Conflict and Integration Between Investment Rules and Human Rights Obligations

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Abstract. Human development difficulties are becoming more and more significant. Tensions have also increased in the interaction between investor interests and the rights of citizens in host nations. However, because there is no established process to address human rights concerns, arbitral tribunals or courts are unable to render impartial decisions. The history of human-right requirements in international investment will be revisited in this essay, along with the ways in which they contradict with investment laws. The potential legal ramifications from both the content and procedural perspectives, as well as the arbitral tribunal's perspective on the application of human rights law, will all be covered in this article. These findings offer a theoretical framework and foundation on which the host countries can base their human rights arguments. These results provide a theoretical framework and basis for host countries to raise human rights defenses or counterclaims. Most importantly, this can also make investors aware of the importance of complying with corporate social responsibilities and then enable them to make rational investment decisions. Respecting the human rights of the people in the host country is conducive to the sustainable development of foreign investment.

Keywords: Investment rules; human-right obligation; arbitration; human-right counterclaim; jurisdiction.

1. Introduction

International investment activities have had some negative impacts on host states, which has aroused widespread social concern. Generally, the host state is willing to conclude bilateral investment treaty (BIT) for reasons such as economic development, and BIT is considered an obligation or commitment of the country. BITs were created for the purpose of protecting investors, but gradually moved towards excessive compensation. Although the measures stipulated by the BIT are reasonable, they are inherently unbalanced, especially after the dispute is submitted to the arbitration stage. For example, countries generally cannot raise their own claims at the place of arbitration, and regulations related to countries are strictly interpreted [1]. Investment arbitration, as a dispute resolution mechanism, is often used by investors as a tool that can prompt the state to make major adjustments to the regulatory framework that are beneficial to investors [2].

However, it is the responsibility of states to uphold the human rights of all individuals within their territory. States' implementation of public interest measures may affect the interests of foreign investors. Therefore, certain nations may assert human rights defenses or even counterclaims in response to foreign investors' claims. International litigation and arbitration are often initiated by claims of discriminatory or uncompensated expropriations based on human rights arguments. Moreover, investment areas where conflicts arise on human rights issues are generally related to the public interests of the host country, such as water supply, power supply, mining and so on. Human rights and investment protection standards cover both competition rights and commercial concessions, with human rights treaties protecting resource claims made by those harmed by extractive enterprises [3].

In the past cases accepted by the International Center for Settlement of Investment Disputes (ICSID), the arbitral tribunal seems to adopt a passive and cautious attitude towards claims involving human rights. The arbitral tribunal found that the conflict between investment treaty obligations and human rights obligations was not sufficiently demonstrated, or that it did not have jurisdiction over the dispute [4]. It is worth mentioning that there are also some cases that positively responded to the

attitude of the arbitral tribunal. The tribunal found that Argentina's amendments to water concession agreements during the financial crisis violated the FET and amounted to expropriation in Saur International v. Argentina. The panel determined that Argentina's commitments under investment treaties and human rights laws are not always at odds with one another or incompatible [5]. Therefore, courts and arbitral tribunals attempt to pursue a balanced application of both and do not feel that human rights laws should predominate international investment. There are disparities and overlaps between the two legal systems, and there is no ideal procedure to reconcile their inconsistencies, so the arbitral tribunal and the court will still have to make difficult choices.

In order to analyze the contradictions between investment laws and human rights requirements and potential remedies, this essay will first discuss the substantive and procedural concerns regarding human rights obligations in investment arbitration.

2. Substantive Issues

2.1. Human Rights Obligations in International Investment

2.1.1 The human rights obligations of host state

Theoretically, international law can support host states to adopt protection measures. However, it is the duty of nations to stop corporate and other non-state actors from violating human rights and to act remedially when they do [6]. However, human rights elements are typically absent from bilateral and international investment agreements [6]. The rationale is that international human rights law and international investment law are sometimes regarded as two different legal disciplines. International investment law typically weakens or ignores human rights that are a component of the broader international legal system and instead employs the lex specialis to build its own regulatory mechanisms [2]. In addition, the arbitral tribunal tends to give priority to the investment agreement reached between the host country and the investor's home country. In principle, the arbitral tribunal only deals with the demands of investors, and has no right to deal with human rights disputes arising from investment activities.

It is very apparent that the FET has been interpreted in an expanded manner, which imposes greater obligations on the host state, so that it may hinder the rules that the host state wants to introduce and implement, including international human rights obligations [7]. However, there are objections to this interpretation in some cases. For example, in *Continental Casualty Property v Argentine Republic Award*, the claimant contends that the currency system was completely overturned following the issuance of Argentina's legislation and contractual commitments. The tribunal found it unreasonable to require a country to remain unchanged in any crisis situation. Foreign investors should not rely on the implication of stability in the preamble of the BIT [8].

