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Recent Clauses Pertaining to Environmental, Labor and Human Rights in Investment Agreements: Laudable Success or Disappointing Failure?

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Ever since its inception, investment arbitration has benefited from a perception of self-contained ecosystem that does not interact with any other normative subject matter. Investor-State tribunals for the most part have been reluctant to accommodate the application of non-investment obligations and treaties, claiming either lack of jurisdiction over such claims, or affirming upfront that non-investment international obligations have no bearing on the State's liability towards the investors, despite the availability of many avenues for the injection of human rights concerns. This hostility has exacerbated the backlash against investment arbitration's legitimacy, as it has woefully impacted both the host State and its individuals on multiple fronts. To name a few, it has constrained any public policy-making envisioned by the State, has given complete – undeserved and illegitimate – immunity to the investor and has inevitably caused the State to consistently breach its international obligations under multiple treaties on the international sphere.[1)]

It is against this backdrop, which is explained by earlier commentaries, that a number of investment agreements as well as model investment agreements have recently adopted progressive provisions imposing upon investors upfront compliance with a set of environmental, labor and human rights, and having the immense merit of clarity and security. These provisions depart from the existing 3,000 IIAs that fail to impose any obligation upon the investors, and even from the recent trend of BITs which merely state their commitment to conform to Corporate Social Responsibility standards, without more. Although truly revolutionary in this sense, some of these provisions remain more effective and readily enforceable than others.

It is worthwhile noting on a preliminary note that in order for the reform however to see its full potential, the most straightforward formulation for such a provision aims at: addressing investors directly; imposing upon them obligations rather than aspiring for their best endeavors; specifying the scope and content of these obligations; and finally, securing their enforceability.

Obligation of Result or Best Efforts Clause?

Taking note of the provisions already proposed, one discerns two categories of obligations imposed:

1. Mandatory obligation or obligation of result upon the investors and/or investments to respect the international environmental, labor and human rights obligations binding on the host State (SADC Model BIT); and
2. Best efforts clause to comply with Corporate Social Responsibility and sustainable development (Indian Model BIT of 2015; Morocco-Nigeria BIT).

Whereas the SADC's language is conclusive as it purports to impose upon investors the "duty" to respect human rights, the formulation of the Morocco-Nigeria BIT and the Indian Model BIT is far less satisfying. The SADC's emphasis on a firm formulation such as "shall not undertake or cause to be undertaken", "have a duty to respect", and "shall act in accordance with" along the three sections of the provision, reflects a serious undertaking of incorporation of human rights and building a bridge between the investors themselves and the host State's human rights instead of relying on the Contracting States' regulatory authority acting as conduit. The Morocco-Nigeria BIT however, is tipping too far on the end of caution, as it merely requires the investors to "strive" to contribute to the sustainable development of the Host State and its local community, to "strive" to adopt high levels of socially responsible practices and to "strive" to apply and achieve the higher-level standards of corporate social conduct. Should a dispute arise between the host State and the investor in relation to the latter's compliance with such a clause, the arbitral tribunal will engage in an extensive analysis as to whether the investor's conduct amounts to a violation of the clause and of its best endeavors obligation. Unlike an obligation of result, an obligation of best-endeavor is more amenable to attenuations. Proving a breach of a "best-efforts" clause requires evidence of a failure on the duty holder's part to exhaust in good faith all reasonable efforts to achieve the obligation imposed. This in turn entails on one hand the marshalling of arguments relying on good faith, that is, the least palpable and most abstract standard in the legal world, and on the other hand, practicing an exercise of balancing between the different choices available to the investors to comply with the obligation at issue and those which the investors have opted for. It would not be cynical to assume that the investors will be given the benefit of the doubt and continue to prevail on this ground in the future. It therefore becomes necessary to impose mandatory duties upon the investors and corporations to go a full step further than what has been achieved so far, and offer a full panoply of accessible remedies in case of a violation and are legally enforceable. A meaningful reform consists of imposing a duty to comply with – a model followed solely by the SADC Model BIT – and not simply encouraging observance of rights. In fact, articulating the investors' obligations in the form of a best endeavor clause wouldn't add anything to the already dense international portfolio of voluntary codes of conduct, guidelines and regulations emanating from international organizations such as UNCTAD, OECD, UNGP,[2)] etc. which have failed to hold investors liable.

Some authors have nevertheless seen the silver lining in these attempts, positing that they "capture a commitment to the recent trend favouring corporate social responsibility".[3)] Is a bad deal ultimately better than no deal? Furthermore, could a 'best-efforts' approach also be justified as being a pragmatic compromise between investment-importing States and investment-exporting States? Yielding a best endeavor obligation could garner corporate support for these types of provisions in investment agreements, especially given that corporations constitute powerful lobbies capable of influencing the political class. If we were to assume that capital-importing States have less bargaining power than capital-exporting countries, and that negotiations will unfold mostly in favor of the stronger-positioned countries, then it is commonsensical to deduce that the investment agreements would contain mediated clauses of human rights obligations rather than full-fledged duties. By the same token, it is therefore reasonably understandable to argue in favor of a more

balanced human rights obligations clause if one were to attain a realistic reform.

