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BUSINESS AND HUMAN RIGHTS: A (R)EVOLUTION OF THE LAW?

Global
Legal Briefings – By **Stéphane Brabant, Marco de Sousa and Caitlin Eaton**

Over the last decade, the law on business and human rights has shifted considerably. Instruments calling on businesses to respect human rights have traditionally been understood as non-binding "soft" law, but are now being given teeth, resulting in businesses increasingly being held to account for actions which have adverse impacts on human rights. This (r)evolution of the law has gained momentum in recent years – in tribunal and court decisions, through grievance mechanisms and other non-traditional forums, in new investment agreements and in domestic legislation – and the trend looks likely to continue.

Businesses and their legal advisors must therefore be prepared to squarely address the growing universal tools and procedures for respecting human rights. This includes playing their part in ensuring that the victims of human rights abuses have access to a fair and fast remedy.

SOFT LAW INSTRUMENTS

The UN Guiding Principles on Business and Human Rights ("**UNGPs**"), endorsed by the UN Human Rights Council in 2011, will now be familiar to many businesses as the cornerstone in the business and human rights legal framework. The UNGPs recognise that, in addition to the primary duty of States to protect human rights, under existing international law companies have an independent duty to respect international human rights. Following the UNGPs, there has been a proliferation of industry and region specific soft law instruments, such as the OECD Guidelines for Multinational Enterprises and the Equator Principles.

Led by the extractives industry, businesses across multiple sectors have taken voluntary steps to meet these obligations throughout their supply chains – and will often publicise these steps, including by establishing internal policies and codes of conduct. Businesses also routinely "contractualise" human rights obligations by incorporating standards in their commercial contracts, such as in lending agreements and joint venture agreements. Initiatives are underway to formulate a set of model contract clauses aimed at protecting workers' rights in international supply chains.

SOFT LAW INSTRUMENTS GAINING TEETH

Despite the voluntary nature of these instruments, it is becoming increasingly difficult for businesses to ignore the risk of potential financial and reputational backlash for human rights infringements. This (r)evolution in the law is marked by a generation of new judges – in international and domestic courts and tribunals, but also in the court of public opinion, including shareholder pressure and the endorsement of consumers. These changing pressures are gradually giving way to a change in mindset, with international human rights obligations forming part of the galaxy of regulation within which businesses must operate.

INVESTMENT TREATY ARBITRATION

This shift in the treatment of international human rights law can be observed in recent investment treaty cases. Twenty years ago, it was almost unheard of to speak about international human rights law in the context of investor-state disputes. However, in recent years, states have deployed human rights arguments as both a shield to defend against investor claims, and as a sword, in the form of counterclaims against investors. Investment treaty tribunals have engaged substantively with these arguments, and have also welcomed the submissions of third party interveners (known as *amicus curiae*) in relation to human rights issues.

For instance, in *Suez v Argentina*, Argentina raised the defence of necessity under customary international law, arguing that it had to take the measures it did to safeguard the essential interests of the State – including the human right to water. In *Urbaser v Argentina*, the State went a step further, arguing that the claimants had violated international human rights obligations relating to the right to water. The tribunal in *Urbaser* accepted jurisdiction over Argentina's human rights counterclaim, but ultimately dismissed the counterclaim on the merits. In reaching this conclusion, the tribunal examined various international human rights instruments – including the UNGPs – and noted that none of these gave rise to a positive international law obligation on the investor to ensure the population's access to water. The tribunal did, however, recognise that companies have a negative obligation not to commit acts that violate human rights. The tribunal stated "*it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law*".

In *Bear Creek v Peru* the tribunal unanimously found that Peru had unlawfully expropriated the claimant's investment, but chose to award only minimal damages representing the investor's sunk costs because the investor had failed to obtain a "social licence", which meant the project was unlikely to be profitable. A social licence is not a legal requirement, and it is not a substitute for respecting recognised international human rights norms. Rather, it encapsulates the need to engage with and respect the rights of local communities, including indigenous populations.

Professor Philippe Sands QC, in a strongly worded dissent, considered that damages should be further reduced on the basis of contributory fault due to the investor's failure to obtain a social licence and its contribution to the local opposition to the project. Professor Sands considered that, while the obligations in the International Labour Organisation's 1989 Indigenous and Tribal Peoples Convention did not apply to private foreign investors, it is not "*without significance or legal effects for them*".