The contrary conclusion of the arbitral tribunal seems to mean that "Legitimate Expectations" lack a clear connotation. The arbitral tribunal only uses a results-oriented approach to judge whether FET protects investors or invests. There is an argument to be made that FET should be defined as a common standard of conduct adopted by states related to their corporate citizenship investments, which would require contracting states to use all reasonable means to demonstrate that they intend to achieve the desired outcomes. This definition makes FET more biased toward protecting investments than investors [9].

Take the *Urbaser* award, a typical case was investment rules conflict with human rights obligations, for example. Argentina terminated the water concession granted to the claimant for breach of contract and impact on residents' water rights. Indeed, the tribunal recognized that Argentina's human rights obligations should be considered part of the framework for determining legitimate expectations, but did not refer to it again in the subsequent analysis, arguing instead that the respondent had Provides claimants with transparent treatment, thereby violating FET [10]. In this case, if the tribunal returned to the analysis of water rights, it could examine whether Argentina acted to protect its investment. Argentina can demonstrate that it has not violated the FET by demonstrating a reasonable link

between its obligation to gradually realize residents' water rights and the termination of the concession [11].

2.1.2. The human rights obligations of investors

There is no doubt that countries need to fulfill their human rights obligations. So the question is whether investors should comply with certain human rights obligations when making investments? The answer is unclear.Investors are generally not considered to be subjects of international law, so international human rights law cannot directly impose human rights obligations on investors. Exceptions are made when all States can be considered to have a legitimate interest in protecting these rights.

As stated in the *Urbaser* award, it is possible to construct investor obligations in domestic law. Some tribunals have also held that investors must comply with the laws of the host state, even if this is not expressly stated in the investment treaty [12]. Parties to an investment contract can also decide to exclude health, safety and environmental regulations from the scope of the stabilization clause to allow the host state to regulate these aspects, which is a more effective way to resolve disputes [13].

Of course, it is most common to directly incorporate human rights rules into investment treaties.Today, more BITs as well as FTAs include provisions on human rights, mostly environmental and labor rights.Among them, some BITs contain “Non-lowering of standards” provisions, with the purpose of avoiding lowering human rights standards and attracting foreign investment, such as Canada-Mongolia BIT (2016), Georgia-Switzerland BIT (2014). Moreover, Article 14 of the Canada-Mongolia BIT (2016) also stipulates “Corporate Social Responsibility” [14]. Most investment treaties do not explicitly refer to international human rights rules, but only to concepts such as human health, human life, environmental protection and public welfare. However, relying solely on these broad human rights concepts cannot form the basis for the application of international human rights law [15].

2.2. Methods of Treaty Interpretation

Overall, human rights law rarely applies directly to foreign investment. But international human rights law is actually the broadest type of international law, which is one of the legal frameworks governing international investment disputes.

In addition to the parties' choice of applicable law, human rights law plays an important role in the interpretation of international investment agreements. The tribunal recognizes the inviolability of these human rights and that BITs should be interpreted in a manner consistent with other rules of international law [10]. This method of interpretation does not mean that any supervisory behavior of the host country towards investors is reasonable. The principle states that the challenged measures need to be taken in good faith and non-discriminatoryly. In the *Philip Morris*, Uruguay's measures were deemed "effective means to protecting public health" and were proportionate to the damage suffered by Abal's business. Facts have proved that Uruguay's measures have indeed controlled the number of smokers and achieved public health goal [16]. In this award, the arbitral tribunal took into account the principle of proportionality when judging whether Uruguay’s conduct constituted indirect expropriation.

2.3. Contributory Fault

The concept of "Contributory Fault" may also be recognized by the arbitral tribunal without mentioning the ILC Articles on State Responsibility. In *RosInvest v. Russia*, the tribunal found Yukos was at fault for the damage to his property. Although this negligence is not enough to lead to its own bankruptcy, they cannot change the conclusion that the respondent violated the IPPA agreement. But this should still be taken into account when calculating the amount [17].

The relatively important question in these cases is whether the claimant's negligent conduct was sufficiently causally related to the injury. In *Copper Mesa,* the arbitral tribunal concluded that the principle of causation, contributory fault, and 'unclean hands' are essentially the same [18]. Whether

or not the arbitral tribunal is correct in lumping these defenses into one matter, it is certain that the arbitral tribunal will consider the conduct of the investor in the various proceedings of the arbitration. And the *Bear Creek* can provide some useful guidance when analyzing whether there is a causal relationship. The dissenting judge Philippe Sands demonstrated how human rights obligations under the ILO Convention were incorporated into FTA. Sands states that the ILO Convention should be regarded as 'an applicable rule of international law'.According to the majority opinion, private investors do not have direct human rights obligations imposed by the ILO Convention. However, Bear Creek failed to fulfill the soft obligations imposed by the Convention. It means that it failed to implement the consultation framework established by the country to safeguard Aymara's human rights. The investor should take into account the requirements of relevant laws and realize the importance of consultation with local people. It is Bear Creek's own fault for not getting a "social license". In his analysis, he cited the decision in *Ubaser v. Argentina,* which stated that all parties are required to refrain from activities that aim to destroy human rights [19]. Although causation is established, the specific amount of compensation remains at the discretion of the arbitral tribunal.

