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Investment and human rights: Is there an elephant in the room? *

by

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Insufficient integration between investment and human rights law is a concern recurrently being raised about the investment regime. However, the UNCITRAL debate on investor-state dispute-settlement (ISDS) reform focuses on procedural aspects. This concern is therefore an elephant in the room, where counterclaims by respondent countries are the only connected topic indirectly touched upon at the moment.¹

Permitting free-standing counterclaims (namely, counterclaims relying on the same factual matrix of the original claims, but grounded in different legal bases than the international investment agreements (IIAs) themselves) would contribute to rebalancing IIAs' asymmetrical character. Such counterclaims, as opposed to defensive counterclaims, would allow tribunals to take a holistic approach to disputes, and to adjudicate, alongside countries' breaches of IIAs, the consequences of investors' non-compliance with human rights obligations. This would promote "procedural efficiency, fairness, and the rule of law."²

Countries' ability to file free-standing counterclaims depends on specific procedural and substantive provisions. Absent such provisions, counterclaims legally unrelated to investors' claims of treaty breach, but factually connected therewith, are inadmissible. Exceptions occur either when parties have entered into a related specific agreement³ or, as in *Urbaser* and *Aven*, ISDS clauses allow either investors or countries to resort to ISDS. However, even in the above cases, counterclaims have been dismissed. The very same argument justifying counterclaims' admissibility—that "it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law,"⁴ including human rights obligations—is the main factor causing their dismissal: the nature of human rights obligations as inter-state primary obligations makes it impossible to merely shift them from countries to corporations.⁵

Thus, based on the argument that corporations are subjects of international law with human rights obligations, counterclaims have been rather inoperative until now. Whether physical and legal persons are objects—or, rather, subjects—of international law is a traditional distinction "not particularly helpful, either intellectually or operationally,"⁶ as the domestic jurisprudence of different countries—often contradictory on this point—demonstrates.⁷

To promote international justice, countries' right to counterclaim should be given a tangible legal basis, going beyond foreign investors' general duty to respect host countries' laws and the putative inadmissibility of their ISDS claims in case of breach thereof. This innovation would contribute to better integration of investment and human rights law, especially if legislation on human rights protection from corporate abuses is contextually established by both home and host countries. This objective is now being pursued by a UN treaty project "to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."⁸

The draft treaty covers all business activities, domestic and transnational (art. 3), and requires countries to prevent and address human rights violations of enterprises, domestically and abroad. Such an approach, covering, without distinction, domestic and transnational corporate human rights abuses, is very promising. Pursuant to the project, home and host state parties shall regulate effectively the activities of business enterprises within their territories or jurisdictions, including their transnational activities, and require them to establish human rights due diligence processes, i.e., mechanisms that identify, assess, prevent, and monitor any actual or potential human rights violations that may arise from corporate business activities (art. 5). Moreover, state parties shall establish systems of legal liability (either criminal, civil or administrative) for human rights violations occurring in the context of business activities (art. 6) and effective mechanisms for the enforcement of national or foreign judgments or awards in this field. They might also require business operators to maintain financial guarantees to cover victims' potential claims of compensation, and give victims the possibility to choose among different fora for filing their claims: home and host country courts, alongside country-based non-judicial grievance mechanisms (art. 4.8). Finally, other agreements (including IIAs) shall be compatible and interpreted in accordance with this treaty (art. 12.6).

Alleged grave violations of human rights by MNEs in host countries are recurring events. Against this backdrop, the possible interplay between free-standing counterclaims and the above developments deserves the utmost consideration, in light of its positive contribution to human rights' effective compliance by home and host countries and national and multinational enterprises.

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¹ [UNCITRAL Working Group III \(Investor-State Dispute Settlement Reform\), *Possible Reform of Investor-State Dispute Settlement* \(Vienna: UNCITRAL, 2018\), paras. 4 and 7.](#)

² [UNCITRAL, op. cit., para. 5.](#)

³ [Burlington Resources Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims \(Feb. 7, 2017\), paras. 60–62.](#)

⁴ *Urbaser S.A. and others v. Argentina*, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016), para. 1202; *Aven and others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award (Sep. 18, 2018), para. 738.

⁵ *Urbaser*, para. 1210; *Aven*, para. 743.

⁶ Rosalyn Higgins, "Conceptual thinking about the individual in international law," *British Journal of International Studies*, vol. 4 (1978), pp. 1–19, 5.

⁷ Compare US Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), with Supreme Court of Canada, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 (2020).

⁸ [UN Open-Ended Intergovernmental Working Group \(OEIGWG\), *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, Draft \(Geneva: OEIGWG, 2019\), p. 1.](#)

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