These cases demonstrate the increasing willingness of tribunals to engage with supposedly non-binding instruments, and to interpret investment treaty protections in harmony with international human rights law.

DOMESTIC LITIGATION

A similar trend can be observed in domestic litigation. In 2019, the UK Supreme Court handed down the important judgment in the *Vedanta* litigation, in which it held that English courts could assume jurisdiction over a UK parent company in respect of claims alleging human rights complaints against a foreign subsidiary. The recent decision in *Okpabi v Shell* affirmed this approach.

NON-JUDICIAL MECHANISMS

Despite the increasing move from "soft" to "hard" law in this area, victims of human rights abuses and rights holders continue to face considerable challenges to accessing effective remedies. Formal dispute resolution can be lengthy, costly or otherwise inaccessible to those who need it most. Victims of human rights violations need a remedy today; not in many years' time, at the end of a lengthy judicial process.

In response to the need for fair, fast and transparent justice, there is growing interest in disputes being resolved through non-judicial grievance mechanisms and other non-traditional systems. The Business and Human Rights Access to Remedy Institute (ARI) currently being developed with the Centre for Human Rights of the American Bar Association is one such initiative, aimed at facilitating the realisation of the third 'remedies' pillar of the UNGPs. The Hague Rules on Business and Human Rights Arbitration provide a set of arbitral rules for the arbitration of business-related human rights disputes that seek to provide a more level playing field for victims.

The development of these initiatives will require lawyers to account for the innovative ways in which businesses may be held accountable to the victims of human rights violations.

HARD LAW INSTRUMENTS

Alongside the shifting treatment of soft law instruments, the requirement that businesses respect human rights law is also filtering into binding treaties and legislation. Recent changes to investment treaty drafting have seen an increased focus on human rights, with states expressly carving out their rights to regulate in the public interest. Some treaties go further; for instance, the 2019 model BITs of both the Netherlands and Morocco expressly refer to instruments such as the UNGPs and OECD Guidelines for Multinational Enterprises.

At the domestic level, several states have introduced legislation requiring companies to comply with human rights standards. The UK Modern Slavery Act requires certain companies to publish transparency statements setting out the steps taken to ensure that slavery and human trafficking are not taking place in any part of their business or supply chain (and there are plans to further strengthen these measures). Similar legislation has been adopted in Australia. Under the French Law on the Corporate Duty of Vigilance, many French companies are required to publish and implement annual vigilance plans addressing risks to human rights and the environment. There are plans to introduce similar mandatory due diligence laws in Switzerland and in Germany. The EU has recently published a draft Directive which would require all EU member states to impose environmental and human rights due diligence obligations on all enterprises domiciled or operating in Europe. Further, the UK and EU have recently announced new sanctions regimes to prevent dealings with individuals and entities accused of human rights violations.

It is noticeable that these developments are taking place in both common law and civil law countries, with remarkable similarity. The alignment of common law and civil law systems on the issue of human rights reflects the universal nature of the issue, resulting in the growth of increasingly universal tools and procedures on how to respect human rights.

At the global level, a working group of the UN Human Rights Council has for several years been negotiating a draft treaty that aims to articulate international legally binding obligations on businesses with respect to human rights.

CONCLUSION

In the span of just a decade since the introduction of the UNGPs, there has been a noticeable shift in the compass of the law on business and human rights. What has traditionally been seen as voluntary soft law is slowly becoming mandatory hard law.

The use of concepts enshrined in the UNGPs in domestic litigation and investment treaty arbitration – notably the duty on businesses to respect internationally recognised human rights and to conduct human rights due diligence – has been instrumental in this (r)evolution of the law. The bright line between public human rights law and private commercial law has become blurred and the trend is clear: corporations will increasingly be held to account for the impact of their investments on local populations. A key part of that accountability will be ensuring that victims have access to fast and effective remedies, including through operational-level grievance mechanisms as alternatives to long and expensive judicial processes. Disruptive technologies also promise new solutions in this area. There are obvious use cases for blockchain and other distributed ledger technologies in the assurance of human rights due diligence processes.

The law is under construction, but the direction of travel is clear. Ensuring respect for human rights has become a business imperative, and businesses and their legal advisors will need to be prepared to address this head-on.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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