Centre for International
Governance Innovation

Conference Report – Ottawa, Canada, January 2017

Bridging International Human Rights, Trade and Investment Law

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About the Author

Kim Jensen is an articling student at CIGI, providing assistance to in-house counsel on a range of legal matters and research support to the International Law Research Program. Kim received her law degree from Thompson Rivers University in April 2016. Prior to attending law school, Kim completed a B.Comm. with a major in international business management.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Executive Summary

A full-day round table meeting brought together individuals representing the public sector, think tanks, civil society organizations, the private sector and academia. The purpose was to discuss the interaction between international trade and investment law and human rights law. Although both of these international legal regimes developed from similar historical roots, each has not influenced the other, and it was widely noted that greater interaction could be beneficial for both regimes.

Many of the experts and policy leaders acknowledged the barriers to greater interaction, such as political will, or the difficulty of effectively reconciling the effects of economic development versus adhering to human rights principles. At the same time, round table participants illustrated promising movement toward interaction between these spheres, such as the inclusion of relevant chapters in trade agreements and the consideration of human rights claims during investor-state dispute settlement. It is much easier to express a desire to have interaction between international trade and investment law and human rights law than it is to actually create institutions and regimes that facilitate achieving this interaction in an international context.

Introduction

The round table was jointly convened by the International Law Research Program at the Centre for International Governance Innovation (CIGI) and the Human Rights Research and Education Centre (HRREC) at the University of Ottawa. The discussion during the round table meeting took stock of new developments in international economic law and human rights law and looked at possible responses to criticisms about the international trade and investment regimes not engaging with the international human rights regime. The entire round table was held under the Chatham House Rule.[1]

The round table considered whether international law can, and should, bridge the gap between the principles of human rights and sustainable development on one side, and reform efforts in treaty making, private initiatives to embed human rights into business practices and new approaches in dispute resolution on the other side. From the round table discussions, CIGI and the HRREC will identify topics for further research and opportunities for policy development collaboration.

First Session: Overview of the General Trade, Investment and Human Rights Relationship

International human rights law has developed alongside the international economic law regime since the end of World War II, with the establishment of the Bretton Woods system in 1944 and the adoption of the Universal Declaration of Human Rights in 1948. However, each sphere has remained largely isolated from the other. In particular, trade agreements traditionally did not include provisions on labour standards, protection of the environment and combatting corruption, and human rights treaties did not have dispute settlement mechanisms as strong as those in trade and investment agreements. Civil society organizations and academics have only recently started identifying interactions between these two spheres of international law and developing ideas to bridge the gap. While increased international trade and investment have raised the standard of living for a significant portion of the world's population, to continue doing so, each regime must be informed by the other. Although bridging two spheres of law has both benefits and risks,

1 Under the Chatham House Rule, those present, including media, "are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed." For a full explanation of the Chatham House Rule, see www.chathamhouse.org/about-us/chathamhouserule.

perhaps the strength or influence of one regime may ameliorate the weakness of the other.

Bridging the gap between the two spheres of law is controversial, as the interaction of economic and social development with trade and investment rules can constrain countries in their domestic regulation. Despite this, bridging the gap is important because interaction between human rights, trade and investment can promote a more sustainable approach to development and drive economic and social advancement. The gap between these spheres is not as pronounced when viewed from a development perspective, as opposed to a human rights or trade and investment perspective. Inequality within developed countries was noted as an area that needs further exploration, and, in light of recent events, it may be just as important as the developed country/developing country inequality. The extent to which trade and investment promote equality within a country, as well as between countries, is a crucial question because this entire debate is informed by a quest to respond to challenges to the legitimacy of the international economic law system, and whether it creates fair and equitable results.

