

A Proposal

On

Crowd-drafting: Designing a Human Rights-Compatible International Investment Agreement

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International Investment Agreements and the Obligations of Investors to Respect Human Rights

International Investment Agreements (IIAs) do not pay attention to the obligation of foreign investors to respect human rights.¹ Especially, the traditional model bilateral investment treaties (BITs) concern the treatment of investors through facilitating different standards of protection like national treatment, most-favored-nation, fair and equitable treatment, full protection and security, and free credit transfer.² Ofodile summarizes the main concerns on the existing traditional BITs: first, most BITs have incorporated investor protection provisions in detail but silent regarding investor obligations; second, they provide a greater right to foreign investors than domestic investors; and third, they limit the regulatory power of the host state.³

The ongoing global concerns advocated by different institutions like UNCTAD show that there is a serious gap in the existing traditional model BITs when evaluated from the perspective of host state interest, especially in ensuring foreign investment that has a positive impact on sustainable development including human rights. The 2015 edition of UNCTAD's Investment Policy Framework states that:

IIAs currently do not set out any obligations on the part of investors in return for the protection rights they are granted. Negotiators could consider including obligations for investors to comply with national laws of the host country. In addition, and parallel to the debate at the level of national policies, corporate responsibility initiatives, standards, and guidelines for the behavior of international investors increasingly shape the investment policy landscape.⁴

The gap in the traditional BITs is very serious and has forced some countries to terminate their BITs and claim renegotiation. For example, Indonesia has revealed its plan to re-examine 60 BITs.⁵ South Africa has terminated its BITs concluded with Luxembourg, Spain, Belgium, Germany, and Switzerland and decided not to renew some other BITs.⁶

Coming to the issue of human rights, different commentators voice concern on the human rights treatment of foreign investors. Foreign investors usually accused of violating the human rights of the local

¹ Peter Muchlinsky, 'The impact of a Business and Human Rights Treaty on Investment Law arbitration' in Surya Deva and David Bilchitz, *Building a Treaty on Business and Human Rights – Context and Contours* (Cambridge University Press 2017).

² International Institute for Environment and Development (IIED), 'Strengthening Citizens' Oversight of Foreign Investment: Investment Law and Sustainable Development' (Briefing 2, August 2007) <<http://pubs.iied.org/pdfs/17015IIED.pdf>> accessed 02 February 2018.

³ Uche Ofodile, 'Africa-China Bilateral Investment Treaties: A Critique' (2013) 35(1) Michigan Journal of International Law 147 <<http://repository.law.umich.edu/mjil/vol35/iss1/5>> accessed 03 February 2018.

⁴ UNCTAD, 'Investment Policy Framework for Sustainable Development', (2015 Edition, 2015) 18 <http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf> accessed 02 December 2017.

⁵ Norton Rose Fulbright, 'Indonesia signals intention to terminate more than 60 bilateral investment treaties' (May 2014) <<http://www.nortonrosefulbright.com/knowledge/publications/116101/indonesia-signals-intention-to-terminate-more-than-60-bilateral-investment-treaties>> accessible 09 February 2018.

⁶ African Development Bank (n 30) 5; Norton Rose Fulbright, 'Bilateral Investment Treaties in South Africa' (July 2014)

<<http://www.nortonrosefulbright.com/knowledge/publications/118456/bilateral-investment-treaties-in-south-africa>> accessed 22 January 2018; Peter Leon, Jonathan Veeran and Erin Warmington 'South Africa Declines To Renew Bilateral Investment Treaties With European Union Member States' (Mondaq, 05 October 2012).

<<http://www.mondaq.com/southafrica/x/199586/international+trade+in+vestment/South+Africa+DeclinesTo+Renew+Bilateral+Investment+Treaties+With+European+Union+Member+States>> accessed 22 January 2018

community which is mainly due to lack of a binding regulatory framework, like BIT, that requires investors to comply with domestic and international human rights laws. In relation to this, the Ethiopian case can be the best example.

There are concerns in Ethiopia that the investment projects of some foreign companies are becoming productive in the cost of the socio-economic rights of the local community. One area of concern is the forced displacement of the local community. For example, in Gambella regional state of Ethiopia, Human Rights Watch reported that -- with inadequate consultation and compensation -- local people have been forcefully moved from fertile to unfertile areas and without accessing basic social services like school, clinic, and water.⁷

As the majority of foreign investors are Chinese, there are many discontents on Chinese companies operating business in Ethiopia. One of the discontents is that Chinese companies take a little care for the environment and socio-economic life of local residents and displace them for large investments with little or no compensation.⁸ For example, in 2016 the business activities of Chinese Company called Shandong Dong caused a serious public protest. The company launched a donkey slaughterhouse to export the skin and meat to China and Vietnam. The local communities complained that the company's business activities were against their religion and culture. As a result of the public protest, the company's factory was closed.⁹ But, after a time it resumed the donkey slaughterhouse and currently exporting its products.¹⁰

