching or circumventing human rights.

Counterclaims and Enforcing Investor Obligations

To ensure that investors comply with their obligations, states should further include some element of enforceability for these obligations. One method of doing so is to specifically provide for counterclaims in IIAs. Counterclaims are new claims, separate from the principal claim, which are linked to the principal claim and investor obligations could act as the basis for a counterclaim. Some tribunals have even already held that investor obligations for human rights or the environment can be the proper basis of a counterclaim. In [Urbaser v. Argentina](#), for instance, the

tribunal accepted the state's counterclaim that the investor bore an obligation to guarantee the human right to water. Similarly, in [Aven v. Costa Rica](#), the tribunal recognized the state's counterclaim that the works undertaken by the investor "caused considerable environmental damage" which they should repair and restore. Moreover, in the related cases of [Burlington Resources Inc. v. Ecuador](#) and [Perenco v. Ecuador](#), Ecuador counterclaimed against the investors alleging that they had breached environmental obligations. The tribunals in both cases agreed with Ecuador's counterclaims, awarding damages in excess of USD 40 million and 50 million, respectively. However, the tribunals also accepted the investors' claims and awarded them \$379.80 million and \$416.50 million, respectively.

Apart from counterclaims, states can also include specific provisions that enforce investor obligations for human rights. For instance, some treaties stipulate that home states can hold investors civilly liable for any acts relating to their investment in the host state that causes significant damage, injuries or loss of life. In the [Netherlands Model BIT](#), "[a]s part of their duty to protect against business-related human rights abuse, the Contracting Parties must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy". [Others](#) provide that if the host state "suffers from a loss, destruction of damages with regard to its public health or life" then the foreign investor must provide the host state with adequate and effective compensation. Still others enforce investors' human rights obligations by [denying](#) them access to arbitration in case of a violation or [accounting](#) for the human rights violation when calculating damages for any arbitral claims made by the investor.

Independent Experts

One final suggestion for including a broader role for human rights in international investment law is to include more human rights expertise at the arbitration stage. It is not difficult to see why tribunals – often staffed with commercial lawyers who may not be well versed in public international law – struggle with treating issues of human rights when they intersect with foreign investment. Including *amicus curiae* with human rights expertise is one possibility for better informing tribunals of relevant human rights issue. However, at present, amicus is granted only limited participation rights. Consequently, their expertise would only be meaningful if their participation rights were enlarged, and they were given access to evidence.

Alternatively, tribunals could appoint their own independent experts (selected from a state-appointed list) to assist them in understanding human rights issues. Experts could, for instance, assist the tribunal with evaluating scientific evidence, determine the socio-economic impacts of a measure, or help the tribunal determine whether a particular measure is oriented towards a legitimate public welfare objective. Their role would be thus to ensure that proper consideration is given by the tribunal to human rights issues.

Some arbitral rules, such as the United Nations Commission on International Trade Law ([UNCITRAL Arbitration Rules](#)) or the [Permanent Court of Arbitration Optional Rules](#), already provide for appointment of independent experts. Building on this practice, states could similarly include in IIAs a requirement that in investment arbitrations involving issues of human rights, tribunals must seek the assistance of an independent human rights expert.

Conclusion

IAs were concluded by states to protect foreign investment in exchange for the promotion of economic development. In today's parlance, such development is better conceptualized as [sustainable development](#). The Covid-19 crisis reminds us that any deviation from a state meeting its sustainable development goals, including the protection of public health and other human rights, is not only a threat to the state but to the world at large.

Protecting foreign investment is one means of a state meeting its sustainable development objectives. However, it should not be an end in and of itself. By carving out a role for human rights in international investment law, states can ensure that protection of human dignity, not property interests, will continue to be their ultimate objective.

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This essay is based on a talk given at the United Nations Business and Human Rights Forum in November 2020 and on two of her previous articles: "[International Investment Law and Non-Economic Issues](#)", *Vanderbilt Journal of Transnational Law*, vol. 53, No. 1 (January 2020) and "[Investor Obligations for Human Rights](#)", *ICSID Review - Foreign Investment Law Journal*, vol. 35, Issue 1-2 (Winter/Spring 2020).

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