Various reasons for the isolation of each sphere were discussed. One suggestion was that the roots of this isolation may be traced to institutional factors, such as the structure of public versus private law and commercial versus constitutional law, or even to the separation of departments within governmental bureaucracy. A common basis for both spheres — protection of equal opportunity — was identified and could be built on. Another possible reason for the isolation is that, from an agreement-making perspective, if the two regimes are merged, the length and complexity of negotiations may increase, especially where the issues are controversial between countries. It was also suggested that bridging the gap between human rights, trade and investment could be more effectively addressed if human rights, as a concept, are more clearly defined. There was also some feeling that human rights, as rooted in the Universal Declaration of Human Rights, are being supplanted in the investment context by a different version of human rights that promotes capital to the detriment of human welfare. Another fundamental disconnect between investment law and human rights law was identified — in investment matters the "loser" party may be paid off, whereas violations of human rights are not compensable in a similar manner.

Some trade and investment agreements incorporate human rights language, such as labour rights, or have side agreements relating to the human rights sphere of law. For example, the North American Free Trade Agreement partners signed two parallel agreements addressing environmental issues and enforcement of labour laws: the North American Agreement on Environmental Cooperation and the North American Agreement on Labor Cooperation, which established the Commission for Labor Cooperation. Also, in 2010, the Agreement Concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia was signed, requiring the state parties to produce annual reports about the effect on human rights of measures taken under the Canada-Colombia Free Trade Agreement.

Some participants of the round table cautioned that there may be a diplomatic or political cost for country-to-country enforcement of such instruments in the future, and it may not be a sustainable model. Investor-state dispute settlement (ISDS) depoliticizes investment disputes; however, it is criticized for limiting the regulatory authority of states and for giving too much power to companies. Some recent arbitral awards were discussed, and it was suggested that it may be time for academics and policy makers to reconsider the role ISDS can play in promoting the sustainable development agenda. An example is found in *Urbaser v Argentina*,[2] where the host state submitted a counterclaim related to the human right to access drinking water and sanitation against the foreign investor.

It was suggested that a new model of interaction between human rights, trade and investment could include civil society as a potential actor, as civil society lies outside the country-to-country relationship and corporate interests, and so is appropriately placed to play a key role. However, issues around standing and remedies would need to be resolved prior to implementing a model such as suggested. The United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and the Mauritius Convention on Transparency represent

2 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* (2016), ICSID Case No ARB/07/26, online: <www.italaw.com/cases/1144>.

important steps in this direction. Further to the discussion about encouraging adherence to certain human rights norms through the trade or investment agreements made by Canada, it was noted that the mechanisms should encourage adherence, rather than punish those people affected by the implementation of the agreement.

Round table participants mentioned that it is not feasible to represent all social and economic interests within international trade and investment agreements, despite the appearance that countries are willing to sign such agreements. Some agreements already broach subjects such as environmental protection or labour standards, and these issues are difficult to reach agreement on. An issue with the current interaction of human rights law with trade and investment law is that human rights may be invoked as an excuse for implementing trade-protective measures. It is sometimes difficult to discern legitimate regulation. Toward the end of the discussion, participants highlighted that there can be optimism about further interaction between the two spheres and eventual bridging of the gap, as other international institutions have been seen to move from rejection to acceptance of human rights as part of their regimes. Systemic integration was discussed and how, although it is an important principle, it comes with challenges and the limitation of solely being an interpretive tool, rather than a substantive principle.

Second Session: World Trade Organization Law and Human Rights

While World Trade Organization (WTO) agreements do not directly reference human rights norms, there has been some, albeit minimal, engagement with human rights at the WTO. Regional and bilateral agreements are increasingly addressing the gap between the human rights sphere and trade and investment spheres. While there have been no cases at the WTO where human rights have conflicted directly with trade, which means that the issue has not been addressed in dispute settlement, WTO case law does show that principles of international law inform WTO dispute decisions. One reason raised to explain why parties avoid grounding their arguments in human rights norms is the lack of human rights language in the WTO agreements. An alternative reason given was that human rights arguments are avoided for fear of those same principles being argued against the initiating country.

