



Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Input to the UN Working Group on Business and Human Rights regarding guidance on human rights defenders and the role of business

March 15, 2018

The Columbia Center on Sustainable Investment (CCSI) is grateful for the opportunity to provide input to the Working Group regarding elements for guidance on human rights defenders and the role of business. As a joint center of Columbia Law School and the Earth Institute, we focus on international investment and its impacts on sustainable development. In this context, we are increasingly concerned about the repression and criminalization of human rights defenders in the context of investment projects—a situation that unfortunately seems to show no sign of abating.

Our input focuses on one specific topic that we believe may be overlooked in general discussions about human rights defenders: the possibility that the international investment law regime, comprised of thousands of bilateral and multilateral treaties, may actually exacerbate the potential for repression and criminalization of human rights defenders. This concern was raised at a one-day roundtable hosted by CCSI and the Working Group in October 2017,¹ and we believe it merits further exploration.

Investment treaties serve to place standards on how governments may treat foreign investors. Investor-state arbitration permits foreign investors to directly enforce, typically without first exhausting (or even commencing) domestic remedies, these standards by suing the government hosting their investment for actions taken (or not taken) by that government that have a negative impact on the investment or profits (including future lost profits) of the investment. However, the standards contained in investment treaties are notoriously vague, and arbitration tribunals are inconsistent, and even contradictory, in how they interpret and apply these standards against governments. As such, it is difficult, if not impossible in many cases, for governments to anticipate when their actions (taken by executive, legislative, or judicial authorities, at any level of government, and even if a government actor is acting outside of its/his/her domestic legal or constitutional authorization) may trigger liability. Investors often initiate investor-state legal actions, and tribunals make awards that are adverse to governments or governments choose to settle the claim, in instances when the government has taken the action in question with the intent of realizing social, environmental, or human rights objectives or obligations,

¹ Further information available at <http://ccsi.columbia.edu/2017/10/18/roundtable-on-impacts-of-the-investment-regime-on-access-to-justice/> (workshop outcome document forthcoming).

but such action also negatively impacted a foreign investor or investment.² Furthermore, governments may face claims by multiple investors based on the same action, or, because many investment treaties have wide definitions of “investor,” it is possible that governments may face claims by a company as well as its direct and/or indirect shareholders for the same action, thus rendering liability even more uncertain.³

On average each such investor-state claim costs nearly US\$6 million for a government to defend,⁴ and even if the government prevails in the case,⁵ tribunals are less likely to shift arbitration costs to the losing investor when the state successfully defends the claim than they would be to shift costs to the state if the investor had prevailed.⁶ Even in cases where a tribunal does shift costs to the unsuccessful investor claimant, governments can have a difficult time recouping the funds that they expended in defending the case.⁷ Of course, when a state loses a claim costs are much higher, typically in the millions or even billions of dollars. These awards are highly enforceable in courts around the world, and there is no appeal from an adverse award available. Furthermore, one study found that the mere

² *E.g.* *Bear Creek v. Peru*, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017) (failure to grant concession amid social unrest); *Windstream v. Canada*, PCA Case No. 2013-22, Award (Sept. 27, 2016) (moratorium on offshore wind investments amid environmental uncertainty); *Bilcon v. Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (March 17, 2015) (refusal of permit for quarry because of local opposition); *Copper Mesa v. Ecuador*, PCA Case No. 2012-2, Award (Mar. 15, 2016) (revocation of mining concessions amid social unrest); *TransCanada v. United States*, ICSID Case No. ARB/16/21, settled (2016) (failure to grant oil pipeline permit amid social opposition); *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012) (termination of oil concession amid social unrest); *Vattenfall v. Germany (I)*, ICSID Case No. ARB/09/6, Award (settlement) (March 11, 2011) (environmental restrictions on coal-fired power plant).

³ David Gaukrodger, “Investment Treaties and Shareholder Claims: Analysis of Treaty Practice,” OECD Working Papers on International Investment, 2014/03 (2014).

⁴ See, among others, Jeffrey P Commission, ‘How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years’ (*Kluwer Arbitration Blog*, 29 February 2016) <http://kluwerarbitrationblog.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/> accessed 27 February 2018. The cost to defend a case can greatly increase based on complexity of issues raised in the case.

