

INTERNATIONAL INVESTMENT AGREEMENTS (IIAS) AND HUMAN RIGHTS

Submission to the Working Group on business and human rights

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Preliminary remarks

The overwhelming majority of international investment agreements (IIAs) focus on the business and economic dimension of foreign investment, while remaining silent on human rights and other non-investment related issues. Such a narrow approach has often been criticised. For instance, the Trade and Industry Committee of the House of Commons observed, in relation to the failed attempt to conclude a Multilateral Investment Treaty under the auspices of the OECD that

[t]he protection of [environmental, labour, health, safety and other standards] should have been on the negotiators' agenda from the beginning of their deliberations. Instead, it appears to have been proposed rather late in the day and by means of preambular and footnoted text of doubtful legal weight. We share the view expressed by many that any multilateral agreement on investment must not drive down standards or open the door to the driving down of standards. We recommend that in any future negotiations of a multilateral investment agreement the protection of existing regulatory standards be of central concern.¹

For many years, foreign investment law has been seen by many as a specific regime isolated from other areas or international law such as human rights. This is paradoxical as these treaties are in good substance human rights treaties concluded for a special category of beneficiaries, namely foreign investors. A few years ago, NAFTA investment chapter was described as “the most bizarre human rights treaty ever conceived” and “a human rights treaty for a special-interest group”.² Indeed, these treaties have an important content of human rights provisions

¹ United Kingdom House of Commons, Trade and Industry Committee, 3rd Report, 1998–99, 9 January 1999, *Multilateral Agreement on Investment*, para 52, [House of Commons - Trade and Industry - Third Report \(parliament.uk\)](http://www.parliament.uk).

² J. E. Alvarez, ‘Critical Theory and the North American Free Trade Agreement's Chapter Eleven’, 28 *U. Miami Inter-Am. L. Rev.* (1996) 303, 307 and 308.

and in many respects overlap with human rights treaties, as demonstrated by parallel proceedings before investment arbitral tribunals and human rights bodies.³

In the recent years, however, the normative landscape has started to change in many regards. There is a general recognition that IIAs must take a more holistic approach and consider the private and public interests of the various stakeholders, including the local population, workers, and indigenous peoples. Investment tribunals, accordingly, are increasingly less reluctant to consider human rights for the purpose of assessing the conduct of foreign investors, the regulatory powers of the Host State, counterclaims submitted by the Host State and the calculation of compensation.⁴

From the standpoint of economics, furthermore, it has authoritatively been argued that holding MNC liable for breaches of human rights is beneficial for all major stakeholders. With regard to the Alien Tort Act, it has been observed that according to available empirical studies in economics

[R]ecognizing corporate liability for Alien Tort Act claims will not harm economic development of Least Developed Countries, US businesses operating abroad, or investment in the US. The net economic value generated by firms that violate fundamental human rights is dubious at best, and the broader adverse effects of these firms' legal violations are unambiguous. From a global perspective, competition based on such violations distorts the global marketplace.⁵

Most importantly for the purpose of this note, several recent IIAs have attempted to strike a better balance between the rights of foreign investors and those of the other stakeholders. ECOWAS Supplementary Act on Investments, concluded in 2008, pioneered a new paradigm of IIA by including obligations upon foreign investors and the Home State, as well as provisions on the protection of human rights, the environment, and labour standards.⁶

Since then, several IIAs as well as a few Model Bilateral Investment Treaties (BITs) include, alongside with the traditional standards of protection enjoyed by foreign investors, references to or specific provisions on human rights. This has generated the proliferation of several types of clauses and different treaty drafting techniques, which may be illustrated in the following tentative taxonomy.

³ On the Yukos case, see, for instance, E. De Brabandere, 'Yukos Universal Limited (Isle of Man) v Russian Federation. Complementarity or Conflict? Contrasting the Yukos Case before the European Court of Human Rights and Investment Tribunals', 30 *ICSID Review* (2015) 345.

