Report from Parallel Session at UN Forum on Business and Human Rights on Monday 16 November 2015 co-organised by Allen & Overy LLP and Essex Business & Human Rights Project

Unpacking the Guiding Principles: is there a place for human rights in investment treaty arbitration?

This session posed two questions:

1) Do international investment agreements (**IIAs**) prevent States from fully implementing their duty to protect human rights under the UN Guiding Principles on Business & Human Rights (**UNGPs**), and if so what is the solution?

2) Does international arbitration provide adequate protection as a forum for the UNGPs on access to remedy? Or is a standing court more appropriate?

Introduction

Angeline Welsh (**AW**) (Counsel, International Arbitration, Allen & Overy LLP), explained how tensions between States' investment obligations and human rights obligations might both arise in investment treaty arbitration, with reference to privatisation of water services in Bolivia and Argentina. AW noted that UNGP 9 foresaw potential for conflict between the two sets of obligations, as did a group of UN experts who expressed public concern in June 2015. AW posed question 1 to the panel.

Question 1

Professor Zachary Douglas QC (**ZD**) (Matrix Chambers) explained that IIAs do not by their terms prevent States from implementing their duty to protect, as tribunals can and should interpret broadly-worded investment protection standards in IIAs, eg. fair and equitable treatment (**FET**), to give full effect to a States' duty to protect human rights. He noted that States have raised human rights in defence of their actions in only a handful of international arbitrations.

In Tara Van Ho's (**TVH**) (Essex Business & Human Rights Project) view, IIAs restrict a State's duty to protect: eg a tribunal may interpret the FET standard as requiring regulatory stability, even if it adversely impacts human rights. TVH explained that arbitral tribunals are willing to refer to human rights to define property rights and due process, but unwilling to define a State's human rights defence (with reference to *Suez, Vivendi v Argentina*[1]). TVH considered it unlikely that tribunals would interpret human rights into standards of investor protection and called for inclusion of specific human rights language in IIAs.

Ariel Meyerstein (**AM**) (US Council for International Business) explained that IIAs only constrain States to the extent that they have agreed to be bound. AM noted that, based on the facts and regulatory activity questioned by investors, a human rights defence could only plausibly be raised in a small proportion of the larger pool of investment claims. When those arguments have been made, for example in several of the Argentine water concession cases, tribunals addressed them (with varying degrees of robustness) through the lens of the 'necessity' defence under the Articles on State Responsibility. AM concluded that often States are motivated by political considerations rather than defending human rights.

Discussion / questions

AW asked whether the broad right to regulate contained in the European Commission's draft investment chapter of the Transatlantic Trade and Investment Partnership (**TTIP**) would have the effect of emasculating investor claims. AM and TVH considered that domestic judicial review mechanisms should prevent abuse

[1] *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19.

as EU and US legal systems contained sufficient protection to prevent State abuse, but ZD raised concerns that the independence of national judges from the executive is uneven across the EU, and that many foreigners continue to fear the costs and uncertainties associated with civil jury trials in the US.

A session attendee suggested that the focus should be on the human rights impacts of State action, rather than States' motives. AM responded that even if there are legitimate public policy objectives in mind, there are always appropriate and inappropriate ways to regulate, i.e. through the rule of law and in a transparent, non-arbitrary fashion, so investors who are mistreated and suffered loss as a result of State regulation (even to protect their citizens' human rights) should receive compensation. TVH noted that tribunals should be mindful of Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

A show of hands demonstrated equal division among session attendees as to whether IIAs prevent States meeting their duty to protect.

Question 2

AW noted legitimacy concerns relating to investment treaty arbitration (particularly pertinent where human rights are at issue) and explained that the European Commission's draft investment chapter of TTIP tabled for negotiation with the USA proposes a standing court of first instance and appeal, enhanced transparency and third party participation rights. She posed question 2 to the panel.

TVH argued that international arbitration is an inadequate forum for access to remedy on human rights: with insufficient participation rights for third parties (including NGOs), unrepresentative tribunals and unpredictable outcomes. TVH explained that arbitration currently fails to meet the four relevant effectiveness criteria for non-judicial grievance mechanisms in UNGP 31. She suggested, and AM agreed, that access to remedy in national courts be strengthened to provide better access to remedy for individuals.

AM highlighted difficulties in relying on arbitral tribunals and on national courts, but did not consider that a standing court would do a better job, as each court is deficient in its own way. AM highlighted that States should take human rights claims before existing regional human rights courts more seriously. ZD acknowledged that the current system takes too long and is too costly. In ZD's view, the European Commission's TTIP proposal positively addresses many legitimacy concerns, but the suggested institutional changes tweak the current system rather than being directed to the establishment of a new regime (as was originally expected). ZD expressed concerns that the European Commission's proposal would be rejected by the USA and that giving States greater control over selection of judges would not necessarily lead to increased sensitivity to human rights.

Discussion / questions

A session attendee asked how the proposed binding treaty on business and human rights, which a UN Intergovernmental Working Group is working on (seeking *inter alia* to regulate the activities of transnational corporates in relation to human rights law) could address problems of credibility of local courts and recognition. TVH suggested that the treaty mirror the language of instruments eg. Convention against Torture or Rome Statute. ZD indicated that there is urgent need for the reform of national laws to allow for more robust regime of parent company liability for the acts of foreign subsidiaries. Another attendee asked whether tribunals should adopt an enlightened system of interpretation, including linkage to human rights bodies or jurisprudence. ZD reiterated that investment protection standards in IIAs were sufficiently broad to incorporate a human rights analysis: it is up to States to make that case to the tribunals. TVH called for incorporation of human rights policy space for States within IIAs.

AW asked the floor whether investment treaty arbitration provides adequate access to remedy to human rights; no attendees raised their hands.