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RECENT TREND TOWARD A BALANCED BUSINESS AND HUMAN RIGHTS RESPONSIBILITY IN INVESTMENT TREATIES AND ARBITRATIONS[1]

TENDÊNCIA RECENTE PARA UM EQUILÍBRIO ENTRE EMPRESAS E A RESPONSABILIDADE DE DIREITOS HUMANOS EM TRATADOS DE INVESTIMENTO E ARBITRAGENS

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Abstract
This last decade there has been a shift in investment agreements, which traditionally focused on unilateral protection of investors– mainly multinational enterprises (MNEs) –, but now increasingly turning toward a more balanced approach to include corporate social responsibility. This has been significantly intensified since the adoption of the United Nation Guiding Principles on Business and Human Rights in 2011. As a matter of legal approach, not simply a voluntary one, how and to what extent do the trend to toward this balanced approach take into account this Guiding Principles and other CSR standards into legal framework developed by States through their duty to regulate and adjudicate in investment law regime? This paper shows that at least from recent cases of legal development through State duty to regulate in investment treaties and duty to adjudicate in matters related to dispute settlement, there is an initial and limited, but significant trend of legal development toward such a balanced approach for business and human rights in investment law regime.

Keywords
Investment and human rights. Human rights due diligence. Investment treaties. MNEs and human rights. State human rights obligation

Resumo
Nesta última década, houve uma mudança nos acordos de investimento, que tradicionalmente se centravam na protecção unilateral dos investidores - principalmente empresas multinacionais (MNE) -, mas agora cada vez mais se voltam para uma abordagem mais equilibrada para incluir a responsabilidade social das empresas. Isto tem sido significativamente intensificado desde a adoção dos Princípios Orientadores das Nações Unidas sobre Empresas e Direitos Humanos em 2011. Por uma questão de abordagem jurídica, e não simplesmente voluntária, como e até que ponto a tendência para esta abordagem equilibrada leva em conta estes Princípios Orientadores e outras normas de RSE no quadro jurídico desenvolvido pelos Estados através do seu dever de regular e julgar em regime de direito de investimento? Este artigo mostra que pelo menos a partir de casos recentes de desenvolvimento jurídico através do dever do Estado de regular os tratados de investimento e do dever de julgar em matérias relacionadas com a resolução de litígios, existe uma tendência inicial e limitada, mas significativa, de desenvolvimento jurídico no sentido de uma abordagem equilibrada para as empresas e os direitos humanos no regime jurídico do investimento.

Palavras-chave
Investimento e direitos humanos. Devida diligência e direitos humanos. Tratados de investimento. MNE e direitos humanos. Obrigação do Estado em Direitos Humanos.

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1. INTRODUCTION

This last decade there has been a shift in investment agreements, which traditionally focused on unilateral protection of investors/investment – mainly multinational enterprises (MNEs) –, but now increasingly turning toward a more balanced approach to include corporate social responsibility (UNCTAD, 2015; VAN DER ZEE 2013; FOOTER, 2009; MUCHLINSKI, 2008). This means that the investment agreements will protect not only the rights of investors, but also those of the third parties whose rights are affected by investors' conducts and investment activities. The need for such a balanced approach first arose in the context of arbitration, in which the claim filed by investors against States' violation of investor/investment rights has been increasingly challenged by the host States to exercise their regulatory rights concerning corporate obligations relating to human rights and environmental problems (SCHACHERER, 2019; JACOB, 2010; PETERSON, 2009). These growing demands basically require business entities to invest in such a way that keeps the balance between maximizing business profits and respect for human rights and sustainable environment.

In doing so, the corporations are expected to comply with authoritative and globally accepted norms and principles for socially responsible investment, such as human rights due diligence (hereinafter: HRDD) obligations as stipulated under Pilar II of the United Nations Guiding Principles on Business and Human Rights (hereinafter: UNGPs) and the Organization of Economic Cooperation Development Guidelines for Business and Human Rights (hereinafter: OECD Guidelines). Since 2011 it has been widely accepted that HRDD is a proper ongoing risk management mechanism that can help investors and companies to reasonably identify, prevent, mitigate and account for how they addresse adverse human rights impacts (UNGPs, 2011, Principle 17). This process includes (1) assessing actual and potential human rights impacts, (2) integrating and acting on the findings, (3) tracking responses, and (4) communicating about how impacts are addressed (Principle 18).