⁴ In *Tulip Real Estate and Development Netherlands B.V. v. Turkey*, ICSID ARB/11/28, Annulment decision, 30 December 2015, para 86, the Tribunal held that "[t]here is a widespread sentiment that the integration of the law of human rights into international investment law is an important concern". This approach was approved in *Urbaser S.A. and Others v. Argentina*, ICSID ARB/07/26, Award, 8 December 2016, para 1200, where the Tribunal reiterated that the treaty in discussion had to be construed "in harmony with other rules of international law of which it forms part, including those relating to human rights". For other examples, see *Bear Creek Mining Corporation v. Peru*, ICSID ARB/14/21, Award, 30 November 2017; *David R. Aven and Others v. Costa Rica*, ICSID UNCT/15/3, Award, 18 September 2018.

⁵ Brief of J. Stieglitz as *Amicus Curiae* in Kiobel, p. 24, at <https://harvardhumanrights.files.wordpress.com/2012/01/brief-of-joseph-e-stieglitz.pdf>.

⁶ ECOWAS Supplementary Act A/SA.3/12/08, Adopting Community Rules on Investment and the Modalities for Their Implementation with ECOWAS, 19 December 2008.

I. Preambles

Traditionally, preambles of IIAs were rather rudimentary. They were normally limited to referring to the promotion and protection of foreign investment, on the hand, and the boosting of the economic development of the Host State and its relations with the Home State, on the other hand. Recent IIAs, on the contrary, contain increasingly sophisticated preambles, often recognizing the importance of respecting human rights. The Preamble of the BIT between Austria and Kosovo (2010), for instance, reads in part

Referring to the international obligations and commitments concerning respect for human rights;

Recognizing that investment, as an engine of economic growth, can play a key role in ensuring that economic growth is sustainable;

Committed to achieving these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognised labour standards;

Another example is offered by the preamble of the Comprehensive Economic and Trade Agreement between the EU and its Members and Canada (CETA):

Reaffirming their strong attachment to democracy and to fundamental rights as laid down in the Universal Declaration of Human Rights, done at Paris on 10 December 1948, and sharing the view that the proliferation of weapons of mass destruction poses a major threat to international security;

Recognizing the importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation;

The Italian Model BIT, in turn, reads in part

Reaffirming their commitment to democratic principles and human rights as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, as well as to the principles of the rule of law and good governance;

A variety of other drafting options can be found in IIAs. The inclusion of the protection of human rights in the preamble is important for the purpose of interpretation as the preamble may be considered as context of the provision to be interpreted as well as for determining the object and purpose of the treaty. From both perspectives, it may assist the interpreter, especially in fleshing out the meaning of generic terms or vague provisions, and to choose between different plausible interpretations.

It may be argued that preambles should contain a reference not only to the Universal Declaration of Human Rights – as it is often the case – but also to other relevant international human rights instruments. The impact of preamble may be amplified by specific references to human rights treaties that are most likely to play a role in foreign investment law, including the two UN Covenants, conventions and legal instruments on the protection of indigenous peoples and labour rights, and, where appropriate, even regional human rights conventions.⁷

⁷ As pointed out in *Tulip v. Turkey*, note 4, para 91, “[i]n investment cases involving parties to the ECHR, some tribunals have relied on the Convention and its case law” (several cases mentioned in the footnote).

II. Compliance provisions

It is undisputed that foreign investors must comply with the laws and regulations in force in the Host State, including those on the protection of human rights.⁸ Importantly, investment tribunals have not hesitated to deprive investors of the protection they would have otherwise enjoyed under the relevant treaty due to violations of local laws and regulations, regardless to any specific provision in the treaty concerning compliance with those laws and regulations.⁹

An interesting development in investment treaty practice is the increasingly frequent inclusion of a provision imposing upon investors the obligation to comply with specific international legal instruments, such as the ILO Declaration on Fundamental Principles and Rights of Work, 1998.¹⁰ The BIT between Morocco and Nigeria combines the general obligation incumbent on investors “to uphold human rights in the host state” with a more specific obligation not to manage or operate the investments “in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties”.¹¹

The incorporation into IIAs of the international human rights commitments of the Host State (and possible also of the Home State) is particularly important as compliance by investors with such commitments would become part and parcel of the broader deal recorded in the treaty. On the one hand, investors continue to enjoy the legal protection they traditionally enjoy under IIAs; on the other hand, they must respect – as a matter of investment treaty – the commitments contained in human rights treaties.

