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Notes From Practice: Announcing The SIFCA Framework – Is The Confluence Of Investment Protection With Business And Human Rights The Future Of Investment Treaties?

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This post shares a development of potential significance, i.e., the drafting of the Sustainable Investment Facilitation & Cooperation Agreement (**SIFCA**), a next-generation model bilateral investment treaty (**BIT**) developed for The Gambia, a sovereign State in West Africa and one of the world's least developed countries (**LDCs**). This post continues the discussion raised in January 2021, in a post by Nicholas Diamond and Kabir Duggal titled "*2020 in Review: The Pandemic, Investment Treaty Arbitration, and Human Rights*", which considered the "*intersection of investment and human rights in 2021"*. Developed for State-to-State investment treaty negotiations, the SIFCA framework incorporates certain investor obligations based on the United Nations Guiding Principles on Business and Human Rights (**UN Guiding Principles**) to a degree previously unknown in modern investment treaty practice. The SIFCA has already had an impact in prompting The Gambia to reconsider several more traditional bilateral investment treaties currently in negotiation to include the innovations of this treaty moving forward.

This post briefly considers: (1) key innovations of the SIFCA model investment treaty; (2) the UN Guiding Principles as a framework for investor obligations; and (3) the Hague Rules on Business and Human Rights Arbitration (**the Hague Rules**) as procedural rules in investor-State dispute settlement (**ISDS**). We raise the prospect that the confluence of two different regimes of public international law – investment protection on the one hand and business and human rights on the other – may signal a new imperative for the future of investment protection and ISDS.

The SIFCA: Next-Generation Bilateral Investment Treaty

Pursuing the best interests of the Host State, the SIFCA's objectives reach far beyond the limits of standard treaty design in international investment agreements (**IIAs**), which has been criticized as primarily benefitting foreign investors while disproportionately allocating risks to the Host States. Some key SIFCA objectives include:

- To promote more equal sharing of risks and benefits in modern IIAs;
- To introduce investors' business and human rights obligations as a shield for Host States in IIAs; and

- To reduce perceived power imbalances in ISDS between developing States and well-funded investor claimants.

The following innovative elements appear in the SIFCA framework:

- A requirement for the investor to submit a declaration of compliance with both the SIFCA itself and the UN Guiding Principles as a condition precedent to the submission of a dispute to arbitration;
- The exclusion of the investor's claims as inadmissible if:
    - the investor's declaration (above) is untruthful, or
    - more than five years have passed from the claim arising and the detection of the associated loss or damage;
- Availability of the Hague Rules as procedural rules for ISDS as an alternative to ICSID Arbitration, and where arbitration under the ICSID Convention and ICSID Rules is chosen, the tribunal's procedure must be determined by reference to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration;
- A requirement that investors pay all deposits during proceedings;
- An express reference to the possibility of the Host State to file counterclaims;
- A requirement that investors, in commencing arbitration, consent to recognizing (1) concerns of human rights, environmental protection, sustainability and investment protection as interrelated and arising directly from an investment (including for jurisdiction under ICSID), and (2) the tribunal's jurisdiction over any third-party claims asserted against the investor by natural persons who have suffered the violation of internationally recognized human rights in connection with an investment; and
- A requirement that any compensation consider the investor's infringement of its obligations under the SIFCA framework or its responsibilities under the UN Guiding Principles or related instruments, including the OECD Guidelines for Multinational Enterprises.

The UN Guiding Principles

A key advancement of the SIFCA framework is the incorporation of investor obligations based on business and human rights principles into an investment treaty model. This approach reflects the UN Guiding Principles' stated purpose of "*enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization*". Given the parallels between this stated purpose and public interest considerations underlying ongoing discussions of ISDS reform, it is unsurprising to find resonance between the UN Guiding Principles and efforts to improve ISDS by incorporating investor obligations into next-generation model IIAs.