The problem is that since this HRDD obligation is a non-binding regulatory framework, it is up to investors to comply with it or not. The difficulty for compliance arises when there is conflict of interest between the purpose of business for profit maximization and the demand for its social responsibility. In order to keep the balance between the two, in principle (as a matter of law) it is the State that has the main duty to ensure the investors' compliance with their social responsibility in investment activities. The State can do so by, for instance, turning such voluntary HRDD obligation into a mandatory one, or providing guidelines to ensure corporate compliance with socially responsible investment under its jurisdiction. At the same time, it should be noticed that having non-binding (voluntary) nature does not mean that the HRDD obligation does not have legal and moral implications. Once the investors accept the HRDD obligation in their agreements or in their policy commitment for doing business, it creates direct duty of care and a failure of implementing it would become evidence of a breach of such duty in legal disputes (MUCHLINSKI, 2012). The same evidence may be used to demand investors moral responsibility in the court of public opinion, which consequently may lead to reputational damage.

Thus, regulatory development by States to ensure the balance between investor's rights to make profits and obligation to respect human rights is of particular importance. This paper aims to explore recent regulatory and policy development that tries to implement such a balanced approach. The focus will be on recent development for the incorporation of human rights-oriented clauses in

international investment treaties (IITs), including bilateral investment treaties (BITs) (Part II.1) and mechanisms of adjudication of business and human rights disputes (Part II.2). It should be noticed, however, that since the focus is on the regulatory development by the State in investment regime, voluntary approach for balancing business and human rights, including dozens of best practices of socially responsible investment by many competent investors/MNEs, are beyond the scope of this paper.

2. 2 STATE DUTY TO PROTECT HUMAN RIGHTS IN INVESTMENT REGIME

2.1 STATE DUTY TO REGULATE INVESTOR'S HUMAN RIGHTS OBLIGATION

Concern over the need to incorporate social issues, such as human rights and environment, has been increasingly taken into account by some countries in their BITs (UNCTAD, 2015; MUCHLINSKI, 2017). Norway is considered to have paved an initial step in this effort in its Draft Model BIT (2007) (now debunked), stating that "[p]arties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines on Multinational Enterprises and to participate in the United Nations Global Compact" (Art. 32). Although this provision only used a very weak language "encourage" (not oblige) and imposed an indirect CSR obligation on investors, the agreement of the State parties to include concern about CSR obligation in a body of law (investment law) can be seen as a concrete step, through which a State implements its duty to protect human rights as set out in international human rights law.

With the adoption of the UNGPs on Business and Human Rights as the most authoritative CSR standards in 2011, the State duty to protect human rights in investment and business activities was reaffirmed. Pilar I of the UNGPs on "the State Duty to Protect" requires State to take appropriate measures in order "to prevent, investigate, punish and redress [human rights] abuses through effective policies, legislations, regulations and adjudications" (UNGPs, 2011: PRINCIPLE 1). Giving particular attention to the protection of human rights through their duty to regulate investment activities, the UNGPs call for a balanced approach by requiring States "to ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of [investment] agreements, while providing the necessary investor protection" (UNGPs, 2011: COMMENTARY TO PPRINCIPLE 1). Otherwise, where investors and related agencies "do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State" (UNGPs, 2011: COMMENTARY TO PPRINCIPLE 1).

An echo of this call has been reflected under Section 7 of the 2015 edition of the United Nations Conference on Trade and Development (UNCTAD)'s Investment Policy Framework for Sustainable Development. It requires Parties to the IITs to strengthen domestic regulatory framework by incorporating internationally recognized CSR standards related to human rights, health and environmental matters (UNCTAD, 2015: Sec. 7.1.2 ~ 7.1.6). This means that State Parties to the IITs are required to incorporate these CSR standards into their domestic regulatory framework, whereas investors for their part need to comply with their human rights obligations under these standards as part of the domestic legal system.

In current international legal system, investors/MNEs only have human rights obligations arising from internationally applied-CSR standards. Given that investment agreements tend to grant investors substantive rights without making them subject to any specific (human rights) obligation (DUMBERRY AND DUMAS-AUBIN, 2013), it appears that human rights obligations arising from internationally applied CSR standards are "the quid pro quo for the protection of investors and investment under international investment protection agreements" (MUCHLINSKI, 2008). As mentioned earlier, two of the international CSR standards that have increasingly drawn substantial interest in this legal development are the UNGPs and OECD Guidelines. Since the revised OECD Guidelines have incorporated corporate HRDD obligation under the UNGPs, the feature of the OECD Guidelines concerning human rights has been built on the notion of HRDD obligations. In this respect, the OECD Guidelines can become one of the most significant soft-law instruments through which the HRDD under the UNGPs can be put into effect or even developed into a binding duty for investors to respect human rights.