3. Procedural issues

3.1. Jurisdiction Issues

To have jurisdiction over a dispute, an arbitral tribunal must prove that the claim is based on a breach of an investment treaty obligation. Human rights issues are often related to investment protection standards, so arbitral tribunals may have jurisdiction over cases involving such legal issues.

Issues of jurisdiction are more likely to arise in cases of human rights abuses by investors. In *Phoenix Action v The Czech Republic*, the arbitral tribunal emphasized that there is no suggestion that ICSID protection should be granted to investments that violate the most fundamental rules of protecting human rights. For example, such extreme examples as investment in pursuit of torture and murder should obviously not be protected. ICSID arbitration was to protect legal and *bona fide* investments [20]. An investment that is not protected by an investment treaty is not an "investment". Without investment, the arbitral tribunal lacks jurisdiction ratione materiae.

Despite the arbitration clause being broad enough to cover human rights claims, it could still be restricted to commercial contract disputes. For example, in *Biloune and Marine Drive Complex Ltd. v. Ghana*, under Ghana's Investment Code, the government agrees to only arbitrate disputes "in respect of" foreign investments. Even if a Syrian investor is forcibly detained by state security, it is not within the jurisdiction of the tribunal [21].

In short, the conflict between human rights norms and investment rules should be resolved at the substantive stage, and there is no need to ignore it at the jurisdictional stage.

3.2. Human Rights Counterclaim

In fact, investors prefer to resort to arbitration rather than the courts of the host country. As mentioned earlier, the parties to the dispute in investment arbitration are not equal, so it is very rare for the host country to lodge a counterclaim. And investment treaties frequently entail responsibilities for the state, not the investor. Therefore, investment agreements also lack provisions for consent to counterclaims by the host state, and rarely include substantive rights enforceable by the state [22].

The first thing that needs to be proven as "consent" is the subject of the counterclaim. Disputes often arise over whether the broad formulation of the dispute resolution clause represents the parties' acceptance of human rights counterclaim jurisdiction [10]. There are also some investment agreements that stipulate that consent is limited to disputes arising from violations of international investment treaty obligations by the host state, excluding human rights counterclaims.Another procedural obstacle encountered by counterclaims is the arbitrability of state counterclaims. There is a view that a sufficiently broad dispute resolution clause can be interpreted as granting the host country the right to initiate arbitration. Although arbitral tribunals tend to interpret human rights

counterclaims broadly, they are sometimes embarrassed to deal with public law issues. This would raise concerns about the distribution of power between domestic courts and international tribunals.

Furthermore, the International Court of Justice believes that the main claim and the counterclaim should have sufficient connection. This is to enable the court to fully understand the claims of the parties and make a more consistent ruling. Therefore, establishing a factual link need only be based on a common factual basis. But how human rights counterclaims can establish a "juridical connection" with investment treaty obligations requires further analysis.

4. Conclusion

Overall, the situation that this essay focuses on trying to solve is: when a host country adopts certain human rights regulatory measures against investors, the investor then submits the dispute to an arbitral tribunal or court, especially to the former. Because the host state is in a disadvantaged position in investment arbitration, arbitral tribunals can only consider human rights issues to a limited extent. This structural unreasonableness is actually fair because investment arbitration itself is designed to protect investors. According to what has been discussed above, human rights claims raised by host countries are likely to face substantive and procedural obstacles.

This article believes that the biggest difficulty is that the source of "human rights obligations" is not clear. This is a relatively broad and unrealistic concept, which can cause difficulties in application. Therefore, this article will classify human rights obligations according to the two subjects of host countries and investors. It also discusses when they arise and which parts of the investment rules they conflict with.

Another aspect is there is a new trend in international investment agreements (IIA) currently. For example, environment is rarely mentioned in BIT, but it is more common in non-BIT IIA. Most BITs will emphasize this in their preamble to make investors aware of the human rights issues that may be involved in their investments. The content of the preamble may also play a role in interpreting treaty obligations. In addition, investment treaties may also provide for state regulatory powers or corporate social responsibilities.

Investment treaties are unlikely to introduce many investor obligations, especially human rights obligations. Because of the lack of clear provisions, the conflict between investment rules and human rights obligations depends on the interpretation of international investment treaties. The analysis of this article is based on the provisions of common international investment treaties and analyzes the attitude of arbitral tribunals towards the application of human rights law.

Finally, human rights claims also face procedural hurdles, such as jurisdiction.And the arbitral tribunal should allow the host country to lodge a human rights counterclaim to better protect the human rights of the local people. What is more certain is that human rights counterclaims should be limited to prevent host countries from abusing them. Of course, the human rights counterclaim encounters additional difficulties because it establishes the investor's obligations.

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