Nov 11 2015

UN FORUM SERIES – Business and human rights in investment treaties: What progress?

Damiano de Felice

This post was contributed by Lorenzo Cotula, who leads the International Institute for Environment and Development's work on Legal Tools for Citizen Empowerment.

On 16-18 November, hundreds of delegates from government, business, NGOs and social movements will be in Geneva for the United Nations Forum on Business and Human Rights. The forum will provide an opportunity to take stock of progress made with implementing the Guiding Principles on Business and Human Rights.

The Guiding Principles affirm the duty of states to protect human rights in the context of business activities. As part of this duty, states must ensure that business-oriented policies are in line with human rights. International investment treaties are an important part of the legal frameworks governing cross-border investments, and the Guiding Principles provide specific guidance on these treaties.

Aligning investment treaties with the Guiding Principles also raises issues about the responsibility of business to respect human rights – another key pillar of the Guiding Principles. Indeed, investment treaties increasingly refer to standards of investor conduct, creating opportunities to integrate the Guiding Principles into a legal instrument that has legal bite.

'Policy space' for action to realise human rights

Let's start with the states' 'duty to protect'. One issue is whether overly broad investment protection standards could get in the way of public action to realise human rights.

In 2003, a report by the United Nations High Commissioner for Human Rights raised concerns that expansive interpretations of investment treaties and the often large compensation pay-outs that arbitral tribunals have awarded to investors could make it more costly and so difficult for states to honour their human rights obligations where doing so would adversely affect businesses.

Since then, potential tensions between the protection standards enshrined in investment treaties and measures relevant to realising human rights have come up in a range of settings. International arbitral tribunals have dealt with investor-state disputes where human rights where directly at stake – for example, the human right to water in relation to concessions to manage water supply systems.

International human rights courts have also looked at this issue, namely in a case where a state objected to the restitution of land claimed by indigenous people partly on the ground that the land was now owned by foreign investors protected by an investment treaty.

The Guiding Principles call on states to maintain the policy space needed to meet their human rights obligations when they conclude investment treaties (Principle 9). In 2013, the United Kingdom adopted the world's first National Action Plan (NAP) to implement the Guiding Principles.

The UK NAP calls on 'agreements facilitating investments overseas' not to 'undermine the host country's ability to meet [….] its international human rights obligations'. The UK is now reviewing its NAP, and it remains to be seen how the revised plan will address this issue.

In recent years, the balance between investment protection and policy space has formed the object of lively debates, and there have been significant shifts in investment treaty practice – though typically not in connection with human rights measures, at least explicitly.

Concerns about preserving policy space led some states to 'recalibrate' their investment treaties, while others have sought to disengage from the investment treaty regime altogether. Yet other states have taken entirely novel approaches, increasing diversity in the investment treaty landscape. For example, Brazil recently concluded treaties that look very different from conventional investment treaties.

As I argued in this article, several recalibrated standards are still to be properly tested in investor-state arbitration. So it is unclear how arbitral tribunals will interpret and apply them, and what difference the recalibrated standards will really make to

protecting policy space.

Promoting responsible investment

Let's now consider how investment treaties intersect with the responsibility of businesses to respect human rights. Investment treaties have traditionally focused on investment protection. Most treaties say little or nothing about the standards that investments must comply with.

Many commentators have called for integrating standards of responsible business conduct into investment treaties. A few investment treaties require investors and their investments to comply with all applicable laws and regulations in force in the country where the investment is made.

Depending on circumstances and approaches, these investor obligations clauses could help the state to have an investor-state dispute thrown out due to inadmissibility or lack of jurisdiction; influence the tribunal's decision on the merits of the case; or reduce the amount of compensation due to the investor.

In some arbitrations, the tribunal found that the state's conduct breached treaty standards, but violations did not warrant compensation because the investor had in turn breached a treaty clause establishing investor obligations.

Investor obligations clauses could also allow states to make counterclaims – that is, to respond to an investor's arbitration claim not only through a defence, but also through seeking damages for harm caused by the investor's illegal behaviour.

Depending on the country, an obligation to comply with national law may not be enough to ensure that internationally recognised human rights are upheld. Some recent treaties call on states to 'encourage' their investors to comply with internationally recognised standards of corporate social responsibility (CSR).