In European countries, this possibility has been signaled by the European Parliament in its 2011 resolution on investment, which asked the EU Commission and member States to include a reference to the updated OECD Guidelines in the future agreements (EUROPEAN PARLIAMENT, 2011). The changing investment policy environment with the launch of the Investment Policy Framework for Sustainable Development by UNCTAD's World Investment Report (2012) enhanced such possibility, as it promoted a 'new generation' investment policies that place "inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment" (UNCTAD, 2015, p.17). The 'new generation' investment policies are characterized by, among other things, "a desire to pursue sustainable development through responsible investment, placing social and environmental goals on the same footing as economic growth and development objectives" (UNCTAD, 2015, p.17).

Since then concern on sustainable development, including human rights and environmental issues began to gain ground in the EU Free Trade Agreements (FTAs) and Association, or Cooperation, Agreement, as States try to accommodate this "new generation" of investment policies into investment legal regime. Nonetheless, there are differences on the way the reference to social responsibility of business were expressed. Some Agreements made reference to sustainable development and CSR only in general term, while others referred to specific internationally recognized CRS standards. In the EU-Columbia & Peru FTA (EU/CO/PE/en, 2012), for instance, Title IX on "Trade and Sustainable Development" provides that in striving to pursue trade and investment in goods and services, "Parties agrees to promote best business practices related to corporate social responsibility" (Art. 271). Similar provision is reflected in the EU-Ukraine Association Agreement (2012, entered fully into force in 2017). It requires Parties to facilitate and promote trade and investment in environmental goods and services in such a way that "contributes to sustainable development, including products that are the subject of schemes such as fair and ethical trade schemes, as well as those respecting corporate social responsibility" (Art. 293, paras. 2-3). This shall include a recognition of the beneficial role certain core labor standards can have on economic efficiency, innovation and productivity (para. 1). Later, the EU-Kazakhstan Enhanced Partnership and Cooperation Agreement (2016, entered fully into forced in 2020), underlines similar concern under the Title "Trade and investment promoting sustainable development." It provides that as part of

"their commitment to enhance the contribution of trade to the goal of sustainable development", Parties "agree to promote: (a) trade and investment in environmental goods and services and in climate-friendly products and technologies; (b) the use of sustainability assurance schemes, such as fair and ethical trade or eco-labelling; and (c) corporate social responsibility practices" (Art. 154 (1)). No further details are provided as to any specific CSR standards that must be complied.

These are different from some EU's FTAs and specific social issues provisions within the above-mentioned EU's FTA, which make specific reference to certain internationally recognized CSR Standards. For instance, as indicated above, the 2012 EU-Ukraine refers to only general corporate social responsibility for Parties when facilitate and promote trade and investment in environmental goods and services in the context of sustainable development. However, reference to specific CSR standards are made with regard to "Cooperation on employment, social policy and equal opportunities" (Chapter 21). It calls for Parties to "promote corporate social responsibility and accountability and encourage responsible business practices," such as those promoted by the UN Global Compact, the International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the OECD Guidelines for Multinational Enterprises (Art. 422). While the CSR standards in this provision only refers to the 1976 and the amended 2000 OECD Guidelines, it would be assumed that this includes the recently amended OECD Guidelines (2011), a session of which (as mentioned earlier) has incorporated the UN Guiding Principles on Business and Human Rights as the most widely recognized and widely accepted CSR standards to date. Similar reference to specific CSR standards can be found in the EU-Georgia Association Agreement (2014, enter fully into force in 2016). Under the Title "Trade and investment promoting sustainable development", the Agreement provides that as Parties "recognise the beneficial role that core labour standards and decent work can have on economic efficiency, innovation and productivity", they "agree to promote corporate social responsibility", such as those promoted by "the relevant internationally recognised principles and guidelines, especially the OECD Guidelines for Multinational Enterprises" (Art. 231). Parallel to this is the provision in Chapter 14 on "Employment, social policy and equal opportunities", which repeats the reference to the same international CSR standards, especially the OECD Guidelines (Art. 352).

The most progressive regulatory development in the EU region that has attracted global attention recently is the Dutch Model BITs (2019). Section 3 on "Sustainable development" includes "sustainable development" (Art. 6) and "Corporate Social Responsibility" (Art. 7). The commitment of Contracting Parties "to promote the development of international investment in such a way as to contribute to the objective of sustainable development" shall provide high levels of environmental, labor and human rights protection (Art. 6(1-2, 4-6)). They shall take into account gender equality by creating a policy that allows women to contribute in the economy in order to achieve sustainable development (Art. 6(3)). As to CSR, the Dutch Model BITs provides that:

> The Contracting Parties reaffirm the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and busines. (Art. 7(2)).