⁵ Of all concluded cases, one third were decided in favor of the State (i.e. the claim was dismissed either on jurisdictional ground or on the merits). In one quarter of cases, investors won and were awarded compensation. One quarter of all cases were settled. Of the remaining cases, either the case was discontinued or the tribunal found that the treaty was breached but did not award compensation. UNCTAD World Investment Report 2017, at 117, available at http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

⁶ Matthew Hodgson, “Counting the costs of investment treaty arbitration,” *Global Arbitration Review*” (Mar. 24, 2014) at 7.

⁷ Memorandum from I. Zarak A. to M. Kinnear, Re: Effective Protection for Respondent States Against Judgment-Proof Claimants, dated Sept. 12, 2016. Statistics cited by Panama indicate that among thirty-five respondent states that had been granted costs awards since Dec. 31, 2013, 49% had been paid in full, 14% had been paid in part, and 37% had not been paid at all.

filing of an ISDS claim against a state is connected with reduced inward FDI flows, and that inward FDI flows drop even further when the state loses an ISDS case.⁸

While more research is required, it is clear that investor-state arbitration under investment treaties can have high costs, both material and reputational, for host states, while benefits, including evidence of increased investment, remain uncertain and undemonstrated.⁹ Furthermore, when the potential for a very costly process and even more costly and highly enforceable awards are coupled with vague and inconsistently applied standards, it becomes clear how such a system may result in a situation in which a government is more likely to attend to and address the demands made by foreign investors at the expense of other competing interests, which can exacerbate tendencies toward intra-national inequality in favor of large corporations and at the expense of the rights of less powerful groups and individuals.¹⁰

With respect to human rights defenders, there is a significant possibility that the international investment law regime may exacerbate repression and/or criminalization of human rights defenders.

Examples

One pertinent example comes from Peru, where local indigenous Aymara communities in Northern Puno have faced criminalization for their efforts to protect their rights and interests affected by the “Santa Ana” silver mining project, an investment of the Canadian company, Bear Creek Mining Corporation. Some Aymara community members and leaders from the region organized and mobilized to raise concerns regarding the project’s potential impacts on the local environment and water sources.¹¹ Community members expressed opposition to the project in various ways, including by engagement with the regional government of Puno,¹² at an information workshop in February 2011, and through peaceful protest.¹³ In March 2011, a more active social protest movement against the Santa Ana project began. The protests, widely known as “Aymarazo,” centered on the rights and interests affected by the project, and grew in intensity until – in June 2011 – the government revoked the decree of public necessity that was one of the legal prerequisites for Bear Creek’s ability to mine the Santa Ana project.¹⁴

⁸ Todd Allee and Clint Peinhardt, “Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment,” 65 *International Organization* 401 (2011).

⁹ For a thorough discussion of the costs and benefits of ISDS see Joachim Pohl, “Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence,” OECD Working Papers on International Investment (2018).

¹⁰ Lise Sachs and Lise Johnson, “[Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities](#)” (2018).

¹¹ Front Line Defenders, “[Aymara Community Leaders on Trial](#),” (2017).

¹² Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, [Amicus Curiae Brief submitted by the Association of Human Rights and the Environment-Puno and Mr. Carlos Lopez, PhD \(Non-Disputing Parties\)](#), p. 9.

¹³ *Id.*, pp. 5-8.

¹⁴ *Id.*, pp. 8-10.

In August 2014, Bear Creek filed an investor-state claim against Peru on the basis of the Canada-Peru Free Trade Agreement (FTA), seeking in excess of US\$ 500 million in damages for alleged expropriation of its investment, and breaches of other standards in the Canada-Peru FTA.¹⁵ In 2017, one of the most active years for the investor-state claim filed by Bear Creek (during which an award was rendered), at least 18 Aymara community members faced trial for obstruction of public services, aggravated extortion, and disruption of the peace.¹⁶ Walter Aduviri Calizaya, a prominent Aymara community leader and organizer, was sentenced to seven years in prison and a fine of two million soles (US\$ 600,000).¹⁷ Concerns regarding Peru's treatment of human rights defenders and groups engaged in social protests have been raised in the past.¹⁸ CCSI is carrying out research to better understand the extent to which the restrictions and pressures placed on the Peruvian government by the Canada-Peru FTA, and the financial, reputational, and political stakes associated with investor-state arbitration, may have influenced the actions taken with respect to Aymara community members.