A recent survey of over 2000 investment treaties found that a growing number of treaties contain such CSR clauses. But these treaties still account for a small share of the global investment treaty stock. And while 'best efforts' CSR clauses can send a signal to investors, they are not enough to create a legally binding obligation for investors to comply with specified standards.

The survey also found that only 0.5% of the investment treaties reviewed contained explicit references to human rights. A closer look at these treaties highlights just how weak these human rights provisions can be.

Of the 10 bilateral investment treaties (BITs) and free trade agreements (FTAs) included in the survey that mention human rights, the BITs that Austria concluded with Kazakhstan and Tajikistan only refer to human rights in the preamble.

Austria's BIT with Malta merely clarifies that the state-state arbitration procedure does not exclude the application of the European Convention on Human Rights. And the Canada-Benin BIT refers to human rights in a provision whereby states 'should encourage' enterprises to voluntarily apply international CSR standards.

This is hardly the stuff that can bring about a real shift in the investment treaty regime. A look at the FTAs in the survey that contain an investment chapter and refer to human rights does not significantly change this picture.

The Model Bilateral Investment Treaty developed by the Southern African Development Community (SADC) is the clearest attempt to integrate the corporate responsibility to respect in investment treaty making. This model treaty states that 'investors and their investments have a duty to respect human rights', and that investors must manage or operate investments consistently with international human rights obligations.

But this provision is yet to feature in an actual investment treaty concluded by a SADC member state, and some legal issues would require thinking through if states were to include similar clauses in their treaties.

Protecting labour rights

Labour is perhaps the area where greatest progress has been made in integrating business and human rights concerns in investment treaties. The Guiding Principles make it clear that fundamental labour rights are human rights that businesses should respect, and states must protect.

Some recent investment treaties feature provisions dealing with labour rights, primarily in terms of the states' duty to protect. For example, some treaties reaffirm the state parties' commitment to the ILO Declaration on Fundamental Principles and Rights at Work.

Some treaties also require each state party to ensure that it will not derogate from, or fail to enforce, its labour laws as part of efforts to attract foreign investment – particularly where this would be inconsistent with the labour rights affirmed in the ILO Declaration or with other fundamental labour rights such as acceptable conditions of work.

Creating effective enforcement mechanisms for these 'non-lowering of standards' clauses is problematic. Because the provisions are not designed to benefit foreign investors, they are unlikely to be enforced through the investor-state arbitration system.

But while some investment treaties exclude these clauses from state-state arbitration, there is no reason why disputes over alleged violations of 'non-lowering of standards' provisions could not form the object of state-state arbitration.

Some treaties covering both trade and investment contain more extensive provisions on labour rights, either in a side agreement or in a chapter of the main treaty. For example, the Dominican Republic–Central America–United States Free Trade Agreement (CAFTA) includes a labour chapter that, in addition to the above provisions, also contains rules on workers' access to national law remedies for alleged violations of labour rights.

But even in these cases, there are questions about the enforceability of treaty provisions. Under the CAFTA labour chapter, for example, a state party can bring a case against another state party only for very narrowly defined violations – namely, a sustained or recurring failure to enforce domestic labour law in a manner that affects international trade.

This framing offers little safeguard, particularly in countries where national labour legislation is itself weak. Other important CAFTA provisions on labour have no effective enforcement mechanism. Also, state-state dispute settlement gives government much discretion to decide whether to bring a case.

Moving forward

Much remains to be done to meaningfully address business and human rights issues in international investment treaties. Ongoing public debates about the investment treaty regime provide an opportunity to reflect on new approaches to treaty making, and more rigorous ways to monitor progress. Next week's Forum on Business and Human Rights provides a space to take stock and think about how to advance this important agenda.

Lorenzo Cotula

Resources

- Land rights and investment treaties: Exploring the interface
- Democratising international investment law: Recent trends and lessons from experience

Lorenzo Cotula is an expert in law and development. He works on international investment law, human rights, land rights and legal issues related to "land grabbing", as well as the political economy of natural resource investments. He leads IIED's work on Legal Tools for Citizen Empowerment – a collaborative initiative to strengthen local rights and voices in natural resource investments. He has extensive experience in low-income countries in Africa and Asia.

This entry was posted in Human Rights Impact Assessments and tagged business, CSR, human rights, iied, investment, labor rights, lorenzo cotula, policy space, responsible, treaty. Bookmark the permalink.