Input for Working Group on Business and Human Rights' report on "Human Rights-compatible International Investment Agreements (IIAs)"

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State duty to protect human rights

> 4. How could old IIAs be reformed efficiently to make them compatible with States' international human rights obligations?

I have addressed these reforms in a recent article entitled "*International Investment Law and Non-economic Issues*"[1], but will briefly summarize them here.

The Right to Regulate

A simple mechanism for reinforcing a state's regulatory space for human rights is to formally articulate the state's right to regulate in an IIA. The effects of these types of provisions on state's regulatory space is typically muted since they neither create any legally enforceable rights or obligations nor create regulatory space. However, they do denote the weight to be accorded to specific human rights, offer a presumption that state regulatory interest will be taken into account, or confirm that investor protection obligations are not absolute. They may also help define the object and purpose of the IIA and its context, which in turn can be used in the interpretation of other provisions of the treaty.

Fair and Equitable Treatment (FET)

Tribunals' ever-evolving interpretations of the FET standard have made it a moving target for states and a threat to state ability to regulate human rights issues. Accordingly, states should consider circumscribing the FET standard. One approach to doing so would be to remove the FET standard altogether. India has taken this approach in its newly revised model BIT, by replacing the FET standard with 'treatment of investors'. Such treatment prohibits measures "which constitute a violation of customary international law" and limits measures to denial of justice, breach of due process, targeted discrimination, or manifestly abusive treatment. By taking this approach, India has removed the ability of tribunals to develop content for the FET standard and has narrowed the grounds for state liability only to the enumerated grounds, notably excluding the concept of legitimate expectations and arbitrariness.

A second approach would be to retain the FET standard, but prescribe the grounds for breach of the standard. The *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* has taken this approach, referring to the FET standard in its investment chapter, but limiting its scope only to grounds of denial of justice in accordance with the principle of due process.

[1] 53 Vanderbilt Journal of Transnational Law 1 (2020), available here: https://44a839cd-f0b7-445f-830a-1aa09cbd42c9.filesusr.com/ugd/8700b0_01cb0acb7f0048218b3b9095efc83496.pdf

A third approach would be to delineate the grounds for the FET standard but allow for a review of the content of the standard if needed. The *EU-Canada Comprehensive Economic and Trade Agreement* adopts such an approach. It limits the FET standard to denial of justice, fundamental breach of due process, manifest arbitrariness, targeted discrimination, and abusive treatment of investors, but allows for any other treatment, as defined by the parties and developed subsequently to the signing of the agreement, to be added.

Alternatively, states can prescribe the elements of the FET standard, but remove it from the scope of investor-state dispute resolution. This would still require states to afford such treatment to investors, but disputes over treatment would be resolved through other means such as through consultations or state-to-state dispute resolution.

Finally, states could clarify the FET standard, mimicking the wording found in indirect expropriation provisions. Thus, in the same way that indirect expropriation standards note that "non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriations", FET standards could contain language that provides that "non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives do not constitute a breach of fair and equitable treatment". This would remove human rights regulations from being caught up by FET claims.

Safeguard Provisions

States can introduce provisions that safeguard their ability to regulate human rights. This includes exceptions provisions, provisions that exclude application of the treaty entirely, and reservations.

For instance, states can introduce exception provisions that exempt human rights regulations from the scope of the treaties altogether. This can be accomplished either by using GATT, Article XX style language or by creating standalone exception provisions. For instance, states can include in the text of IIAs the following wording: provided that it is not applied in an arbitrary or discriminatory manner and has been enacted with due process, a measure enacted for a public purpose which affects a foreign investment is not compensable. Alternatively, states can exempt human rights regulations from investment arbitration, but to prevent abuse, allow state parties to collectively determine whether the regulation in question falls within this exception. This is the approach taken by the Australia-China FTA.

Finally, states could subject disputes concerning regulatory measures aimed at protecting human rights to a different dispute resolution mechanism altogether. Such disputes could be regulated by state-to-state dispute resolution or by joint state party committees or ombudsmen as a means of limiting investor challenges to human rights regulations. More radically, states could exempt such regulatory measures from investment arbitration altogether. The CPTPP and some Singaporean BITs already employ such a practice with their tobacco carve-outs that enable state parties to deny investors the ability to bring an investment arbitration challenging a tobacco control measure. States could follow a similar practice for human rights regulations and prohibit such regulations from even being the subject of an ISDS claim.

