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Human-rights-based Claims by States and "New-Generation" International Investment Agreements

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1. **Introduction**

Recent years have witnessed an unprecedented level of attention on corporate responsibility for human rights. As public calls for action in this area intensify, States are signing up to a growing list of codes and protocols focused on the regulation of business activity.[1]Yet few of these instruments have binding legal force, and even fewer impose obligations directly on companies. As a result, the scope for claims against companies for alleged human rights violations remains limited.

Against that background, recent developments in the sphere of international investment agreements (**IIAs**) are of note. Unlike bespoke business and human rights instruments, a number of "*new-generation*" IIAs (or proposed IIAs) arestarting to include direct and binding human rights obligations on companies. The 2012 South-African Development Community (**SADC**) Model bilateral investment treaty (**BIT**), the 2016 draft Pan-African Investment Code (the **draft PAI Code**) and the 2016 Morocco-Nigeria BIT are notable examples. Although a draft copy is currently not available, it appears from reports that Ecuador's recently-announced 2018 model BIT (the **Ecuador Model BIT**) will also contain human-rights-related investor obligations.[2]This post examines the historical context of these IIAs, the nature and scope of the obligations imposed by them on investors, and, should any of them (or IIAs based on them[3]) enter into force, the potential for them to give rise to human-rights-based claims by States against investors.

2. **The approach of most IIAs to corporate responsibility for human rights**

IIAs are typically asymmetrical: they offer substantive rights to investors, which may be enforced against States, and do not impose obligations on investors in return (whether human-rights-related or otherwise). In fact, historically, most IIAs have not addressed human rights at all. Where they have, references have typically been limited to the IIAs' preambles.[4]Such references are significant in that they indicate the IIA's object and purpose. They may, therefore, influence the interpretation of the IIA's text.[5] They do not, however, create human rights obligations for investors, which the State could seek to enforce.

In fact, the limited scope of dispute resolution clauses in IIAs means that it is typically impossible for a State to bring a claim (of any nature) against an investor. States give a standing offer to arbitrate disputes under IIAs in the dispute resolution clauses of IIAs. An arbitration agreement between the State and an investor is only formed once an investor accepts that offer by filing a request for arbitration. Claims must, therefore, always be initiated by an investor.

An IIA could conceivably provide for a State to commence proceedings against an investor before national courts.[6]However, even if an IIA were to allow a State to commence such a claim, since traditional IIAs do not impose obligations on investors, establishing the basis for the claim would likely be difficult. It would instead have to be founded on legal obligations arising outside of the IIA itself, but few international human rights law instruments impose obligations on companies, and human rights obligations under the national law of the host State may not be binding on the foreign investor that is a party to the IIA proceedings (assuming such an investor is a corporate entity incorporated outside the jurisdiction and several corporate layers removed from the investment).

Counterclaims by a State against an investor are possible under some IIAs.[7]For the reasons explained above, however, establishing a breach by an investor of an obligation applicable to it is rarely straightforward. Moreover, even if the investor's breach of a relevant obligation can be established, a State must typically also show that there is a sufficient connection between the legal obligation breached and the investor's own claim (as required, for example, by the ICSID Convention, if applicable[8]). That is often difficult.[9]

3. **Investor obligations in "*new-generation*" IIAs**

In an effort to overcome these issues, some "*new-generation*" IIAs (or proposed IIAs) are starting to impose obligations on investors. As noted above, the 2012 SADC Model BIT, the 2016 draft PAI Code and the 2016 Morocco-Nigeria BIT are all examples of this trend. By way of illustration, Article 20(1) of the draft PAI Code requires (among other obligations) that "*investors shall adhere to socio-political obligations including, but not exclusively…(a) respect for socio-cultural values; …and (e) Respect for labor rights*", and Article 24 sets out a number of principles that "*should govern compliance by investors with business ethics and human rights*", which include "[s]*upport*[ing]*and respect*[ing] *the protection* [of] [*sic*] *internationally recognized human rights*".

