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Consideration of thematic studies

Right to development in international investment law

Overview of the ongoing study by the Expert Mechanism on the Right to Development

Conference room paper

Summary

The study will explore the current and future role of the right to development in international investment law. In this context, it will consider obligations of states to protect the human rights of their populations, including the right to development, together with their right to regulate in international investment law. It will also explore the evolving role of investors as duty holders in complying with human rights obligations as well as States' obligations of international cooperation and the advancement of sustainable development and the sustainable development goals arising, amongst others, from the new generation of international investment agreements.

A. Objective of the Study

1. The study "The Right to Development in International Investment Law" ("the Study") aims to explore the current and future role of the right to development and sustainable development in international investment law. In this context, it will consider obligations of states to protect the human rights of their populations, including primarily the right to development, together with their right to regulate in international investment law. It will also explore the evolving role of investors as duty holders in complying with human rights obligations as well as States' obligations of international cooperation and the advancement of sustainable development and the sustainable development goals ("SDGs") arising from international investment agreements, whether bilateral or multilateral ("IIAs").

2. Against this backdrop, the Study will also consider the role of *amicus curiae* (i.e. arguments presented by interested third parties but who are not parties to the particular case) in investment disputes, both as a source of human rights expertise as well as a means of participation for groups of individuals or peoples whose human rights are affected by the events underlying the dispute.

3. In this context, it will address the related question of whether arbitrators should have a proven record of human rights expertise (including in sustainable development and SDGs as a pre-requisite of their appointment to adjudicate investment disputes which raise issues of human rights or the SDGs or whether alternative means of achieving a suitably qualified tribunal may be more effective.

4. In line with the mandate of our Mechanism, the Study will also highlight good practice and make recommendations.

5. This document is a brief overview of the analysis carried out to date (which is ongoing), touching on some but not necessarily all the issues which will be included the final report. No recommendations will be presented at this stage.

B. The Right to Development in International Investment Law

6. The premise on which the right to development is examined in the context of international investment law is the symbiotic relationship between the right to development and sustainable development considered together with the SDGs. This relationship has already been explored in our Mechanism's first thematic study of 6 July 2021 entitled "Operationalizing the right to development in achieving the Sustainable Development Goals".

7. For current purposes, it is important to emphasise the three aspects of sustainable development, namely social development, economic development and environmental protection. The social development dimension necessarily includes human rights, since it is impossible to have social development and in turn sustainable development if human rights are undermined. The 17 SDGs and the 169 targets incorporated in the 2030 Agenda represent the current global consensus on the scope and content of sustainable development.[1]

8. In light of the above, the Study will examine the interaction, tensions and the potential co-existence of human rights and international investment law. Alongside the right of States to regulate, attention will be paid to the duty of international cooperation between States and individuals' and peoples' right of participation, which are both important ingredients of the right to development.

9. These issues will be explored through *inter alia* examination of the topics raised in our questionnaire and the answers received. We are grateful to the States, intergovernmental organisations, UN agencies, civil society members and academics who have so far contributed to the Study.

[1] A/HRC/48/63- see paras 19-23.

10. This document seeks to highlight some of the issues, bearing in mind the work on the Study will continue for the remainder of 2022 and will benefit from – circumstances permitting – a country-visit as well as academic visits.

C. Sustainable Development in International Investment Agreements

11. Many IIAs, especially more recent ones, include various refinements and clarifications aimed at ensuring States' right to regulate in the public interest. Importantly, some IIAs and model bilateral investment treaties (model "BITs") have expressly incorporated sustainable development, SDGs and human rights, both in their preambles as well as their operative provisions.[2]

12. Since the adoption of the Sustainable Development Goals Agenda by the UN General Assembly in 2015, 224 IIAs have been concluded. Of those, 31% include provisions addressing the SDGs directly.

13. IIAs address sustainable development and SDGs in different ways, either by highlighting the right of States to regulate or by imposing duties on foreign investors, including a duty to contribute to sustainable development, to observe specific standards, to comply with human rights generally or to comply with principles of corporate social responsibility.