In this provision, the Dutch Model BITs mentions specifically OECD Guidelines and the UN Guiding Principles on Business and Human Rights. So long as the Contracting Parties "endorsed or supported" these CSR standards, they shall commit to do so in their investment agreement. Yet, when explaining the need to reaffirm the importance of due diligence, the Dutch Model BITs simply provides that the aim of due diligence process is "to identify, prevent mitigate and account for the environmental and social risks and impact of its investment" (Art. 7(3)). The absence of expressed human rights term in this provision raises the assumption that due diligence is required only to identify and assess environmental and social risks of investment activities (OECD 2020 (MUCHLINSKI COMMENT), p. 23). Having said that, the Dutch Model BITs represents "the most extensive business responsibility provisions yet to be included" in the IITs/BITs (IBID).

Despite the voluntary nature of the HRDD in the OECD Guidelines and the UN Guiding Principles (soft laws), by incorporating into the IITs/BITs, it creates a legal basis that binds parties to the treaty to ensure the implementation and enforcement of the standards (WAWRYK, 2003). This will pave the way towards the hardening of HRDD obligation under the OECD Guidelines if enough States support and sign such IITs (Footer, 2009). At the same time, the UNGPs, from which the HRDD obligations under the OECD Guidelines derived, "may lead to an embedding of international standards for corporations with respect to human rights" as part of international CSR and make them globally enforceable (Mann, 2008). To what extent will this lead to international liability remains to be seen. However, for now, even the Dutch Model BITs – which is considered to have a "strong impact" of human rights responsibility in investment regime – still "fall short of a full treaty-based binding business obligation to respect human rights and other social responsibilities that gives rise to international liability" and "reflect the current limits of what may be achievable in practice" (OECD 2020 (MUCHLINSKI COMMENT), pp. 23-24).

Outside Europe, recent development in investment agreement, in particular since the adoption of the UNGPs in 2011, have indicated a trend toward such possibility, although it is still in early stage and rather limited. The Benin-Canada BIT (2013), for example, includes CSR, as one of the main components of Chapter II on the "Obligations of the Contracting Parties":

> Each of the Contracting Parties shall ensure the promotion of investments of investors of the other Contracting Party as well as the protection of those investments and investors in its territory, consistent with the provisions of the guiding principles of this Chapter, including national treatment, most-favoured nation treatment, minimum standard of treatment, compensation for losses, compensation for expropriation, transparency, subrogation and corporate social responsibility. (Art. 4).

CSR is considered one of the guiding principles for investors to keep the balance between profit maximization and the positive impact of business to the society. In practice, this CSR must be translated into concrete actions to respect human rights, to protect the environment and to avoid any adverse impacts to the society. Hence, it adds,

> Each Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. (Art. 16).

Although the Contracting Parties are only required to encourage investors to "voluntarily" (not "mandatorily") incorporate internationally recognized CSR, once they accept the encouragement to do so, it becomes a mandatory obligation that binds them. The problem is that in the absence of a strong reference of obligation to a specific form of international recognized CSR, such as HRDD under the UNGPs and OECD Guidelines, its application may meet with some difficulties as to how a legal basis for an arbitration should be established in case the allegation of human rights abuses arises as a result of investment activities. Similar weak reference to internationally recognized CSR standard can also be found in most of the subsequent BITs by Canada during the period of 2013 and 2014 (CAMEROON-CANADA BIT, 2014, Art 15; CANADA-NIGERIA BIT, 2014, art 16; CANADA-REPUBLIC OF KOREA FTA, 2014, Art 8). Nonetheless, regardless of such weak reference, there was an increasing awareness on the part of the States to include concern about human rights impacts of investment activities in their BITs.

It was only since late 2014 onwards that Canada began to adopt strong wordings in its BITs that oblige Contracting Parties to encourage investors to incorporate internationally recognized CSR. The 2014 Canada-Mali BIT, for instance, begins with a need for Contracting Parties to recognized that "it is inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures" (CANADA-MALI BIT, 2014, Art. 15 (1)). The BIT then provides that "Each Party 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, [...] such as labour, the environment, human rights, community relations, and anti-corruption" (Art. 15 (3)). This implies that obligation to encourage investors to incorporate internationally recognized CSR is no longer a voluntary action, but a mandatory one. Having said that, most of these BITs impose direct obligation to ensure the application of CSR on State. It only indirectly imposes CSR obligation on investors. Furthermore, in most instances, investors are not allowed to file arbitration claims against a host State merely based on its CSR-related obligations (CAMEROON-CANADA BIT, 2014, Art. 20; CANADA-NOGERIA BIT, 2014, Art. 21; CANADA-REPUBLIC OF KOREA 2014, Art. 8 (18)). It was rather an exception, however, when in the 2015 Canada-Burkina Faso BIT, investors were allowed to establish claims of arbitration on the basis of CSR obligation (Art. 21).