A careful review of the UN Guiding Principles addresses the assertion that the business and human rights regime lacks the requisite specificity to provide effective investor obligations in IIAs. In particular, incorporating the UN Guiding Principles as a whole into investor obligations in IIAs provides clarity regarding both the spirit and the letter of investment treaty law. Concerning the former, Guiding Principle 11 provides:

> *Business enterprises should **respect human rights**. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.*

As Guiding Principle 12 explains, the responsibility of businesses to respect human rights refers – at a minimum – to *"internationally recognized human rights"*. Guiding Principle 15 builds upon this foundation, outlining the following more specific considerations:

> *In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:*
>
> *(a) A **policy commitment** to meet their responsibility to respect human rights;*
>
> *(b) A human rights **due diligence process** to identify, prevent, mitigate and account for how they address their impacts on human rights;*
>
> *(c) **Processes to enable the remediation of any adverse human rights impacts** they cause or to which they contribute.*

It follows from the above that an investor's compliance with the UN Guiding Principles entails not only a general aspiration to respect human rights in the abstract, but rather a specific policy commitment, due diligence processes, and processes to enable the remediation of adverse human rights impacts. In this way, the UN Guiding Principles outline not only the high-level spirit of compliance, but also specific aspects of implementation in practice. Simply put, you either have such policies and processes in place, or you don't. This binary quality – expressed both in the spirit and the letter, in general, and in the specific – allows for the ready incorporation of the UN Guiding Principles into investment treaties as the basis of well-considered investor obligations.

The Hague Rules on Business and Human Rights Arbitration

For the first time, the SIFCA introduced the Hague Rules into the ISDS context, an innovation that proves to be compatible with the investment protection regime. While the scope of the Hague Rules has previously been considered "*in contrast to investment treaty arbitration*", there is actually no reason to assume that the reach of the Hague Rules is necessarily different from the potential reach of investment treaty arbitration or that the use of the Hague Rules in this context is inappropriate.

First, the Hague Rules were developed from the 2013 UNCITRAL Arbitration Rules and key aspects of the Transparency Rules with the stated purpose of providing "*a set of rules for the arbitration of business and human rights disputes*". As the Hague Rules' Introductory Note recognizes, however, "*the scope of the Hague Rules is not limited by the type of claimant(s) or respondent(s) or the subject-matter of the dispute*", and "[p]*arties could thus include business entities, individuals, labor unions and organizations, States, State entities, international organizations and civil society organizations, as well as any other parties of any kind*". Key

purposes of the Hague Rules include addressing adverse human rights impacts and serving as a grievance mechanism consistent with the UN Guiding Principles, which is not inconsistent with investment protection as a fundamental premise.

Second, the Hague Rules also address such concerns in arbitral proceedings as cultural appropriateness (Article 18(1)), rights compatibility, tensions between transparency and confidentiality in the public interest context, reasonableness in fees and expenses (Article 52(1)), and public interest considerations in the allocation of costs (Article 53(1)). Since the Hague Rules contemplate "*the potential inequality of arms among the disputing parties*" (Article 5(2)), e.g., "*in cases between rights-holders and businesses*", they also hold a unique capacity to address potential inequality of arms between developing States and well-funded investors in ISDS. The incorporation of a requirement that investors consent to the application of the Hague Rules to access investor-State arbitration in investment treaty models like the SIFCA may assist with answering "*the question of why companies will agree to arbitrate*" under the Hague Rules as well as encouraging their full application rather than "*watered down arbitration agreements that cancel out possibilities for human rights remedies*", at least in the context of such disputes arising in relation to a foreign investment.

Conclusion: Confluence of Two Regimes

The SIFCA innovatively brings together investment protection and business and human rights considerations. Some may claim that these two regimes are distinct and that the SIFCA Model is overly ambitious in seeking such a convergence. Every reform project must, however, begin with a first step. In the current climate in which ISDS reform is receiving significant and serious consideration, the innovations of the SIFCA, and in particular the incorporation of investor obligations based on business and human rights principles, may suggest a thought-provoking new direction for the evolution of international investment law and ISDS. As the *Urbaser* Tribunal noted in considering the applicability of human rights to private sector entities, "*an obligation to abstain, like a prohibition to commit acts violating human rights . . . can be of immediate application, not only upon States, but equally to individuals and other private parties*" (Award at [1210]). Of course, as the *Urbaser* Tribunal also noted, any extension of positive human rights obligations to the private sector (such as "*an obligation to perform services complying with the residents' human right to access to water and sewage services*" (Award at [1207])) remains subject to further development in treaty practice or in the general principles of international law. Viewed in this light, the SIFCA represents not only a framework for incorporating investor obligations into a model investment treaty, but also a promising addition to the broader conversation over the future of human rights discourse and responsibility in international law. Ultimately, it is expected that healthy and respectful debate may lead to acceptance of the principles espoused in the SIFCA and to improvements in future treaty practice. In time, investment treaty practice may witness the confluence of two different regimes in public international law that perhaps were never so different after all.

Disclaimer: *The authors wish to recognize the following as having contributed to the efforts of the*

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