A second example comes from Ecuador.¹⁹ Here, a Canadian mining company, Copper Mesa, held interests in three projects in Ecuador's Intag Valley where surrounding communities were strongly opposed to mining, including with respect to Copper Mesa's projects. There were various violent incidents between the local communities and the private security guards hired by Copper Mesa as community members sought to protect their rights and interests by protesting the project and physically blocking the mining concessions. At one point, the situation became so violent that the private security company used tear gas and fired weapons at local villagers and officials.²⁰ Some community members who resisted the project were reportedly charged with crimes and

¹⁵ Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21.

¹⁶ Front Line Defenders, "[Aymara Community Leaders on Trial](#)," (2017); "[Six Years After the 'Aymarazo' Protests in Peru](#)," Intercontinental Cry (June 27, 2017).

¹⁷ Business & Human Rights Resource Center, Human Rights Defenders Portal, [Walter Aduviri Calizaya](#). The sentence was upheld on appeal in December 2017. La Ley, "[Caso Aduviri: estudios superiores permiten inaplicar error de prohibición en población indígena](#)," (February 16, 2018). See also Sian Cowman and Aldo Orellana López, "[Dura condena contra líder aymara devela política de criminalización de la protesta en Perú](#)," Derechos Humanos y Medio Ambiente Puno (July 30, 2017).

¹⁸ It has been reported that, in days leading up to the Bagua massacre, the US State Department cited the Peru-US Free Trade Agreement in placing pressure on the Peruvian government to address protests by indigenous communities regarding mining in La Oroya, Peru. See Jose De Echave and Lori Wallach, "[Peru's 'Bagua massacre' haunts the TPP](#)," The Hill (June 11, 2014). Regarding concerns expressed with respect to Peru's treatment of human rights defenders and social protesters, see generally: UN Working Group on Business & Human Rights, [Statement at the end of visit to Peru by the United Nations Working Group on Business and Human Rights](#) (Lima, July 19, 2017); UN Special Rapporteur on the rights of indigenous peoples, [Report on the situation of indigenous peoples' rights in Peru with regard to the extractive industries](#), UN Doc. A/HRC/27/52/Add.3 (July 3, 2014).

¹⁹ Copper Mesa Mining Corporation v Republic of Ecuador, PCA Case No. 2012-2, Award (15 March 2016).

²⁰ *Id.*, para. 4.265.

imprisoned, although were not eventually found guilty. As the conflict regarding the project escalated, the government halted the project without compensation; in response, Copper Mesa brought an investor-state claim against the Government of Ecuador among other things, alleging that the Government had breached its obligation to provide the foreign investor and its investment “full protection and security”.²¹ This standard in investment law is frequently interpreted to require the host state to provide physical protection and security to an investor.²² States do not have an absolute obligation akin to “strict liability” but an obligation more akin to an exercise of due diligence.²³ However, this standard requires active conduct by the state and not merely inaction. In this case, the tribunal asked the question of whether Ecuador should have “imposed its will on the anti-miners, acting with all the powers and forces available to a sovereign State, so as to ensure that [Copper Mesa], as the concessionaire under concessions granted by [Ecuador] could gain access to the Junín concessions in order to carry out the required consultations and other activities required for its EIS?”²⁴ The tribunal points that the risk to the investment from anti-miners in the area was “real, long-standing and well-known even before [Copper Mesa]’s Junín concessions; and that the State’s presence in the Junín area, including its police, was invariably weak, intermittent and ineffective.”²⁵ Regardless, the Tribunal goes on to find that the Government of Ecuador has breached this obligation, noting that “[p]lainly, the Government in Quito could hardly have declared war on its own people. Yet, in the Tribunal’s view, it could not do nothing.”²⁶ The Tribunal does acknowledge Copper Mesa’s contributory conduct in firing live ammunition on protestors, but rather than dismissing the claim, simply reduced damages against Ecuador (to US\$ 19.4 million) to reflect the fact that Copper Mesa’s “negligence” in engaging with local communities contributed to the collapse of its project.²⁷ While leaving the middle ground between declaring war on its own people and doing nothing open to interpretation, the tribunal has put a hefty price tag on the failure to protect the investor in the face of actions taken by human rights defenders.