Mechanisms within the WTO other than dispute settlement, such as the Trade Policy Review Mechanism, may offer an avenue to increased recognition of human rights. Participants noted, however, that responding to the multitude of questions posed during reviews is resource intensive for trade departments. Human rights impact assessment of trade agreements is another avenue; however, assessments could be developed to be more effective and efficient and to offer an important insight into the effect of trade. The Canada-Colombia agreement was given as an example of a trade agreement requiring human rights impact assessment. However, less than optimal design and reporting renders the assessment results largely inadequate.

It was suggested that regional or bilateral agreements offer a more promising avenue than multilateral agreements for linking human rights with trade. One response to this was that it could result in countries not wanting to negotiate with Canada if those countries expect issues beyond the core trade issues, such as the protection of social, economic or cultural rights, to be on the table. Language invoking human rights norms in economic agreements is found in some preambles; however, it was cautioned that this language does not create binding obligations. If obligations are sought, they must be clearly expressed in the sections of the agreement.

Third Session: Addressing Inequality

Equality is often expressed as a level playing field; however, it was noted that there is an underlying issue of capacity, which means that some persons will never experience a level playing field. Although interaction between factors such as participation rights, budget allocation and taxation may help

to level the playing field, there is no set procedure to make this happen. Human rights violations cannot be justified by utilitarian gains, and it is not possible to select a single right against which all of the others are measured, thus making the reduction of inequality difficult. The inclusive trade agenda seeks to address the inequality that arises because the benefits of trade do not have a natural tendency to disperse. Analysis of the effects of trade and investment agreements must involve a certain level of granularity to achieve optimal inclusion and benefit from them. Countries that have implemented inclusive trade policies have experienced fewer backlashes. A current example of this is found in a comparison between Sweden and the United Kingdom.

Academic work is beginning to confirm anecdotal evidence of social concerns, and this is encouraging human rights and labour conditions to be taken into account in the international economic law sphere. Some broad concepts were raised and discussed in relation to inequality. The concepts included defining human rights, achieving a level playing field and the role of corporate social responsibility (CSR) and Sustainable Development Goals (SDGs). It was also noted that while human rights created a vocabulary to articulate discontent, that vocabulary does not always help with the articulation of how to address the discontent. It was also stated that the SDGs have a role to play in addressing inequality and that they are expressed with the phrase "for all," which denotes an underlying equality principle. CSR is an important aspect, as it is one area where human rights, trade and investment intersect. It was suggested that companies should be held responsible for meeting their self-imposed CSR policies and that corporate taxation and labeling regulations may serve as tools to stimulate further implementation of CSR.

In order to determine what is happening in the interaction between human rights, trade and investment, cause and effect must be better understood. Causes are currently assigned to the international trade and investment system without a determination of whether there is a domestic connection as well. Perhaps it would be more fruitful to look at domestic governance structures in parallel with the international economic system. Another response was that the impact of the historical design of the international system is important because developing countries seeking equality are beholden to finance institutions and are subject to different rules from those that applied when now-developed countries were in the process of development.

Fourth Session: Investment Law and Human Rights

This session opened with an overview of the relationship between human rights and investment law. While there is currently no single solution to the imbalance, the issue has been widely acknowledged, and that is the starting point for the discussion. It was noted that both human rights and investment law developed from international law regarding the treatment of aliens after World War I, and the concept of fair and equitable treatment in some international investment agreements is expressly based on the customary international law, minimum standard of treatment (MST) of aliens. Despite this common origin, it was noted that the actual application of the fair and equitable treatment standard by arbitral tribunals has followed a different path that often does not fit with the MST doctrine.

Imbalance in the negotiating power of countries is an issue that was raised — certain countries are rule-takers rather than rule-makers, and rule-takers have to follow the investment agreement models with which they are presented. This may not reflect access to the process that is required for balanced or fair and equitable outcomes. Creating an entirely new agreement model is difficult and resource intensive, and so many agreements follow a similar model, which is why so many international investment agreements have similar provisions. This adds another dimension to the relationship between rule-takers and rule-makers and makes it more difficult to create a balanced relationship.