Different from Canada, Brazil instead imposed direct CSR obligation on investors in some of its BITs or known as Agreements on Cooperation and Facilitation of Investments (hereinafter: ACFIs). Since 2015, some of its ACFIs have required investors to "strive to achieve the highest possible level of contribution to the sustainable development of the Host Party and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards" set out in the Articles on "Corporate Social Responsibility" (BRAZIL-MALAWI BIT, 2015, Art. 9 (1); BRAZIL-ETHIOPIA BIT, 2018, Art. 14 (1); BRAZIL-SURINAME BIT, 2018, Art. 15 (2)). These ACFIs did not mention in specific which voluntary principles and standards of CSR an investor must comply with. It was later in the 2018 Brazil-Ethiopia ACFI (Art. 14 (1)) and the 2019 Brazil-United Arab Emirates ACFI (Art. 15 (1)) that the provision on CSR made specific reference to the OECD Guidelines on Business and Human Rights as applicable voluntary principle and standard for compliance.

However, in the latest AFCI with India in 2020, there was again no explicit reference to any specific voluntary principles and standards, but simply added principles and standard set out in "internal policies, such as statements of principle that have been endorsed or are supported by the

Parties" (Art. 12 (1)). This means that if State Parties to the AFCIs have endorsed the UNGPs and OECD Guidelines on Business and Human Rights, and their respective investor/MNEs have incorporated the HRDD under this voluntary regulatory regime into their internal policies in doing business, the standard of HRDD may apply to investment activities under this AFCIs.

This is in fact in line with the 2016 Indian Model BIT, which requires investors to incorporate internationally recognized standards of CSR in their internal policies and practices (MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY, 2016, Art. 12). While both Brazil and India have endorsed the UNGPs and OECD Guidelines on Business and Human Rights, for now only India has committed to and been in the process of developing a National Action Plan for the implementation of the UNGPs and OECD Guidelines, in particular HRDD obligation for investment activities under its jurisdiction (United Nations Human Rights Office of the High Commissioner, 2019).

Despite such inconsistencies in the way the wordings for the reference to the voluntary principles and standards were written in the AFCIs, both Brazil's and India's model BITs have shown some innovative steps towards a more balanced approach for business and human rights in investment regime. Emphasizing the significance of this balance approach, all Brazilian ACFIs since 2015 have required investors to "develop their best efforts to comply with […] voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host Party receiving the investment" (BRAZIL-MALAWI BIT, 2015, Art. 9 (2); BRAZIL-ETHIOPIA BIT, 2018, Art. 14 (2); BRAZIL-SURINAME BIT, 2018, Art. 15 (2); BRAZIL-GUYANA BIT, 2018, Art. 15 (2)). Such voluntary principles and standards include: (1) contributing to sustainable development; (2) respecting the internationally recognized human rights; (3) providing employment opportunities and training of workers; (4) avoiding any corrupt and complicit practices that harm human rights; (5) advocating good governance practices and refraining from discriminatory business practices (BRAZIL-MALAWI BIT, 2015, Art. 9 (2); BRAZIL-ETHIOPIA BIT, 2018, Art. 14 (2); BRAZIL-SURINAME BIT, 2018, Art. 15 (2); BRAZIL-GUYANA BIT, 2018, Art. 15 (2)). Some of these voluntary principles are recognized under the 2016 India's model BIT, which requires investors to "address issues such as labour, the environment, human rights, community relations and anti-corruption" (Art. 12).

The downside of this innovative approach is that, not all of these CSR provisions are enforceable in adjudication process, as some ACFIs exclude CSR provisions as the subject of claims under the State - State (State Parties) arbitrations (Ex. Brazil-Suriname BIT, 2018: Art. 25). Despite there also exists investors-State arbitrations or known as investor-State dispute settlement under International Centre for Settlement of Investment Dispute (ICSID), it was mainly designed to provide investors/MNEs with access to remedy against the State, not for the third parties, such as the victim of human rights abuses. In very rare cases, such *Urbazer v. Argentine* (further discussed below), the tribunal may allow for counterclaim by the State. However, since in general the scope of dispute resolution clauses is rather limited, it is difficult for a State to bring human rights claim against investors. The claim may happen only if the investors accept the offer to fill the request for arbitration, or if the investors themselves initiate the claim, which in practice would be unlikely.

In addition, efforts by State to protect human rights of the third parties may in fact infringe the protected rights of the investors under the BITs. In contrast, actions trying to protect investors by the State, which is likely so in most cases, may violate human rights of the third parties affected by investment activities. This is why human rights issues have been less accommodative under existing

ICSID. In order to address this regulatory gap, this last few years have seen significant attempts to create a set of new rules of arbitration that can accommodate human rights issues as subject of claim in an investors-States arbitration. This will be the focus of discussion in the next session.