Human Rights Experts

Since tribunals tend not to be familiar with human rights issues, one way to ensure consideration of human rights issues would be to provide for the tribunal to be able to appoint an independent human rights expert (selected from a state appointed list) when confronted with a human rights issue. Experts could, for instance, assist the tribunal with evaluating evidence, determine the human rights impacts of a measure, or help them determine whether a particular measure is oriented towards a legitimate public welfare objective.

Alternatively, states could ensure arbitrators have a public international law (as opposed to a commercial arbitration) background, as these individuals are more likely to be familiar with human rights issues.

Reinstating Development Goals

States could also consider adding provisions targeted at promoting development goals into their treaties. For instance, IIAs could contain provisions requiring investors to engage in human rights impact assessments prior to investing or they could specify provisions that build on denial of benefits clauses (for example, as found in the NAFTA) to prevent investors from benefitting from the IIA if they have caused significant adverse human rights impacts.

Moreover, in treaties between developed and developing countries, states could include provisions requiring the developed state to actively promote and facilitate investment in the developing state and to cooperate with it "to transfer technology to and build capacity…[in the state]…to host and benefit from foreign investment." The idea of facilitating more interaction between the contracting states has been adopted in Brazilian IIAs. Brazil uses joint committees (composed of state parties) to share opportunities to expand mutual investment and to cooperate to facilitate investment and uses ombudsmen to support investors while in the host state. These practices enhance capacity building in the states as well as help states adhere to their IIA obligations.

Investors' responsibility to respect human rights

I have written about this topic in two related articles, "*Investor Obligations for Human Rights*"[2] and "*Human Rights Provisions in International Investment Treaties and Investor-State Contracts*"[3] but will briefly summarize my findings here.

1. Are human rights provisions in existing IIAs effective in encouraging investors to respect all internationally recognised human rights? If not, what should be done to strengthen their efficacy?

[2] ICSID Review - Foreign Investment Law Journal (2020), available here: https://academic.oup.com/icsidreview/advance-article-abstract/doi/10.1093/icsidreview/siaa002/5866671?redirectedFrom=fulltext

[3] In *Investment Protection, Human Rights, and International Arbitration, Edward Elgar (2021, forthcoming)*, available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3643407

The answer to this question is no, because for the most part, human rights obligations for investors in IIAs are non-binding. For instance, the Canada-Burkina Faso BIT stipulates that states "should encourage enterprises operating within its territory or subject to its jurisdiction to incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies." Similarly, the India-Belarus BIT specifies that investors "shall endeavor to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies." There are no repercussions for investors for failing to adhere to these requirements, making them ineffective as a tool for imposing human rights obligations on investors. The only way to make them effective is to make them binding by specifying repercussions for failure to adhere to them. (See the answer to Question 2 below)

2. Should IIAs include legally binding human rights responsibilities of investors to prevent and mitigate potential negative impacts of their investment on individuals or communities? What measures and/or mechanisms could ensure that these provisions are complied with by investors in practice?

Yes, IIAs should include legally binding investor obligations. Models to emulate include:

- the Morocco-Nigeria BIT, which specifies that investors *shall* uphold human rights in the host state, act in accordance with core labour standards, and not manage or operate investments in "a manner that circumvents international environmental, labour and human rights obligations";
- the draft Pan Africa Investment Code, which denotes that investors shall "ensure that they do not conflict with the social and economic development objectives of host States" and contribute to the host state's economic, social and environmental progress. It also establishes human rights-related principles, with which investors should comply, including stipulating that investors should support and respect human rights and ensure that they are not complicit in human rights abuses;
- The Brazil-Malawi BIT, which specifies that investors "shall strive to achieve the highest possible level of contribution to the sustainable development of the Host Party and the local community" by adopting socially responsible practices. It also details the means by which this contribution can be made, including, among others, strengthening local capacity building through close cooperation with the local community, developing human capital, and refraining from seeking or accepting exemptions that are not established in the host state's legislation relating to environment, health, etc.;
- the Economic Community of Western African States (ECOWAS) Supplementary Act on Common Investment Rules for the Community, which stipulates that investors shall uphold human rights in the workplace and in the community and shall manage and operate their investments without breaching or circumventing human rights. It further requires investors to refrain from, either complicitly or with the assistance of others, violating human rights in times of peace or during socio-political upheaval.