Further, the relationship between investors and states is an important one that is shaped by the negotiation process and resulting agreement. The fault for any violations of human rights norms was suggested to lie with the investor corporations, not with the investment agreements, because it is not the agreements that cause human rights violations. Some investment agreements seek to protect certain human rights, beginning with labour rights. The current system for monitoring

Canadian investors and their operations abroad does include built-in penalties. Capital flight may become a concern if regulation is too onerous, although studies show investors tend to remain because of other considerations, such as access to a specialized labour force, capital markets, insurance providers and qualified lawyers.

It was stated that, historically, home-state diplomatic protection was used to intervene and protect a company from certain risks while operating abroad, and, at present, the focus has switched to the home state being able to intervene if a company misbehaves while doing business abroad. Depending on domestic standards, if human rights are incorporated into investment agreements, it may be that human rights are justiciable in the home state and the host state. It was asserted that the John Ruggie principles on business and human rights[3] should inform the behaviour of companies and should be taken more seriously because they have become the global standard for the linkage of business and human rights.

The current cases being brought by foreign victims and litigated in Canada indicate there may be change in sight. There was a question regarding what has changed so that Canadian courts are now hearing these cases. It was suggested that the current cases are quite complex, and all are being heard in Canada for distinct reasons and may have been brought by taking advantage of technicalities within the Canadian legal system. Many similar cases are not heard in Canada because *forum non conveniens* rules. However, sometimes, the intricacies of a case will render a Canadian court the most appropriate forum. The environment in which Canadian companies are operating in foreign countries is also a factor in bringing more cases to Canadian courts. Many resource-rich countries have a high level of internal conflict or corruption, and this creates an environment that is conducive to certain violations of human rights norms. There is also more regulation around aspects of company operations, such as supply chains, disclosure and bribery, and this demands more transparency and accountability.

Conclusion

Although some positive trends were highlighted, there is further potential for international trade and investment to interact with human rights. Academics are currently undertaking research agendas in this area, and civil society organizations continue to encourage governments to address the disconnect. Implementing solutions to bridge two large spheres of international law is complex, and it is a long process due to the inefficiencies of taking action without having impact-analysis mechanisms in place. As various countries take small steps toward integrating trade and investment law and human rights principles, what the effective and efficient processes look like will become more obvious.

The round table discussion identified some areas for further research, including evaluation and analysis of human rights chapters in trade agreements, raising awareness of the benefits that trade and investment regimes may realize with greater incorporation of human rights principles, potential private law mechanisms that may function to bridge the gap, whether investment law and trade law would interact with human rights law in a similar manner and whether a solution for one would be transferable to the other. It was also suggested that technology could assist in many ways, from trackers on certain products that are certified as being produced through a value chain that does not involve human rights abuses to the implementation of reporting systems.

3 *Guiding Principles on Business and Human Rights* (New York, NY and Geneva, Switzerland: United Nations, 2011), online: <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

About CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research programs focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

À propos du CIGI

Au Centre pour l'innovation dans la gouvernance internationale (CIGI), nous formons un groupe de réflexion indépendant et non partisan qui formule des points de vue objectifs dont la portée est notamment mondiale. Nos recherches, nos avis et l'opinion publique ont des effets réels sur le monde d'aujourd'hui en apportant autant de la clarté qu'une réflexion novatrice dans l'élaboration des politiques à l'échelle internationale. En raison des travaux accomplis en collaboration et en partenariat avec des pairs et des spécialistes interdisciplinaires des plus compétents, nous sommes devenus une référence grâce à l'influence de nos recherches et à la fiabilité de nos analyses.

Nos programmes de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques mondiales, et le droit international, et nous les exécutons avec la collaboration de nombreux partenaires stratégiques et le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

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