14. By way of example, IIAs sometimes include: a reference to sustainable development in their preamble (e.g. the Brazil-India BIT (2020) and the Islamic Republic of Iran-Slovakia BIT (2016)); a definition of "investment" that includes contribution to the sustainable development of the host country (e.g. the Morocco-Nigeria BIT (2016)); a public policy exception allowing the host State to take measures to protect public policy objectives such as health and the environment (e.g. the Canada-Mongolia BIT (2016) and the Georgia-Japan BIT (2021)); providing that labour and environmental standards should not be relaxed to attract foreign investment (e.g. the Colombia-United Arab Emirates BIT (2017) and the Japan-Morocco BIT (2020)); incorporating obligations on investors relating to responsible business conduct (e.g the Brazil-Ethiopia BIT (2018)) or precluding corrupt practices (e.g. the Georgia-Japan BIT (2021)) and specific provisions promoting compliance with sustainable development in foreign direct investment (e.g. the European Union-Singapore Free Trade Agreement (2019)).

15. Similarly, principles of cooperation and capacity building are sometimes expressly referred to in BITs, e.g. in the Brazil-Malawi BIT (2015), which highlights the strengthening of local capacity building through close cooperation with the local community in order to contribute to the sustainable development of the host country.

16. Examples of progressive Model BITs include the Dutch Model Treaty (2019)[3] and the Belgium-Luxembourg Economic Union Model BIT (2019)[4] (the "BLEU Model BIT").

17. The Dutch Model BIT (2019) contains numerous references to sustainable development and human rights, including an express reference to the Universal Declaration of Human Rights.[5] This model BIT may already have been used in negotiations, as the Netherlands has obtained permission from the European Commission to renegotiate its existing BITs with several countries including Argentina, Burkina Faso, Ecuador, Nigeria,

[2] Of the IIAs collected by UNCTAD (and available on its website at https://investmentpolicy.unctad.org), which include some which have been terminated and others which have been signed but are not yet in force, over 200 contain the term "sustainable development", the oldest being probably the Framework Agreement for Cooperation between the European Economic Community and the Federative Republic of Brazil (1992).

[3] Articles 2, 3, 6 and 7.

[4] Articles 14-18.

[5] See in particular Article 6 (6) and the Preamble and Articles 2, 3, 5, 6.

Tanzania, Turkey, the United Arab Emirates, and Uganda, and to start negotiations for new BITs with Qatar and Iraq.[6]

18. The BLEU Model BIT expresses manifold aspects of the right to development, through the lens of sustainable development, by emphasizing the importance of international cooperation on achieving sustainable development, recognising its economic, social and environmental aspects as "interdependent" and "mutually re-enforcing".[7] Significantly, as well as encouraging dialogue between the Contracting Parties, it also encourages them to conduct a dialogue with the civil society organisations in their territories.[8] This model BIT may be viewed as a practical illustration of "mandatory multilateralism" in international investment law concerning sustainable development.[9]

D. The Importance of Recent Developments

19. Progress has been made in incorporating sustainable development, SDGs and human rights in IIAs since the adoption of the 2030 Agenda. There are, however, two important caveats.

20. First, looking at the IIA universe in its entirety (close to 3,300 IIAs), the overwhelming majority of those in force do not include provisions directly addressing sustainable development objectives. That suggests that a systemic approach is necessary in order to place sustainable development and SDGs in the mainstream of States' approaches to national investment policy frameworks and the negotiation of IIAs.