2.2. State Duty to Adjudicate Business and Huan Rights Claims

Beside duty to regulate as described above, State also has duty to adjudicate as part of its duty to protect human rights under international legal obligation. In the UNGPs on Business and Human Rights, the State duty to adjudicate is implemented through its duty to provide accountability mechanism and redress for the victims of human rights abuses in investment activities as set out under Pillar III on "Access to Effective Remedy". The significance of the State duty to adjudicate under Pillar III includes both remedial and preventive dimensions. It upholds the value of justice to the victims, while revealing accountability mechanisms that help shaping corporate conduct by indicating what is socially unacceptable in investment activities (WACHENFELD AND JERB, 2012). Unless States take appropriate steps to investigate, punish and redress corporate human rights abuses when they do occur, there would be no proper access to remedy (UNGPs, 2011, COMMENTARY TO PRINCIPLE 25; RUGGIE, 2008, para. 82).

As an adjudication process, access to remedy consists of substantive and procedural elements. The substantive elements include actions to counteract or restore the harms that have occurred, such as, "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines) for the provision of remedy" (UNGPs, 2011: CCOMMENTARY TO PRINCIPLE 25), while the procedural elements refer to "grievance mechanisms" (UNGPs, 2011, PRINCIPLES 20, 22, 25). These can be in the form of State-based judicial grievance mechanisms, State-based non-judicial grievance mechanisms and non-State-based grievance mechanisms (UNGPs, 2011, CCOMMENTARY TO PRINCIPLE 25). The State-based judicial or non-judicial mechanisms are administered and controlled by government on the basis of statutory provisions. These can be in the form of criminal and civil courts, labour tribunals, National Human Rights Institutions, National Contact Points, ombudsperson offices, and Government-run complaints offices (UNGPs, 2011, COMMENTARY TO PRINCIPLE 25). The State duty to effectively exercise its own judicial or non-judicial grievance mechanisms and to facilitate non-State-based judicial and non-judicial grievance mechanisms is significant for meeting its duty to adjudicate and fulfil its substantive remedial obligations. In this context, the facilitation process includes building "public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so" (UNGPs, 2011, CCOMMENTARY TO PRINCIPLE 25). The State, whether individually or in cooperation with regional and international human rights regimes, has to ensure that its judicial or non-judicial mechanisms are able to "form the foundation of a wider system of remedy", in which its "operational-level mechanisms can provide early-stage resources and resolution" (UNGPs. 2011, CCOMMENTARY TO PRINCIPLE 25).

Having said that, aside from the regulatory gap mentioned earlier, there are other legal and administrative barriers for the State-based judicial and non-judicial mechanisms. These include (1) the avoidance of liability under domestic civil and criminal laws on the ground of *forum non-conveniens*, (2) the denial of justice in host States, (3) lack of access to justice in home States and (4) the exclusion and alienation of victims from certain vulnerable groups in society (UNGPs, 2011, CCOMMENTARY TO

PRINCIPLE 25). On another front, prohibitive cost in bringing claims, difficulty to get legal representation and lack of expertise can also become practical and procedural barriers to proper access to justice. Another common barrier is the lack of domestic courts' independency due to corruptive judicial process (UNGPs, 2011, CCOMMENTARY TO PRINCIPLE 25).

To complement such insufficient State based-judicial mechanisms, the creation of non-judicial mechanisms in the form of mediation-based mechanisms, such as publicly funded mediation services, national human rights institutions may provide more immediate, accessible and affordable remedies (RUGGIE, 2008: para. 84). However, due to their voluntary nature, none of them may be available at all in any one country. That is why the UNGPs emphasizes the important role of national human rights institutions to ensure not only the availability of remedial mechanisms, but also the effectiveness of their implementation (UNGPs, 2011, CCOMMENTARY TO PRINCIPLE 27).

In the absence of effective State-based mechanism, non-State-based mechanism, such as investor – States dispute settlement under the ICSID is expected to become a viable means to hold investors accountable for human rights abuses and to provide proper remedies for the third parties whose rights are affected by investment activities. To date, investors have filed more than 800 claims at the ICSID on the basis of investors-State statutory provisions. However, since the statutory provisions of investment treaties usually do not cover human rights, which as a result raise the issue of jurisdictional limit and applicable law in the arbitral proceeding, the ICSID rarely address human rights claims.

At least in one recent case (*URBASER v. ARGENTINE*), ICSID was trying to overcome this issue by allowing a counterclaim by Argentine, alleging that Urbazer failed to provide concession set up under agreement and as a result it violated the right to water. Although the counterclaim was dismissed on the ground that human rights to water only impose duty on the State (paras. 1210-1220), not on private actors such as Urbazer, the tribunal took a revolutionary step by providing jurisdiction for human rights claims in investment arbitration. The tribunal considered that "[t]he situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties (para. 1210). The tribunal also for the first time explicitly insisted that public and private entities, including investors/MNEs, have a negative obligation "not to engage in activity aiming at destroying" human rights (para. 1199). This legal argument at least was signaling that the tribunal is ready to take a balance approach by allowing human rights claims in investment arbitrations.