III. General exceptions

Several IIAs contains provisions on general exceptions, which are often modelled after Article XX GATT. According to Article 10 (1), Canada Model BIT, for instance,

Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

- (a) to protect human, animal or plant life or health;

⁸ Article 12(1) of the Indian Model BIT, for instance, included in the local laws foreign investors must comply with: Law concerning payment of wages and minimum wages, employment of contract labour, prohibition on child labour, special conditions of work, social security and benefit and insurance schemes applicable to employees; environmental Law applicable to the Investment and its business operations; Law relating to human rights; and relevant national and internationally accepted standards of corporate governance and accounting practices. The BIT between Japan and Argentina, requires investors to comply with the laws of both the Host and the Home State (footnote one).

⁹ See, for instance, *Fraport AG Frankfurt v. Philippines*, ICSID ARB/03/25, Award, 2007, para 401; *Gustav Hamester GmbH v. Ghana*, ICSID ARB/07/24, Award, 2010, paras 123-4).

¹⁰ See, for instance, Article 14 (4) of the Indian Model BIT, or Article 18 (3) of the BIT between Morocco and Nigeria.

¹¹ Article 18 (2) and (4) of the BIT between Morocco and Nigeria. Article 18 (7) of the Morocco Model BIT, reads in French: “Les investisseurs devront gérer et exploiter leurs investissements en respectant les obligations internationales en matière d’environnement, de travail et de droits de l’homme auxquelles les deux Parties sont parties” (English unofficial translation: “Investors shall manage and operate their investments in compliance with international environmental, labour and human rights obligations to which both Parties are party”).

[...]

Other IIAs reproduce the same provision, but with a different level of deference. States may take measures that are *applied and designed* to protect human, animal or plant life or health, rather than measures which are *necessary* to achieve such objectives.¹² Arbitral tribunals are thus expected to exercise a less strict review.

Provisions closely following Article XX GATT, however, have a limited coverage in terms of human rights. Only human rights affecting life or health fall within the scope of the exception. It is worthwhile to refer in this regard to the innovative approach taken in Art. 14 of the Colombia Model BIT, which reads

Provided that such Measures are not applied in a manner that would constitute means of arbitrary and discriminatory treatment against a Covered Investor or Investment, nothing in this Agreement shall preclude a Contracting Party from adopting, maintaining or enforcing Measures that such Contracting Party deems necessary for:

- a. protecting human rights;
 - b. protecting human, animal or vegetable life and health;
- [...]

The reference to human rights clearly expands the scope of the provision to all relevant human rights and adequately protects the Host State against any claims related to measures otherwise inconsistent with the treaty but necessary to protect human rights.

IV. Right to regulate

Human rights can be looked at from another perspective. Recent IIAs frequently contain provisions intended to safeguard the regulatory space of the Host State. This is a reaction to the perceived undue restrictions of the right and duty of States to regulate to pursue public interest, without exposing itself to claim of indirect expropriation.¹³ Normally, these provisions are silent on the protection of human rights and may refer to legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.¹⁴

Article 5 of the Italian Model BIT introduced an important innovation as the protection of human rights is expressly included between the policy objectives the Host State may invoke as a matter of general exceptions. It reads:

For the purpose of this Agreement, the Contracting Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of human rights, public health, safety, the environment, public morals, financial stability, social or consumer protection, or the promotion and protection of cultural diversity.

¹² See, for instance, Article 22 COMESA.