21. Secondly, new IIAs that do incorporate sustainable development in their substantive provisions appear to limit its role mainly to exceptions, recommendations and political commitments rather than imposing binding obligations on States or investors to contribute to sustainable development.[10]

22. Nevertheless, despite what might be viewed as modest beginnings, there is the very significant potential for further incorporation of sustainable development in IIAs which may assist in promoting the right to development. This area therefore merits further study. A number of important questions arise, including e.g. how the concept of "sustainable development", as incorporated in the new generation of BITs, will be interpreted by international arbitral tribunals seized of investment disputes and whether "sustainable development" will in that way acquire the status of hard law. Of particular interest is the incorporation of "sustainable investment" in the descriptions of "investment" in the Morocco-Nigeria BIT (2016) and the Mauritius-Egypt BIT (2014). It remains to be seen whether tribunals will interpret those references to "sustainable development" as constituting an essential ingredient of the protected investment or merely being recommendatory in nature. Independently of the answer, the inclusion of sustainable development in the definition of "investment" in international investment law is a step in the right direction.[11]

23. Related to this issue, in answer to our questionnaire, one State has commented that the concept of sustainable development should be clearly defined in IIAs and that the exclusion of the SDGs from the provisions on investment may have the unwanted effect of investors engaging in activities which are not sustainable and yet claim protection rights under the IIA.

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[6] https://www.jonesday.com/en/insights/2019/07/renegotiation-of-existing-bits

[7] Article 14(3).

[8] Ibid.

[9] Loukas Mistelis and Giammarco Rao "Multilateral Principles in a Bilateral World, Mandatory or Consensual Multilateralism in International Investment Law", The Italian Review of International and Comparative Law 1 (2021) 59-85

[10] Ole Kristian Fauchald, "International Investment law in support of the right to development"? Leiden Journal of International Law (2021), 32, pp. 181-201, at p.189

[11] Klentiana Mahmutaj: "Will the Morocco-Nigeria BIT transform sustainable development into hard law?" EJIL Talk! 27 January 2022 https://www.ejiltalk.org/will-the-morocco-nigeria-bilateral-investment-treaty-transform-sustainable-development-into-hard-law/

24. Furthermore, the practical application of the BLEU Model BIT (2019) may serve as a useful test of efficacy because it incorporates various aspects of the right to development in international investment law, such as international cooperation in achieving sustainable development, recognition of its economic, social and environmental aspects as interdependent and mutually re-enforcing as well as well expressly encouraging dialogue between states and between states and civil society.

25. The treatment of sustainable development in international investment law cannot, however, properly be examined without also considering relevant parallel developments in the municipal laws of States, particularly where their impact extends beyond their own territories.

26. For example, a recent case of the German Federal Constitutional Court (*Bundesverfassungsgericht*) considered the justiciability of "sustainable development" in the context of environmental and climate law in Germany.[12] The Court, without referring to "sustainable development" by name, considered the concept of "intragenerational equity" (i.e. equity and fairness between current generations), not only within one State but also across borders, and "intergenerational equity" (i.e the commitment and responsibility towards future generations)[13] when exploring Germany's duties under the Paris Agreement (2015). Whilst not directly concerning international investment law, this is a relevant parallel development which shines a useful sidelight on the growing role of sustainable development in international law.

27. The relevance of the German Court's decision is further enhanced by increasing numbers of investor-state disputes involving environmental and human rights concerns.[14] A recent example concerns a group of investors which have brought arbitrations under the Energy Charter Treaty (1994), through which they are seeking a total of EUR 4 billion in damages over fossil fuel projects from four EU Member States.[15] A wide range of competing factors, including amongst others, the "European Green Deal", some EU Member States relying heavily on fossil fuels and the present lack of reform of the Energy Charter Treaty, highlight the interplay and potential tensions between sustainable development, climate change and investors' rights in international investment law. In this context, it may be a cause for concern that "the majority of known fossil fuel [investor-state dispute] cases are decided in favour of investors".[16] This aspect of international investment law will be further explored in the Study.

E. Human Rights, Corporate Social Responsibility and the Right to Development

28. Human rights are an integral part of sustainable development and the achievement of the SDGs. However, as they have already featured quite prominently in investor-state disputes prior to the new generation IIAs, they are dealt with in this document separately in order to highlight both current and future challenges.