The SADC Model BIT and the Morocco-Nigeria BIT go further; they impose a direct obligation on investors to respect human rights *in general*. Specifically, Article 15(1) of the SADC Model BIT states that:

"Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the [*sic*] human rights by others in the Host State, including by public authorities or during civil strife."

Article 18(2) of the Morocco-Nigeria BIT similarly provides that "[i]*nvestors and investments shall uphold human rights in the host state*." Both instruments also establish defined minimum standards with which investors must comply. They each provide that "[i]*nvestors and their investments shall act in accordance with core labour standards as required by the ILO Declaration*

on Fundamental Principles and Rights of Work, 1998."[10] In addition, both specify that "[i]*nvestors and their investments must not manage or operate investments in a manner inconsistent with the international environmental, labour, and human rights obligations binding on the home State and/or host State*".[11] As the commentary to the SADC Model BIT explains, this is intended to require investors and investments to ensure that their practices are consistent with the international human rights obligations of the host State or their home State (i.e. as agreed in relevant human rights treaties), regardless of whether those obligations have been incorporated into domestic law.[12]

4. **The possibility for States to bring human-rights-related claims against investors under "*new-generation*" IIAs**

The new provisions described above open up the possibility of positive human-rights-related claims by States against investors in the event of their breach, subject to the scope of the applicable dispute resolution provisions. The jurisdiction clauses in the Morocco-Nigeria BIT, the SADC Model BIT and the draft PAI Code, however, remain relatively restrictive. Significantly, none of them contains a dispute resolution provision broad enough to allow States to initiate claims for breaches of them against the investors concerned. The dispute resolution clauses in the Morocco-Nigeria BIT and the SADC Model BIT are explicitly one-directional (allowing claims by investors only).[13] While the dispute-resolution clause at Article 42(1) of the draft PAI Code is broader, allowing any "*investment dispute between an investor and a Member State pursuant to this Code*" to be resolved directly between the investor and the State, it only envisages investor-State arbitration. As explained above, State initiated claims against investors are not possible in that forum.

Nevertheless, there is scope for States to raise non-compliance by an investor with its IIA obligations in the form of a positive human rights counterclaim all three of these IIAs. Both the SADC Model BIT and the draft PAI Code provide for this expressly.[14]Specifically, they both permit the relevant tribunal/court hearing a claim by an investor to take into account an alleged breach by an investor of its obligations under the relevant instrument and to consider "*whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award*."[15] In addition, both allow a host State to initiate a counterclaim against an investor "*for damages or other relief resulting from an alleged breach*" of an investor obligation.[16]

The Morocco-Nigeria BIT does not expressly address counterclaims. However, the jurisdiction clause permits tribunals to determine "*any dispute between the Parties*", which seems wide enough to allow a counterclaim by a State that an investor has breached an obligation under the IIA. In addition, an investor may choose to submit a claim under the ICSID or UNCITRAL Rules, both of which contemplate host State counterclaims.[17]The requirement under Article 46 of the ICSID Convention for counterclaims to have arisen directly out of the "*subject-matter of the dispute*" may, however, operate as a restriction.[18]

5. **Conclusion**

The imposition of human-rights-related obligations on investors by "*new generation*" IIAs is an important innovation in that it establishes a clear expectation as to investors' behaviour. If the relevant instruments (or instruments based on them) enter into force, the inclusion of these obligations will go some way to assuage concerns regarding the imbalance between investor and

State obligations in traditional IIAs. A number of issues remain, however, relating to the enforcement of such obligations. As explained above, the "*new generation*" IIAs do not make it possible for States to initiate claims. Allegations of breach will, therefore, have to be addressed by way of a counterclaim in the event proceedings are commenced by an investor, which is a significant restriction and assumes a State must commit, or be alleged to have committed, a wrong. If an investor commences its claim in arbitration under the ICSID Rules, a State will – moreover – still be required to demonstrate that its counterclaim arises out of the "*subject-matter of the dispute*" in order to establish the jurisdiction of the arbitral tribunal over the counterclaim.