¹³ As pointed out by the Commonwealth Investment Experts Group, African Region, “Summary Record”, October 20-21 2011, “[O]ne common issue is the need to clarify the interaction between international investment instruments and domestic investment policy as well as policy in other areas – for e.g., sustainable development and environmental regulation. Governments must always be concerned about ensuring that there is sufficient policy space for them to engage in reconciling competing interests”, at <http://secretariat.thecommonwealth.org/files/243514/FileName/FINALIEGOutcomesSummary%282%29.pdf>.

¹⁴ Article 8.9 (1) (2) CETA, which must be read in combined with Annex 8 A on Expropriation.

V. *Social and environmental impact assessment*

A particularly effective manner to protect human rights is the inclusion in IISs of provisions imposing upon foreign investors the obligation to carry out a social and environmental impact assessment before starting their investment projects. Although the obligation already exists in numerous jurisdictions, incorporating it in the treaty enhances its effectiveness and recalibrates the content of IIAs.

The purpose of the assessment is to anticipate as accurately as possible the impact investment projects may have on the environment and society, in order to detect any potential problem and ultimately ensure that they are sustainable and balanced in terms of costs-benefit from the standpoint of all stakeholders. This is crucial to assist not only the Host State in making the relevant decisions – typically the authorizations in the natural resources, infrastructures or public utilities sectors – but also for investors themselves in designing and developing their project. Given the purpose of the assessment, the publicity and accessibility of the materials used for the assessment as well as effective opportunities for public participation and public scrutiny deserve specific treatment in IIAs.

Again, ECOWAS Supplementary Act traced the road. Article 12 (1) and (2) reads:

Investors and Investments shall conduct an environmental and social impact assessment of the potential investment. Investors or the investments shall comply with environmental assessment screening criteria and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host Member State for such an investment or the laws of the home State for such an investment. The investor shall comply with the minimum standards on environmental and socio-cultural impact assessment and screening that the Member States shall adopt at the first meeting of the Parties, to the extent that these are applicable to the investment in question.

Investors or the investments shall make the environmental and social impact assessments accessible in the local community and to affected interests in the host State where the investment is intended to be made prior to the completion of the host State measures prescribing the formalities for establishing such investment.¹⁵

The same provision further requires investors and the Host State to apply the precautionary principle when appropriate.

The obligation to conduct social and environmental impact assessment is one of the most effective substantial obligations imposed upon foreign investors under IIAs. It remains to be seen whether the assessment conducted before the establishment of the investment needs to be kept under review and repeated periodically as appropriate.

¹⁵ Note 6.

VI. *Liability*

The question of the liability of multinational companies (MNC) remains rather controversial and has generated a good deal of frustration amongst State, International Organisations, and civil society. The conclusion of a legally binding instrument on the responsibility of MNC has been the object of a hot debate since the attempt to establish the so-called New International Economic Order. Although no such instrument has been concluded yet, principles and guidelines applicable to MNC as well as compliance mechanisms have been agreed upon by States.

From this perspective, the ECOWAS Supplementary Act, adopted in 2008, broke new grounds by imposing upon the Home State the obligation to ensure that its legal system allows for, or does not prevent or unduly restrict, civil action before its courts in relation to liability for damages resulting from alleged acts or decisions made by investors in the territory of the Host State. The Host State laws on liability shall apply to such civil proceedings.¹⁶ This development can be inserted in the evolution of the role played by the Home State, which is today much broader than a protective one.¹⁷

The example has been followed in the Southern African Development Community (SADC) Model BIT Template (2012),¹⁸ and more recently in the 2015 Indian Model BIT,¹⁹ and the BIT between Morocco and Nigeria.²⁰ The Indian Model BIT, in particular, provides that

Without prejudice to the jurisdiction of the Courts located in the Host State, Investors and its Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State.

The Home State shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before their domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investments or Investors in relation to their Investments in the territory of the Host State.

As pointed out by the Indian Law Commission, the provision is intended to remove or minimise jurisdictional hurdles that could prevent civil action before the tribunals of the Home State,

¹⁶ Note 6, Article 29.

¹⁷ See, for instance, T. Gazzini, 'Beyond Protection: The Role of the Home State in Modern Investment Treaties', in C. Titi (ed.), *Public Actors in International Investment Law* - Special Issue of the European Yearbook of International Economic Law (2021) 19.