1. Current Situation

29. Arbitral awards in investor-state disputes thus far provide only a fragmented and incoherent approach to human rights arguments in international investment law. Frequently, defences advanced by States based on their right to regulate to protect the human rights of their citizens have failed, raising serious concerns about the real policy space available to

[12] Jelena Baumler: "Sustainable Development made justiciable: the German Constitutional Court's climate ruling on intra- and inter-generation equity" https://www.ejiltalk.org/sustainable-development-made-justiciable-the-german-constitutional-courts-climate-ruling-on-intra-and-inter-generational-equity/

[13] Ibid.

[14] *Eco Oro Minerals Corp. v Republic of Colombia* ICSID Case No. ARB/1641, *Odyssey Marine Exploration v Mexico* ICSID Case No. UNCT/20/01

[15] Financial Times, 21 February 2022 https://www.ft.com/content/b02ae9da-feae-4120-9db9-fa6341f661ab

[16] Ibid.

states and the risks of a regulatory chill. Even more frequently investment tribunals have held that they did have not jurisdiction to consider human rights issues at all.[17] Decisions declining jurisdiction have been particularly conspicuous in cases where States have mounted counterclaims based on alleged breaches of human rights by investors.[18]

30. There are, however, exceptions. In the case of *Urbaser v Argentina*[19] a counterclaim was allowed (in principle) in which the State argued that the concessionaire had failed to make a particular level of investment and thereby violated the human right to water. The counterclaim fell within the tribunal's jurisdiction, however, because the tribunal found that the parties had consented to the use of counterclaims.[20] Similarly, the tribunal in *Ecuador v Burlington* entertained counterclaims filed by Ecuador and ordered the investor to pay USD 41.7 million for breaches of Ecuadorian environmental law and contractual obligations.[21]

31. Thus far, the body of tribunal awards in this field has not achieved meaningful progress in reconciling human rights with investor protection and in that respect have failed to fulfil the right to development.

2. Recent Developments

32. The right of States to self-regulate is now expressly articulated in the newer IIAs, either in their preambles or in their substantive provisions. This positive development is, however, of limited value as the provisions are declaratory in nature and do not create new enforceable rights or obligations nor "regulatory space". Therefore, on their own, they are unlikely to counterbalance investment protection provisions in the IIA[22].

33. The express reference to human rights obligations and human rights instruments in some of the new generation of IIAs, although small in number, represent a step forward,[23] as does the inclusion of provisions for investors to observe corporate social responsibility standards. For example, the duty of investors to uphold human rights in the workplace and the community, and to operate in a manner which does not violate human rights, appears in many of the new IIAs.[24]

34. In this context, some of the new generation of IIAs[25] emphasise the importance of domestic law by expressly placing a duty on investors to comply with human rights obligations under the domestic law of the host State. This approach is of practical importance[26] for two main reasons. First, it is a reminder that human rights violations have real consequences[27] and, secondly, such express inclusion may eliminate the principled jurisdictional objection to human rights counterclaims by States.

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17 Fabio G.Santacroce: 'The Applicability of Human Rights Law in International Investment Disputes" in Meg Jinnear and Campbell McLachlan (eds) ICSID Review- Foreign Investment Law Journal, OUP 2019, Vol 34 Issue 1) pp.136-155

18 Some examples include, *Rusoro Mining ltd v Venezuela ICSID Case No. ARB(AF)/12/5, Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Anglo American plc v Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/14/1)

19 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016.

20 Edward Guntrip: "Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?" EJIL Talk! 10 February 2017

21 https://www.iisd.org/itn/en/2018/10/18/burlington-v-ecuador/

22 Barnali Choudhury, International Investment Law and Non-economic Issues, 53 Vanderbilt Law Review 1 (2021)

23 See for example, Article 6 (6) the Dutch Model BIT (2019)

24 ECOWAS Article 14 (3), Draft Pan African Investment Code (2016), Article 24(a) and (b)

25 Article 15.1 of 2012 Model BIT of the Southern African Development Community, Article 5.3 of the Netherlands Model BIT (March 2019 version), Article 13 of India Model BIT (2016) Article 14 of the Morocco- Nigeria BIT (2016), Draft Pan-African Investment Code, Article 13 of India Model BIT (2016)

26 Eric De Brabandere, "Investment Claims: Human Rights Counterclaims in Investment Treaty Arbitration", 25 October 2018, https://oxia.oulaw.com/723.