While it is difficult, at this moment in time, to definitively prove a causal impact of the international investment law regime on the rights of human rights defenders, the examples discussed above illustrate how the regime may exacerbate the repression and criminalization that human rights defenders face. In particular, where governments are faced with a choice between protecting the interests of investors, on the one hand, and complying with their obligations to protect, respect, and fulfill the rights of human rights defenders, on the other, the high stakes associated with investor-state arbitration can incentivize governments to prioritize the former even if at the direct expense of the latter.

²¹ *Id.*, para. 6.25.

²² In some cases tribunals also have extended the obligation to include legal security.

²³ *Copper Mesa*, para. 6.81. *See also*, e.g. *ELSI v. USA*, *AAPL v. Sri Lanka*, *AMT v. Zaire*, *Lauder v. Czech Republic*, *Saluka v. Czech Republic*, *Plama v. Bulgaria*, *Noble Ventures v. Romania*.

²⁴ *Id.* para. 6.82.

²⁵ *Id.* para. 6.83.

²⁶ *Id.*, para. 6.83.

²⁷ *Id.*, para. 10.9.

Pillar One

States should analyze their obligations under international investment agreements to which they are a party and determine how their obligations under such agreements may impact their ability to realize their human rights obligations towards rights-holders, such as human rights defenders. To the extent a state's obligations under an international investment agreement may be inconsistent with its obligations under other international legal instruments, states should, through "subsequent agreement" and "subsequent practice" make clear the meaning of their investment agreements to clarify that actions taken that may otherwise be inconsistent with their obligations under international investment agreement but that are taken with the objective of realizing the rights of human rights defenders should not result in treaty violations.²⁸ In future treaties states should clarify this directly in the text of the treaty. States should decline to renew or terminate existing treaties with respect to which their obligations to investors are in theory or practice inconsistent with their obligations to human rights defenders.

Prior to entering into any trade and investment agreement a human rights impact assessment should be conducted in order to, among other reasons, determine whether a trade and investment agreement would impose on a state any obligations that are inconsistent with its obligations under preexisting treaties. A state should refrain from entering into a trade and/or investment agreement when the obligations under such agreement are inconsistent with its obligations under existing human rights instruments.²⁹

These points could be highlighted in the guidance under the auspices of the foundational principles and operational principles under Pillar One.

Pillar Two

With respect to businesses, and more specifically, to the extent that businesses must identify, prevent, and mitigate human rights abuses against defenders, through both due diligence and their own activities and leverage, businesses should carefully consider whether the investment context itself may subtly create pressure to repress or criminalize human rights defenders protesting investment projects. Particularly in such a scenario, businesses must make clear to governments that they should not criminalize human rights defenders' protest and efforts to defend their rights and interests in the context of

²⁸ Lise Johnson, "Ripe for Refinement: The State's Role in Interpretation of FET, MFN and Shareholder Rights," GEG Working Paper 2015/101 (April 2015); David Gaukrodger, "The legal framework applicable to joint interpretative statements of investment treaties," OECD Working Papers on International Investment," 2016/01 (2016).

²⁹ Report of the Special Rapporteur on the right to food, Olivier De Schutter, Guiding principles on human rights impact assessments of trade and investment agreements, A/HRC/19/59/Add.5 (19 Dec. 2011). For a discussion of how investment law and human rights law may compete or even conflict with respect to land investments and options for states in this context, see Kaitlin Y. Cordes, Lise Johnson and Sam Szoke-Burke, "Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections," CCSI (March 2016) available at http://ccsi.columbia.edu/files/2016/03/CCSI_Land-deal-dilemmas.pdf.

investment projects, and should further participatory decision-making with all interested stakeholders in such scenarios.

To the extent that a business decides to pursue investor-state arbitration arising out of a factual scenario involving the interests of third-parties, including human rights defenders, it should refrain from raising claims about “full protection and security” as they relate to human rights defenders’ legitimate efforts to protest investments or defend their rights in the context of investments. These points could be highlighted in the guidance under the auspices of the foundational principles and operational principles under Pillar Two.