While this may to some extent sound promising, it is not a straightforward task. Aside from legal and administrative barriers mentioned above, the lack of human rights obligation directly imposed on investors/MNEs under existing BITs and unwillingness of the home and host States to regulate and enforce human rights obligations remain the most difficult barrier to overcome. At the same time, the present rules and procedures of the investors-States arbitration settlement, such as that of the ICSID, has been too States- and investors-centric, which need improvement toward a more human-rights-oriented procedure.

Aiming at addressing this inadequacy of investors-State arbitration, the past five years have seen a significant joint effort by some academics, practitioners (experts) and relevant stakeholders to establish rules of arbitration that accommodate human rights concerns. This effort has culminated

in the launch of the Hague Rules on Business and Human Rights Arbitration (2019) (hereinafter: Hague Rules) in the Hague on 12 December 2019. This is the product of a three-year preparation by a "Working Group" of 6 experts coordinated by Claes Cronstedt and a two-year drafting process (including public consultation) by a group of 14 experts chaired by Bruno Sima (former judge of International Court of Justice) (HAGUE RULES, 2019, Foreword).

The Hague Rules set up "procedures for the arbitration of disputes related to the human rights impacts of business activities" by providing: (1) "the possibility for a remedy for those affected by the human rights impacts of business activities" as stipulated in Pillar III of the UNGPs on Business and Human Rights; (2) a mechanism for business enterprises to address human rights impacts of their investment activities by exercising HRDD obligation as set forth in Pillar II of the UNGPs (PREAMBLE, paras. 1-2).

The Hague Rules are based on procedural framework for international commercial arbitration under the 2013 Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules). In general, the Hague Rules are similar to the UNCITRAL Rules in the following aspect (to mention some): (1) the reliance on a proper and informed consent for arbitration by the parties involved, (2) the possibility for discretion by parties to modify or even pull out from certain provisions, (3) the procedural conditions for the appointment of arbitral tribunal and carrying out proceedings, (4) the diverse groups of claimants or respondents or subject matters for the arbitration proceedings (HAGUE RULES 2019: Introductory Note).

The core difference is that the Hague Rules provide significant modification to reflect:

> (a) The particular characteristics of disputes related to the human rights impacts of business activities; (b) The possible need for special measures to address the circumstances of those affected by the human rights impacts of business activities; (c) The potential imbalance of power that may arise in disputes under these Rules; (d) The public interest in the resolution of such disputes, which may require, among other things, a high degree of transparency of the proceedings and an opportunity for participation by interested third persons and States; (e) The importance of having arbitrators with expertise appropriate for such disputes and bound by high standards of conduct; and (f) The possible need for the arbitral tribunal to create special mechanisms for the gathering of evidence and protection of witnesses (PREAMBLE, para. 6).

These key features of the Hague Rules are elaborated in the subsequent articles and commentaries. The detailed discussion of the whole key features, which falls outside the scope of this paper, will not be provided here. Only the analysis of some key features that give rise to the necessity of specific requirements for a human rights-oriented modification of the rules for arbitration will be presented.

The *first* key feature focuses on the specific characteristic of dispute related to human rights impacts arising from investment activities. Article 1(2) states, "[t]he parties agree that any dispute that is submitted to arbitration under these Rules shall be deemed to have arisen out of a commercial relationship or transaction." This provision reveals the nature of the connection between human rights violation and commercial dispute, given that human rights are normally not the subject of commercial issue in private dispute and they should be address by national courts (COMMENTARY TO ART. 1).

Therefore, in order to ensure that the dispute satisfies the compatibility of an award, the Hague Rules set up obligation based on the UNGPs on Business and Human Rights (Art. 31 (f)), requiring tribunal to carry out a human rights-compatible dispute proceedings by including human rights-based arguments in the reasoning of an award (Art. 45 (4). In addition, these human rights-compatible arguments should be built upon law or standards (stem flexibly from various legal instruments) applicable to the substance of business and human rights the dispute (Art. 46).

The *second* key feature is the need for a balance of power between disputing parties in investment arbitration in terms of representation and assistance. Proper representation is important to ensure that the arbitral tribunal will not compromise its independence and impartiality, and each party can present its case in a fair and efficient way (Art. 5(2)). This must be accompanied by sufficient assistance to overcome barriers related to language and literacy (Art. 21), cost (Art. 51-54) and fears of reprisal (Art. 33). Consequently, these will allow tribunal to obtain proper documents of evidence (Art. 32) and enable parties to present a clear statement claim (Art. 22) in a dispute.