¹⁸ See <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>, Article 17.

¹⁹ Note 8, Article 13. The provision has not been included neither in the BIT concluded between India and Belarus on 24 September 2018, nor in the Investment Cooperation and Facilitation Treaty concluded between India and Brazil on 25 January 2020.

²⁰ Note 11, Article 20.

most prominently the *forum non conveniens doctrine*.²¹ The provision was indeed deliberately designed having in mind the infamous Bophal incident.

The meaning of this provision, nonetheless, remains to be clarified, especially with regard to what would amount to undue restrictions of the jurisdiction of the tribunals of the Home State in cases which by definition are transnational in character and raise delicate questions of extraterritoriality. Yet, the development must be emphasised as it occurs at a time in which domestic tribunals seems to move in opposite direction, with the United States Supreme Court watering down the scope of the Alien Tort Act,²² while tribunals in other jurisdictions showing signs of increasing willingness to adjudicate this category of disputes.²³

VII. Denial of benefits

Traditionally, denial of benefits clauses were inserted in IIAs with a view to giving the right to the Host State to deprive a legal entity of the enjoyment of the treaty if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Host State.²⁴ As such, the clauses related to the possible exclusion from the protection of the treaty or certain companies by virtue of the nationality of those owning or controlling it, or, the other way around, the limitation of the exposure of the Host State to treaty claims. The exercise of such a right, however, cannot have retroactive effects.²⁵

The Italian model BIT revisited the clause as follows:

Each contracting Party reserves the right to deny to an enterprise of the other Contracting party the benefits of this Agreement if nationals of a third Country own or control the enterprise and:

[...]

2. The denying Contracting Party reacts proportionately in light of the serious deterioration of the political situation in the other country with respect to the rule of law, democracy and human rights.²⁶

It is assumed that the expression “other country” in paragraph 2 means “third Country”. The clause is still linked with ownership and control by nationals of a third Country, but its scope of application is limited to cases in which the conduct of the third Country deserves a proportionate reaction by the Host State. The idea behind this provision is to build in the treaty a mechanism which allows the Host State to unilaterally react to serious violations of human rights committed by a third Country by excluding enterprises owned or controlled by its nationals – but still otherwise entitled to enjoy the protection of the treaty – from the scope of the treaty. The undeclared but evident purpose of the provision is to compel the third State to

²¹ Law Commission of India, Report 260, at <http://lawcommissionofindia.nic.in/reports/Report260.pdf>, pp. 36–37.

²² See, in particular, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 10; and *Jesner v. Arab Bank, PLC*, No. 16-499, 584 U.S. (2018).

²³ See, for instance, *Vedanta Resources PLC and another v Lungowe and others*, [2019] UKSC 20.

²⁴ Article 17(1) Energy Treaty Charter.

²⁵ See, for instance, *Plama Consortium Limited v. Bulgaria*, ICSID ARB/03/248 February 2005, para 162.

²⁶ Article 18 Italian Model BIT.

change attitude. Consequently, the reaction must be not only proportionate, but also temporary. It could be considered as a counter-measure from the standpoint of State responsibility and as such could be justified also under customary international law. By virtue of the inclusion of the denial of benefits provision, however, the issue becomes a matter of treaty law and the Host State may rely on Article 18(2).

The real challenge of Article 18(2) is the determination of the serious deterioration of the political situation in the Third Country from the standpoint of the rule of law, democracy, and human rights. This is unavoidably a delicate political decision unilaterally taken under Article 18 (2) by the Host State. Importantly, the conformity of the decision with Article 18 (2) would eventually be reviewed by the courts of the Host State or arbitral tribunals, should the concerned enterprise resort to the dispute settlement mechanism established in Article 14.