Moreover, recently, more than 115 local residents killed at a rubbish dump near to the capital city of Addis Ababa. Foreign companies were trying to turn the rubbish into fuel for electricity. It was reported that the dump had occurred due to careless construction activities of the companies.¹¹

Generally, it can be concluded that there are human rights concerns on the operation of foreign investments in Ethiopia albeit gross corporate human rights abuse is not recorded yet.¹²

The overall qualitative evaluation tells us Ethiopian BITs neither adequately integrates human rights provisions nor makes a cross-reference to domestic or international human rights laws. The BITs do not have a regulatory space except Ethio-France BIT which allows the contracting States a general right to regulate, i.e. without specifying the matters that could be covered under this right such as environmental,¹³ labour, human rights and so on.

Coming to the global aspect, the overall solution is clear, that is, incorporating regulatory space provisions in BITs. The host state should be allowed to regulate the human rights treatment of foreign

⁷ Human Rights Watch, 'World Report 2013: Ethiopia', Events of 2012 <<https://www.hrw.org/world-report/2013/country-chapters/ethiopia>> accessed 2 November 2018.

⁸ Getachew Atnafu, 'Investment and socio-economic development: The case of Ethiopia', *Gonder University annual research proceeding* (2011), Vol.3, p. 47.

⁹ Editor, 'Ethiopia closed donkey slaughterhouse' *Yegnaguday Magazine*, 17 April 2017, Addis Ababa.

¹⁰ Samson Birhane, 'Ethiopia Exports First-Ever Donkey Meat', *Addis Fortune*, 30 July 2017, Addis Ababa.

¹¹ Mahlet Fasil, 'In-depth analysis: Qoshe garbage dump collapse: a trail of corruption, criminal negligence and countless', *Addis standard*, 17 March 2017, Addis Ababa.

¹² Mizanie Abate Tadesse, 'Transnational Corporate Liability for Human Rights Abuses: A cursory Review of the Ethiopian Legal Framework' (2016) 4 *Mekelle University Law Journal* 37. <http://www.mu.edu.et/mulj/pdfs/V4_N1/V4_N1_2.pdf> accessed 04 January 2018

¹³ Wakgari Kebeta Djigsa, 'The Adequacy of Ethiopia's Bilateral Investment Treaties in Protecting the Environment: Race to the Bottom' (2017) 6 *Haramaya Law Review* 89.

investors. To this end, human rights provisions shall be incorporated in the preambles (as objectives) and substantive provisions (as binding rules) of BITs.

The preamble of a BIT may state that the BIT's objectives shall be achieved without relaxing human rights. The substantive part may also incorporate a regulatory space provision as follows:

Nothing in this Agreement shall be understood to prevent any Contracting Party from taking any measure to regulate investment projects of foreign investors in the framework of domestic laws designed to respect, protect and fulfill international human rights.

The substantive provisions may also directly require investors to comply with domestic human rights law as stated in the new Indian model BIT. The BIT requires investors to refrain from engaging in corruption activities and comply with the law of host State related to human rights.¹⁴

It is evident that sustainable development includes, among others, human rights, labour standards, health and safety measures. Among these, it looks that the sustainable development goals (SDGs) give due emphasis on gender equality which is a very important issue as far as business and human rights are concerned. As mentioned under Goal 5 of the SDGs, the specific target concerning gender equality is ending all forms of discrimination and violence against all women and girls in the public and private spheres.¹⁵ As articulated under Goal 12, companies are encouraged to adopt sustainable practices and to integrate sustainability information into their reporting cycle -- which means including gender equality.¹⁶ As far as foreign investment is concerned, if incorporated in binding agreements like BITs and effectively implemented, those mentioned SDGs will have a positive impact on the improvement of the human rights treatment of investors. The issues of SDGs or human rights are not new for most investors as they themselves also incorporate them in their code of conducts. For example, the code of conduct of Nestle SA states 'Nestlé respects the personal dignity, privacy and personal rights of every employee and is committed to maintaining a workplace free from discrimination and harassment'¹⁷. But, what matters is the implementation. In this regard, the launch of a Global Commission on Business and Sustainable Development and some advocacy made by Global Reporting Initiative (GRI) are good starts to make companies practical in achieving the SDGs and the principles of their own code of conducts related to human rights.

¹⁴ Indian Model BIT, 'Bilateral Investment Treaty between the Government of the Republic of India and ---- (Adopted 2015) Article 9&12 <https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf> accessed 02 February 2018.

¹⁵UNGA, 'Transforming our world: the 2030 Agenda for Sustainable Development', (A/RES/70/1, 21 October 2015) <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E> accessed 11 March 2018

¹⁶ Ibid

¹⁷Nestle SA, 'Code of business conduct of Nestle Company' (Principles Mandatory, November 2007) Section 12 <<https://www.nestle.co.za/common/documents/about/2008nestl%C3%A9codeofconduct.pdf>> accessed 10 March 2018.