The *third* key feature is the prerequisite of a high degree of transparency. Although this is based on Article 1 of the UNCITRAL Rule, a more detailed feature of transparency in the context of human rights arbitration is presented under the Hague Rules. It broadens the scope of transparency to include (1) the publication of the notice of arbitration and reply as well as other key documents (Art. 39-40), (2) the statement of claims and defense (art. 22-23), (3) the tribunal decision and awards (Art. 44, 48-50) and (4) public hearings (Art. 41). Nonetheless, there are flexibility for the tribunal to exercise discretion in order to (1) to protect public interests, (2) to ensure fairness of the resolution of the dispute, (3) to guarantee safety and confidentiality of parties, witness (Art. 33 (3)) and representatives (Art. 18(5) , and (4) to avoid potential conflict among relevant stakeholders (Art. 38).

The *fourth* key feature is the requirement to appoint qualified arbitrators who have high moral characters and expertise in business and human rights field (Art. 11). The significance of this requirements lies in that fact that since business and human rights disputes has special characteristic in terms of impartiality, moral independence and expertise is crucial for the legitimacy of the arbitration (Commentary to Art. 11). This requirement provides a new and innovative element to the Hague Rules as it has been absent in the existing commercially oriented arbitration. In addition, given that a party may encounter with administrative and procedural barriers (language, literacy, cost, etc.), qualified arbitrators can provide recommendations for the parties to have qualified representation and assistance in order to proceed an effective and balanced dispute mechanism that leads to a fair outcome.

To a significant extent, these key features of human rights-oriented provisions of the Hague Rules have provided a meaningful stepping stone toward a balance approach in investment regime, at least in principle concerning procedural aspect of business and human rights dispute mechanism. However, the extent to which the Hague Rules will be effectively implemented in business and human rights dispute remains to be seen.

Uncertainty arises, as some remaining issues need further clarifications. *Firstly*, issue relates to the application of the Hague Rules based on consent as evidence of dispute agreement. This may weaken the urgency for submitting the application under the Hague Rules, as parties may opt to enter into a non-human rights-oriented agreement to submit a dispute. *Secondly*, as with the UNGPs on Business and Human Rights, the Hague Rules place the State-based mechanisms as the primary means

of adjudication for the purpose of accountability and remedy in business and human rights dispute. The extent to which this categorization on the functional order of legal means of adjudication may affect the application of the Hague Rules needs further clarification. *Thirdly*, although the Hague Rules allow tribunal to stem law or standards applicable to the substance of business and human rights dispute from various legal instruments, its impact on rendering a fair award for the purpose of accountability and remedy depends very much on how the arbitrators interpret them for a human rights-compatible dispute. In the absence of legal provisions that are designed for business and human rights dispute, efforts to make a connection between applicable law and subject of the claim for the purpose of human rights-compatible reasoning would not be straightforward. This is one of the reasons why the incorporation of human rights-related clauses into the BIT provisions as discussed in the previous section is very crucial, as they may provide a straightforward interpretation in business and human rights dispute if the tribunal utilizes them as applicable law.

3. CONCLUSION

As a matter of legal framework, the past few years have witnessed increasing effort to strike the balance between commercial objectives and human rights concerns in investment regime. In essence, this is only a part of an overall global regulatory movement concerning issues related to business and human rights, which has been significantly intensified since the adoption of the 2011 UNGPs on Business and Human Rights. In practice, as increasing number of States are setting up National Action Plan for the implementation of human rights obligation under UNGPs, various fields of law, including investment law, have become regulatory domain through which States establish regulatory framework to ensure the implementation of such human rights obligation in the course of investment activities under their jurisdiction.

This paper has shown a trend of regulatory development for the setting-up of human rights obligation in the course of business activities through investment law regime. The States do so through their duty to regulate human rights obligation in investment activities and to adjudicate the adverse impacts of business activities. So far, duty to regulate has been focused on the incorporation of human rights obligation-related clauses into IITs, in particular BITs. While duty to adjudicate has been mainly centralized on non-State-based investment dispute settlement mechanisms, such as ICSID.

Having said that, for the purpose of keeping the balance between business and human rights, in particular in relation to investors' human rights accountability and remedy for the affected group, the State duty to regulate and adjudicate needs to be performed effectively (for instance, related to the use of clear and strong wordings) and synergistically. This is because as a matter of legal requirements with regard to the applicable law and legal reasoning, the effectiveness to perform duty to regulate by incorporating human rights-related clauses into IITs/BITs will provide legal instruments applicable for human rights disputes. It also helps to lay out a straightforward human rights-compatible legal interpretation for claims in investment disputes. As the recent IITs/BITs and arbitration rules raised in this paper have shown, investment law regime has indicated an initial but significant trend toward such synergic legal development, although its prospect and effectiveness remain to be seen.

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