CHAPTER 3

Investment Treaty Tribunals, Human Rights, and International Law

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In seeking to import human rights norms into investment arbitration, whether through the concepts of “inherent powers” or “legitimate expectations” or Article 31(3)(c) of the Vienna Convention on the Law of Treaties, it may seem that tribunals are being encouraged to simply find a way to reach a certain result. It may seem that way for good reason. Moreover, since all participants in treaty arbitration seek application of well-articulated, predictable, legal standards, this trend towards increasingly liberal importation may be very troubling. This paper addresses some of the troubling aspects. But, despite these aspects, there are at least three overarching benefits to recent efforts to make human rights an integral part of treaty arbitration, and it is useful to anticipate the benefits before turning to the troubling aspects.

First, States may discern a shift in balance of treaty cases if investors are held to human rights norms, because it is investors who will increasingly have to meet these norms in order to prevail in their claims. The first benefit is thus the levelling of the imbalance perceived by States.

Second, States will not face a choice between adhering to treaty obligations and violating their citizens’ rights. That choice probably is not a genuine one, in any event: there is no reason in principle why any such choice has to be made. For example, environmental regulation is not an alteration of the investment regime. But, again, with the perception that human rights norms comprise part of the investor’s legitimate expectations concerning the investment regime, an inconsistent line of conduct that does not create State exposure to liability may be very useful.

The final benefit is potentially the most important because of its implications that reach well beyond arbitration: the encouragement to States to incorporate formally an increasing number and variety of human rights norms will, in addition to enhancing their own protection from investor claims, also promote a human rights attachment generally, improving the lives of the State’s citizens.

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Having set out the rosy tripartite conclusion, however, we now revert to the less than happy road to that conclusion. First, a clarification on why we refer to importing human rights norms: even the most ardent advocates of making human rights a part of investment treaty arbitration acknowledge that human rights are not, with few exceptions, expressly provided for in BITs, or even clearly part of the applicable law. That is, investor-state tribunals are rarely expressly authorized to resolve human rights claims.

To be sure, in ICSID cases, rules of international law often come into the applicable law through Article 42 of the ICSID Convention, which provides that, in the absence of the parties’ agreement, the applicable law shall be the law of the State Party to the dispute “and such rules of international law as may be applicable.” [Emphasis added]. International law, as some arbitrators explain, includes that part of general international law, namely customary international law, which in turn includes the protection of fundamental human rights.

However, we are talking about the most fundamental human rights when we are talking about customary law or, more loosely, general principles of law. As the tribunal in Phoenix v. Czech Republic put it, “nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.”¹

But what about something less extreme? What is an investment that affects human rights? That is, what constitutes a human rights violation by an investor, or conversely, what measures affecting an investment can be justified in the name of human rights? What about the “right to livelihood” and an investment that threatens the unemployment of a village population because of mining exploration—and thus sees its license revoked?

The problem is set out succinctly by John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations in one of his reports, where he notes that “with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that directly bind businesses.”²

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¹ Phoenix Action, Ltd v. The Czech Republic, ICSID Case No. ARB/06/5, Award of April 15, 2009 at paragraph 78.