The Host State will presumably raise a preliminary objection and invoke Article 18 (2). Nothing seems to indicate that the provision was intended to be a self-judging one. It is nonetheless evident that the determination by the court or tribunal may be fraught with difficulties as it implies an inquiry on the alleged “serious deterioration of the political situation”. At any rate, as the traditional denial of benefits clause, Article 18 (2) cannot produce any retroactive effects. Therefore, pending disputes or disputes arising out of facts that have occurred before the application of Article 18 (2) remain unaffected.

The Colombian Model BIT contains a provision on denial of benefits which also relates in part to the protection of human rights, but functions in a completely different manner. The Host State may deprive an investor of the other Party the protection granted by the treaty if the investor has been found by an international court or by the judicial or administrative authorities of any State directly or indirectly responsible *inter alia* of serious human rights violations.

According to Article 17 (1) (d) the benefits of the treaty may be denied to

an investor of the other Contracting Party, in case that an international court or a judicial or administrative authority of any State with which the Contracting Parties have diplomatic relations has proven that such investor has directly or indirectly:

- i. committed serious human rights violations;
- ii. sponsored persons or organisations sentenced because of serious human rights violations or violations against International Humanitarian Law or sponsors internationally-listed terrorist organisations;
- iii. caused serious environmental damage in the Territory of the Host Party; [...]
- vi. caused grave violations of the Host Party’s labour laws.

In contrast with Article 18 of the Italian BIT, in this case the reaction envisaged in the provision directly targets the investors of the other Party and excludes them from the enjoyment of the protection under the treaty. While a determination on serious violations of human rights by an international tribunal definitely offers adequate guarantees to the investor, it remains to be seen whether domestic judicial or administrative authorities are able to deliver an independent and impartial judgment.

Aware of the need to prevent any abuse or misuse of the denial of benefits clause, the Parties have conferred to the Council – which is composed of representatives of both of them – the power to decide on an opposition made by the Home State within 90 days. If the Council does not settle the question within 6 months, the conformity of the denial of benefits with Article 17

will be ascertained by the competent domestic courts or an investment tribunal in accordance with the section of the treaty dealing with investor-State dispute.

As a result, the treaty established in favour of the investor a three-layer protection: (a) denial of benefits is based on a determination by an international tribunal, or domestic judicial or administrative authorities; (b) the Council is competent to settle the question in case of opposition raised by the Home State within 90 days; and (c) should the Council be unable to reach any decision within 6 months, the question will be dealt with within the dispute settlement mechanism of the treaty.

Concluding remarks

Traditional IIAs need to be reconsidered for several reasons, including their complete silence on the protection of human rights. There is nothing inherent in such a silence, which is entirely due to a deliberate choice made by the contracting parties. Quite the contrary, the protection of human rights can and must be included in those agreements with a view to bringing them in line with current international law in an integrationist perspective.

It is encouraging that since the adoption in 2008 of the ECOWAS Supplementary Act on Investment, human rights have found their way into IIAs. Today a significant number of IIAs contain preambles referring to or provisions related to human rights as illustrated in the tentative taxonomy.

These provisions deserve attention as they often strike a delicate balance between the protection of human rights, the regulatory powers of the Host State and the legally protected rights of investors. Furthermore, different drafting options may be available for each of these provisions, for instance with regard to the human rights instruments referred to or incorporated in IIAs, the level of deference of the review of measures adopted under general exceptions clauses, or the safeguard to the regulatory space of the Host State.

The provisions on economic and social impact assessment as well as those related to the liability of MNC, in particular, are expected to effectively minimise the risks and negative impact of investment projects on the enjoyment of human rights, and to enhance the protection of the victims of wrongdoings by MNC.

The most recent development concerns the evolution of denial of benefits provisions. Traditionally related exclusively to the ownership or control of companies for the purpose of the qualification of investors under the relevant treaty, these provisions are now linked also to violations of human rights committed either by a third State or investors themselves.

The process of integration of the protection of human rights into IIAs, however, is only the beginning. It deserves the broadest support in order to maximise the positive impact of foreign investments as a vehicle for sustainable development and to enhance the legitimacy of foreign investment law. At the same time, caution and rigor are necessary to strike a fair balance between the legally protected rights of foreign investors and the interests of all other stakeholders.