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Could BITs and BATs be combined to ensure access to human rights remedies?*

by
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The United Nations Guiding Principles on Business and Human Rights (UNGPs) restate the obligation of governments to ensure, through judicial, administrative, legislative, or other means that, when human rights abuses occur in the context of business activities within their territory, the victims of such abuses have access to effective remedies.¹

The UNGPs build upon an earlier policy framework comprising the following so-called “pillars”: (a) countries are obliged to protect human rights, including against business-related abuse; (b) business enterprises have a responsibility to respect human rights; and (c) victims of business-related human rights abuses must have access effective remedies.²

Whilst countries and businesses have made some progress toward implementing the UNGPs, victims of human rights abuses still face significant obstacles in gaining access to effective remedies. One notable exception has been the Accord on Fire and Building Safety in Bangladesh of May 2013 (Accord),³ an agreement between global brands and trade unions that requires brands to provide a means of redress in the event of a breach of the Accord. In 2016, two labor unions commenced arbitrations under the Accord against two global fashion brands. The arbitrations, which were administered by the Permanent Court of Arbitration (PCA) and heard by an ad hoc tribunal, were settled in recent months on favorable terms.⁴

How then can countries replicate in an investment context the success achieved under the Accord and require investors to provide an effective means of redress for human rights abuses, in compliance with their obligations under the UNGPs and the underlying legal framework? They may do so by revising existing bilateral investment treaties (BITs) to ensure victims can access international arbitration to resolve claims relating to investment-related human rights abuses and obtain appropriate redress.

BITs enable foreign investors to arbitrate their investment disputes with a host country without a traditional arbitration agreement contained in an underlying commercial contract (known as “arbitration without privity”⁵). This is achieved by having the host country make an open offer in a BIT to arbitrate with any foreign investor that falls within a defined category in that treaty. If a foreign investor wishes to commence arbitration, it merely has to accept the standing offer from the host country to constitute a binding arbitration agreement with the host country.

There seems to be no reason in principle why this concept of “arbitration without privity” (or constructive consent), developed in BITs, could not be utilized to enhance access to human rights remedies in future BITs. How so? By analogy with Gary Born’s innovative concept of a “bilateral arbitration treaty” (BAT).⁶ Born has proposed that, in any given BAT, two countries would provide that all of a particular category of commercial disputes between their respective nationals would be resolved—as a default mechanism—by international commercial arbitration in accordance with whichever institutional or non-institutional rules they wished.

The BAT concept could be adapted to help secure compliance with the UNGPs and the underlying legal framework by revising future BITs to:

(a) require a home country’s investors to comply with specified human rights standards in connection with their investments in the host country (a requirement that is already beginning to feature in new investment treaties); and

(b) provide that claims by a host country’s nationals relating to alleged violations of those human rights standards by the home country’s investors shall be resolved by arbitration pursuant to specified institutional (or non-institutional) rules;⁷

(c) condition the host country’s standing consent to arbitration of investor-state claims on the mechanism referenced in (b).

It is suggested that the categories of disputes referenced in (b) would not directly involve the contracting states, in consistency with the BAT concept. However, the contracting states could support human rights victims by providing for financial and/or technical support to pursue claims against foreign investors. Successful claimants ought to be entitled to appropriate reparation for injuries caused by investors, including restitution and financial compensation.

The establishment by the home country of its investors’ standing constructive consent to international arbitration for the resolution of human rights claims by host country’s nationals in connection with their investments in the host country—in consideration of host country’s standing consent to arbitration of investor-state claims—would thus contribute in an investment context to compliance with their obligations under the UNGPs by requiring investors to provide an effective means of redress for human rights abuses.

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¹ UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (New York: UN, 2011).

² UN, “Guidelines on a principle-based approach to the cooperation between the United Nations and the business sector,” (2009), available at <https://business.un.org/en/documents/5292>.

³ See, <http://bangladeshaccord.org/>.

⁴ A. Ross, “Second dispute under Bangladesh accord settles,” *Global Arbitration Review*, January 23, 2018, <https://globalarbitrationreview.com/article/1152965/second-dispute-under-bangladesh-accord-settles>.

⁵ J. Paulsson, “Arbitration without privity,” *ICSID Review - Foreign Investment Law Journal*, vol. 10 (1995), pp. 232-257.

⁶ G. Born, “BITS, BATS and butts: reflections on international dispute resolution”, available at www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/News/Documents/BITS-BATs-and-Buts.pdf.

⁷ The revised 2010 UNCITRAL Arbitration Rules could serve as suitable institutional rules, available at <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>, and the PCA could serve as an administering institution, as it did in the Accord cases.

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