27 For an interesting take on investors' breaches and compensation see Article 2 of the Bangladesh-Denmark BIT (2009), which refers to state's damage to public health, life or environment which

35. Moreover, the existence of an effective counterclaim mechanism rooted in IIAs[28] may dissuade investors from acting in a manner which violates human rights in the host State in the first place and, in the event of a breach, avoid arbitration in favour of settlement, reducing the costs and uncertainty of legal proceedings for host States.

36. By contrast, IIAs' reference to investors' liability under the laws of the home State may not be as beneficial. This is expressed, for example, as investors' liability under the laws of their home States for acts and decisions that lead to "damage, personal injuries or loss of life in the host state".[29] It is not immediately apparent what value this type of provision adds, as it merely reiterates an existing principle of investors' liability in their home jurisdictions for acts carried out extraterritorially. The provision does not appear to add any supplementary obligations on the home States.[30]

37. On a related issue, the incorporation of provisions on corporate social responsibility raises particular challenges, given the non-legally binding nature of the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights. As a result, they feature in IIAs in a recommendatory vein. For example, the Canada-Burkina Faso BIT (2015)[31] encourages investors to incorporate internationally recognised standards both in their policy and practice and the India-Belarus BIT (2018) recommends that investors do the same voluntarily.[32] Despite this inherent weakness, the importance of corporate social responsibility for sustainable development is expressly articulated in the Switzerland-China FTA (2013).[33]

38. Although aspirational, the clauses on corporate social responsibility demonstrate an increased awareness of the importance of human rights in international investment law. This is also demonstrated by decisions of domestic courts in investors' home States. By way of example, in 2019 six civil society organisations brought a claim against a French oil company, Total, for its alleged failure to comply with the French 2017 Duty of Vigilance law (which requires companies to create and implement publicly available vigilance plans for which they can be held accountable) in their mining project in Uganda.[34] The French *Cour de cassation* accepted jurisdiction over the dispute in December 2021 and the case is currently awaiting trial on the substantive merits. This is the first legal action in France based on the duty of vigilance of transnational corporations.[35] In a similar way, other domestic courts, like those of the UK, Canada[36] and the Netherlands[37] have taken the view that parent companies can be liable for the overseas operations of their foreign based subsidiaries,[38] albeit that their findings turned on the specific facts of the particular cases.[39]

39. This development, however, has its limitations, as despite the jurisdiction of national courts to determine the substantive aspects of liability, many of these cases have settled on

would make the investor liable to pay compensation to the state, either under domestic or international law.

28 See for example Article 14 of the Slovakian-Iran BIT (2016)

29 See Article 7(4) of the Dutch Model Treaty (2019), Article 20 Morocco-Nigeria BIT (2016)

30 Eric De Brabandere "The 2019 Dutch Model Bilateral Investment Treaty: Navigating Turbulent Ocean of Investment Treaty Reform", ICSID Review, Vol.36, No. 2(2021), pp. 319-338 at p. 328.

31 Article 16.

32 Article 12. See Also Argentina-Japan BIT (2018) article 17; Australia-Hong Kong FTA (2019), Article 16.

33 Preamble.

34 https://www.business-humanrights.org/fr/dernières-actualités/france-french-high-court-allows-case-in-total-uganda-oil-case-to-go-on/

35 Ibid.

36 https://www.business-humanrights.org/en/latest-news/guatemalan-protestors-receive-public-apology-from-pan-american-silver-after-reaching-landmark-conclusion-in-canadian-court/

37 https://www.reuters.com/article/us-shell-nigeria-court-idUSKBN29Y1D2

38 Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents) [2019] UKSC 20 https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf and Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents) [2021] UKSC https://www.supremecourt.uk/cases/docs/uksc-2018-0068-judgment.pdf both of which were decided on well-established principles of English tort law.