Human rights investor obligations can also draw from practices in IIAs that specify investor obligations for other issue areas. For instance, some IIAs require investors to protect the environment and to remediate environmental damage; to engage in environment impact

assessments; to promote and finance transfers or access to environmentally sound technologies and know-how; and refrain from exploiting or using local natural resources to the detriment of the rights and interests of the host State. Drawing from these practices, investors could similarly be obliged to fulfill these same requirements except in relation to human rights.

Several IIAs also impose anti-corruption obligations for investors. Thus, IIAs specify that investors should "adhere to UN anti-corruption efforts"; refrain from "engaging in corruption or being complicit in corrupt acts"; and refrain from "trying to achieve gains through unlawful means." A failure to adhere to these obligations can result in states prosecuting offending investors. Alternatively, in some treaties, investor corruption is considered a bar to initiating dispute settlement and investors who have engaged in corrupt activities are prohibited from initiating investment arbitrations. Using anti-corruption obligations as a precedent, investors who commit human rights violations could face civil or criminal prosecutions or be prohibited from initiating investor arbitration.

Indeed, specifying consequences for investors who fail to respect human rights can be one means of ensuring compliance with such provisions. Models to emulate for specifying consequences include:

- the Bangladesh-Denmark BIT, which provides that if the host State "suffers from a loss, destruction of damages with regard to its public health or life or the environment, including natural resources by the investor" then the investor is obliged to accord the host State adequate and effective compensation under domestic or international law;
- Stipulating that home States can hold investors civilly liable for any acts relating to their investment in the host State that causes significant damage, injuries or loss of life;
- Barring investors' access to arbitration if the investor fails to comply with human rights or environmental provisions of international instruments, as the Colombia Model BIT provides; or
- Enabling arbitral tribunals to take into account investor failure to respect human rights in determining the compensation for an award or to off-set damage awards.

3. Have counter-claims brought by States against investors been effective in addressing human rights abuses linked to their investment? If yes, please provide details.

Counterclaims are new claims, separate from the principal claim, which are linked to the principal claim. Although counterclaims are generally permitted by most arbitral rules, some tribunals have struggled to determine whether to accept a counterclaim.

Tribunals can accept counterclaims if two preconditions, consent and connection, are met. The issue of consent is tied to a tribunal's jurisdiction as a tribunal will only have jurisdiction over a legal dispute arising directly out of an investment if the parties have consented to submit such a dispute to arbitration. Since in most instances, investors do not consent to counterclaims, tribunals have focused on dispute resolution provisions in the IIA to determine whether consent has been obtained. Where the treaty's dispute resolution provision contains open-ended language – such as consent being granted for 'any legal dispute'– tribunals have found that investors consented to the counterclaim. Similarly, where treaties provide consent to submit disputes to arbitration under the auspices of ICSID, tribunals have located consent in article 46 of the ICSID Convention which

specifically allows for counterclaims. Conversely, where the dispute resolution provision is worded narrowly, tribunals have not found consent.

The second requirement for a counterclaim is that there is a connection between the principal claim and the counterclaim. The connection between the primary and counterclaim can be either legal or factual in nature.

Given that tribunals have struggled with allowing counterclaims, states interested in initiating counterclaims should explicitly provide that counterclaims are permissible in their investment treaties. Alternatively, they can specify that ISDS should be conducted under ICSID rules.

Some successful counterclaims involve:

- *Urbaser v. Argentina*, where the tribunal accepted the state's counterclaim that the investor bore an obligation to guarantee the human right to water, since both consent – a broadly worded treaty – and connection were present. However, the tribunal ultimately rejected the counterclaim on its merits;
- *Aven v. Costa Rica*, where the tribunal accepted the state's counterclaim that the works undertaken by the investor "caused considerable environmental damage" which they should repair and restore. However, the tribunal ultimately rejected the counterclaim on its merits; and
- *Burlington Resources Inc. v. Ecuador; Perenco v. Ecuador,* which involved two related investment arbitrations in which Ecuador was successful in counterclaims against both investors. The tribunal found that the investors had not met their environmental obligations under Ecuadorian law.