Who is the Burden Holder of these Obligations: The State or the Investor?

Whereas the Morocco-Nigeria BIT human rights provision addresses States, the SADC Model BIT has opted for directly imposing the obligations upon the investors. The latter, in its Article 15 entitled "Minimum Standard for Human Rights, Environment and Labor" reads as follows:

"*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.*"

This choice of policy is determinative of the provision's reach. For the clause's application to reflect the increase of liability upon the investor, it should have as direct burden holders the investors themselves, instead of the contracting State parties. Otherwise, States could mutually undertake to improve their respective human rights regulations and regime, altogether while leaving out the investors from the equation. At most, the tribunals dedicated to the human rights cause could weigh in these concerns when entertaining the fair and equitable treatment standard, in order to tip the balance slightly in favor of the host States. It goes without saying however, that this solution falls short of an actual remedy for either the host State or its local communities affected by the investors' activities. This inevitably raises the legal question as to whether treaties could conceptually impose obligations on non-State third-party actors, a topic of study in itself.[4)]

What are 'Environmental, Labor and Human rights', Anyway?

What are the appropriate environmental, labor and human rights standards to incorporate for a meaningful reform and enforceable clause? The question owes its relevance and significance to the many treaties that have been ruled as not self-sufficient or self-executing because they lack the precision required to render them directly applicable.[5)] The novel clauses above mentioned all follow the same pathological all-inclusive, globally-generic formulation pattern. This is likely to encumber the due diligence the investors conduct prior to making their bids. Not to mention that the treaties may ultimately not be applicable in the domestic legal regime, in which case the foreign investors will have been treated less favorably than their domestic counterparts, who, placed in the same situation before a domestic court, will not be found bound by inapplicable international treaties for lack of self-sufficiency. This reflexively begs the question as to whether the weight and uncertainty surrounding these obligations inhibit foreign direct investment, given that the investors will lose interest and incentive to make profit in what has become an onerous investment climate. Given that there are rare mechanisms of dispute resolution and human rights courts to enforce these rights, one could easily explain why the delimitation of economic, social and cultural rights is still absent.

What Enforcement Mechanism Secures the Provision?

It goes without saying that for the provision to be enforceable, it requires an enforcement mechanism to back it up. More precisely and most importantly, arbitral tribunals should be able to exercise their mandate to sanction the abusive investor conduct through ways that go beyond merely taking into account the investors' breach of human rights when assessing the fair and equitable treatment or when determining compensation. Examples potentially take the following forms: denial of benefits provision operating as *exceptio non adimpleti contractus*; enabling counterclaims by the host State (Indian Model BIT); subjecting the investor to civil actions before the judiciary of the home State (such as the Morocco-Nigeria BIT); allowing the host State to initiate arbitration proceedings on the violation by the investor of the obligations, etc.

Conclusion

Several configurations for the environmental, labor and human rights provisions are conceivable. While the most robust formulation effectively achieves their incorporation, for the reform to remain realistic, reaching a certain compromise for the corporations' sake may be advisable. States are left to experiment based on experience, comparative analysis and discourse such as this post. It is subject of contention however, whether arbitration is suitable for these types of claim and, if answered in the affirmative, it remains subject to speculation what future amendments of arbitration proceedings are needed to adapt to this shift in policy.

References

?1 See Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, *in International Investment Law For The 21st Century: Essays In Honour Of Christophe Schreuer*, 678, 679 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich, 2009); UNCTAD, Selected Recent Developments in IIA Arbitration and Human Rights, IIA Monitor No. 2 (2009), International Investment Agreements, available at https://unctad.org/en/Docs/webdiaeia20097_en.pdf.

?2 *E.g*. U.N. Human Rights Council, The Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, HR/PUB/11/04 (2011), available at https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf .

?3 Grant Hanessian, Kabir Duggal, 'T*he Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?*' ICSID Review – Foreign Investment Law Journal, Volume 32, Issue 1, Winter 2017, 216-226, available at https://academic-oup-com.ezp-prod1.hul.harvard.edu/icsidreview/article/32/1/216/2738869?searchresult=1.

?4 Michael Waibel, *The Principle of Privity*, *in CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES*, 201 et seq. (Michael J. Bowman, Dino Kritsiotis eds., 2018).

?5 *See* in this regard, Karen Kaiser, *Treaties, Direct Applicability* (2013) available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1468; *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, 8 (Jan Klabbers & René Lefeber eds., 1998); Marc J. Bossuyt, *The Direct Applicability of International Instruments on Human Rights (with special reference to Belgian and U.S. law)*, Revue Belge de Droit International, 317, 317-344 (1980).

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