39 Ibid.

large sums of compensation but without admission of liability by the investors.[40] By way of illustration, a British company, Petra Diamonds, recently agreed to pay compensation to Tanzanians who were alleged to have suffered serious human rights abuses at a diamond mine at the hands of security personnel contracted by Petra's local subsidiary.[41] The settlement was, however, agreed with no admission of liability.

40. Although an examination of the domestic law of States is not a primary area of focus, the Study will seek to highlight some important recent developments in the laws of historically capital-exporting States in order to assess whether they collectively represent an important cultural shift which may bear on the proper role of IIAs in the protection of human rights in host States.

41. However, in light of the above, all that can be presently said is that the endorsement of human rights in IIAs is still in its infancy and a wider incorporation of them would be necessary before a consistent and coherent approach can be achieved.

F. The Right of Participation through Consultation with Relevant Stakeholders

42. In our questionnaire, we asked whether IIAs should expressly require States to consult stakeholders in their own civil society prior to permitting a foreign investor to make an investment in their territory and whether this should be limited to particular types of investment and stakeholders.

43. Some States have expressed reservations in this regard, including concerns that the process may discourage foreign investment or that it may adversely affect the State's ability objectively and consistently to assess the merits of investments.

44. Nevertheless, the Study will highlight the importance of relevant stakeholders being consulted in relation to foreign investments[42] and how consultations prior to the investment being made may be more effective in protecting the population's human rights and fulfilling their right to development. Early consultations also carry the benefit of avoiding potential human rights breaches and related lengthy litigation and Investor-State disputes.

G. Amicus Curiae

45. *Amicus curiae* has been used as means of supporting human rights in investor-State cases, providing both relevant factual and legal expertise which tribunals do not necessarily possess. In that way, they also perform the important function of allowing stakeholders to participate and be consulted in a process the outcome of which directly or indirectly affects them.

46. Unfortunately, *amicus curiae* have received a chequered and inconsistent reception by arbitral tribunals and recent cases only re-enforce this trend. In December 2021 an ICSID tribunal rejected the admissibility of *amicus curiae* on human rights and particularly the right to live in a healthy environment in the case of *Eco Oro Minerals Corp. v Republic of Colombia*.[43] Similarly, another arbitral tribunal recently refused the application for an *amicus curie* submission on human rights and international environmental law in a dispute under the NAFTA Agreement between a US investor and Mexico.[44]

[40] https://www.bbc.co.uk/news/world-africa-55725305

[41] https://www.business-humanrights.org/en/latest-news/tanzania-petra-diamonds-reaches-a-settlement-with-71-claimants-for-alleged-human-right-abuses-at-its-subsidiary-includes-comments-from-raid-leigh-day/

[42] For an illustration of its importance see Bear Creek Mining Corporation v Republic of Peru, ICSID Case No.ARB/14/2

[43] *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No. ARB/1641 Procedural Order No.6 Decision on Non-Disputing Parties' Application.

[44] *Odyssey Marine Exploration v Mexico*, ICSID Case No. UNCT/20/01 Procedural Order No.6

47. As an alternative to the vehicle of *amicus curiae* some of our contributors have suggested that arbitral institutions establish a new permanent institution which is exclusively dedicated to defending the collective interest. The merits of alternative proposals will be considered further in the Study.

H. Arbitrators' Qualifications in Human Rights and Sustainable Development

48. The lack of familiarity with human rights law of some arbitrators in investor-state disputes has been a concern for States and civil society. In our questionnaire, we asked the question whether a requirement for formal qualifications may lead to fairer awards which fully take into account human rights concerns raised in particular disputes.

49. Some of our contributors are of the opinion that arbitrators ought to be required to demonstrate expertise in human rights law[45] before they are permitted adjudicate investor-state disputes, while others take the view that the better approach would be to appoint an independent expert to the arbitral tribunal which would assist them with any human rights and related expertise.

50. The Study will address this apparent deficiency and possible solutions.

[45] See also Article 20 (5) of Dutch Model BIT (2019) which states that the appointing authority shall make every effort to ensure that members of the tribunal either individually or together, possess the necessary expertise in public international law and that includes, amongst others, expertise in environmental and human rights law.