In addition to potential jurisdictional problems, where investors' human-rights-related obligations are drafted very broadly, or by reference to human rights obligations binding on States rather than investors, issues may arise in establishing their content (which will be necessary in order to prove a breach). To the extent that the "*new generation*" IIAs are not implemented or directly applicable in the law of the relevant State parties, a question also arises as to whether the obligations imposed by them can be considered binding on investors.[19]

Finally, it is also not clear what remedies a State should be able to claim for violations. The ultimate beneficiaries of human rights are individuals; it is individuals that typically suffer losses as a result of human rights transgressions. A State would have to somehow establish a right to claim damages from an investor on behalf of its citizens, or otherwise demonstrate how the violation by an investor of its obligations has caused the State itself to suffer losses. While it may be that neither of these obstacles is insurmountable, claims are unlikely to be straightforward. Even if those hurdles are overcome, there is the further difficult question of how such losses should be quantified.

[1] *See e.g.* UN Guiding Principles on Business and Human Rights; ILO Declaration on Fundamental Principles and Rights at Work (1998); Voluntary Principles on Security and Human Rights (2000); OECD Guidelines on Multinational Enterprises (2011).

[2] https://www.cancilleria.gob.ec/ecuador-propone-nuevos-acuerdos-de-inversion-que-protegen-al-pais-y-defienden-los-derechos-humanos/

[3] In the case of the SADC Model BIT and the Ecuador Model BIT.

[4] For example, in the preamble to their BIT, Switzerland and Georgia "[r]*eaffirm*[…]*their commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law*". See also Preamble to EFTA-Lebanon FTA (2004)).

[5] Perhaps influencing an arbitration tribunal to adopt an interpretation of an investor's rights under an IIA which is more balanced as between the investor's interests and the need for the State to regulate in the public interest where such interest involves human rights considerations.

[6] Provided the IIA had effect under national law so as to extend the national court's personal jurisdiction to claims against foreign investors. An IIA could also provide that an investor must give advance consent to arbitration (potentially as part of an investment registration process) in order to benefit from investment protection. However, where indirect investments are protected

by an IIA, the scope of consent would have to be broad enough to capture all of the investor's shareholders.

[7] https://arbitrationblog.practicallaw.com/holding-investors-to-account-for-human-rights-violations-through-counterclaims-in-investment-treaty-arbitration/

[8] Most IIAs limit a tribunal/court's jurisdiction under it to disputes arising out of an "*investment*". The ICSID Convention requires that a counterclaim arises directly out of the "*subject matter*" of the dispute.

[9] We are aware of only one case in which jurisdiction over a human rights based counterclaim has been upheld: https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf

[10] SADC Model BIT, Article 15(2) and Morocco-Nigeria BIT, Article 18(3).

[11] SADC Model BIT, Article 15(3) and Morocco-Nigeria BIT, Article 18(4).

[12] SADC Model Bilateral Investment Treaty with Commentary, p. 36. The relevant clause in the Morocco-Nigeria BIT requires the relevant human rights obligations to be binding on both the host State and host State.

[13] Morocco-Nigeria BIT, Article 27; SADC Model BIT, Article 29.4.

[14] SADC Model BIT, Articles 19(1)-(2), 29(9); draft PAI Code, Article 43.

[15] SADC Model BIT, Article 19(1) and draft PAI Code, Article 43(1).

[16] SADC Model BIT, Article 19(1) and draft PAI Code, Article 43(2).

[17] ICSID Rules, Article 46; UNCITRAL Rules, 21(3). An investor may also submit a claim under any other arbitral rules, with the consent of the host State. To the extent the State intends to bring a counterclaim it would be unlikely to agree to rules which did not permit that.

[18] This will also impact counterclaims in ICSID proceedings brought under the dispute resolution clause in the SADC Model BIT.

[19] As non-parties to the IIAs.

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