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Responsabilization

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LA PROTECTION DES INVESTISSEMENTS ETRANGERS:
VERS UNE RÉAFFIRMATION DE L'ÉTAT?

THE PROTECTION OF FOREIGN INVESTMENTS:
A REAFFIRMATION OF THE STATE?

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CHANGES IN THE BALANCE OF RIGHTS AND OBLIGATIONS: TOWARDS INVESTOR RESPONSABILIZATION

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The classical approach to investment protection is that States have obligations and investors have rights.\(^1\) However, there are emerging trends in favor of a rebalancing of rights and obligations of States and investors. In the context of this recalibrated approach, more attention is given to the definition of substantive provisions, such as the fair and equitable treatment standard or that concerning indirect expropriation. Other standards of protection are also gaining traction, such as the right of a State to regulate in the field of environmental and health protection, so as to facilitate policy space or the introduction of carve-out provisions for example.

There is also a move from investor protection to investor responsabilization. This emerging responsabilization trend can be observed, for example, in recent treaties, and most notably in investment treaties and facilitation agreements negotiated on the African continent, and it is also making a foray into customary international law. This feature will be presented together with reflections on the implementation of investors' obligations.

It should be noted at the outset, that at the time of the adoption of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the ICSID Convention),\(^2\) this responsabilization trend was not unknown. The envisaged disputes were primarily contractual investment disputes. They asserted breaches of investment contracts that had been concluded between the parties. The balance of rights and obligations between States and investors was thus different from that encountered when treaty claims entered the realms of

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\(^1\) This article does not take a position on whether investors should or should not be considered as holders of rights under investment agreements. The article draws on the research project on “Foreign Investment in Africa”, Gaining Development Momentum, funded by the Swiss National Science Foundation (SNSF), at www.investmentinafrica.ch (accessed 1 September 2017).

\(^2\) Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, 17 UST 1270, TIAS 6090, 575 UNTS 159.
ICSID. As a reminder, the AAUPL v. Sri Lanka case was the first case brought to ICSID on the basis of a consent to arbitration in a bilateral investment treaty. At that time and thereafter, the balance of rights and obligations turned towards investor protection, in a framework which has generally favored the reading of investment treaties in "clinical isolation" from other sources of law. This balance is now changing.

This article will focus on obligations arising from investment treaties and facilitation agreements and possibly under customary international law. That said, even though there may be circumstances where specific international obligations cannot be identified through these two prisms, one should not forget that there are other policy and legal grounds for responsabilizing investors. The interpretation and application of investment treaty provisions should not be understood in a one-sided manner. The various interactions between State authorities and investors in the context of an investment have a role to play, especially when assessing whether treaty provisions have been respected. Domestic law can also find application in investment arbitration, particularly through the interplay of Article 42 of the ICSID Convention and offer avenues for assessing the conduct of an investor. Other means are provided through corporate social responsibility standards. The United Nations Guiding Principles on Business and Human Rights, endorsed by the UN Human Rights Council in 2011, the OECD Guidelines for Multinational Companies, and the Equator Principles all promote certain behavior to be pursued by companies. Specific accountability and monitoring mechanisms contribute to their effectiveness. Their legal status may raise questions, especially in terms of their binding nature. This said, more and more domestic legislation and international instruments include references to

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5 In line with this trend, a tribunal noted that "[t]he BIT imposes no obligations on investors, only on contracting parties", Spyridon Roussalis v. Romania, ICSID Case No ARB/06/1, Award, 7 December 2011, para. 871.
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them, and as such give these behavioral guidelines an important normative status. It is also interesting to note in this context that the Human Rights Council established in 2014 an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with a mandate for “conducting constructive deliberations on the content, scope, nature and form” of an international instrument. This latter endeavor may create another avenue for establishing investors’ obligations at the international level.  

I. INVESTOR RESPONSABILIZATION IN INVESTMENT TREATIES AND FACILITATION AGREEMENTS

Treaties dealing with investment promotion and protection are diverse. They may be bilateral or regional in their scope, they can take the form of model agreements, and they can focus on investment protection or on investment facilitation. The latter contain lower protection standards and do not provide for investor-state arbitration but for alternative dispute settlement procedures. Increasingly, these various types of treaties state that investors have rights but also obligations. These obligations present different facets and their content may indeed vary. They may also combine treaty obligations with other types of law-making techniques.

A variety of obligations

Some treaties provide for specific obligations linked to the respect of the domestic order of the host State as well as to the safeguard of public order and morals. This is the case with the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference, which is an ancestor of sorts to the newly adopted African treaties. Article 9 of this Agreement states:


15 Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference, 5 June 1981, General Secretariat of the Organisation of the
The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.

Highlighting the conventional nature of the obligations, an investment tribunal specified that this provision imposes a positive obligation on investors to respect the law of the host State, as well as public order and morals. An investor of course has a general obligation to obey the law of the host State, but Article 9 raises this obligation from the plane of domestic law (and jurisdiction of domestic tribunals) to a treaty obligation binding on the investor in an investor state arbitration.\textsuperscript{16}

Other treaties also require that investors comply with the domestic law of the host State. An issue of differentiation among them is the scope of the domestic law to be respected.

The COMESA Investment Agreement requires in its Article 13 that “COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made.”\textsuperscript{17} The Southern African Development Community (SADC) adopted a Model Bilateral Investment Treaty (BIT) in 2012 which is narrower in its coverage of domestic law. It requires that: “Investors and Investments shall comply with all laws, regulations, administrative guidelines and policies of the host State concerning the establishment, acquisition, management, operation and disposition of investments.”\textsuperscript{18}

Whatever the scope of the provision, it indicates that investors should at a minimum be able to show that they were cognizant of the applicable domestic law when they made their investments and that they have remained aware of its requirements.

Other obligations, as contained in investment treaties, can demand proactive behavior. They require investors, inter alia, to abide by human rights, to conduct environmental and social impact assessments or to promote sustainable development.

\textsuperscript{16} Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, Award, 15 December 2014, para. 663.

\textsuperscript{17} Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA), 5 November 1993, 2314 UNTS 265 (not yet in force).

The SADC Model BIT provides that

[i]Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the host State, including by public authorities or during civil strife (Article 15-1).

It adds that

[i]Investors and their investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998 (Article 15-2).

[i]Investors and their investments shall not [establish,] manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the host State or the home State, whichever obligations are higher. (Article 15-3)

Moreover, the Draft Pan-African Investment Code\(^ {20} \) requires that “[i]nvestors shall contribute to the economic, social and environmental progress with a view to achieving sustainable development of host States” (Article 22-3).

The Reciprocal Investment Promotion and Protection Agreement between Morocco and Nigeria, adopted in December 2016, provides that “[i]nvestors or the investment shall conduct a social impact assessment of the potential investment. The Parties shall adopt standards for this purpose at the meeting of the Joint Committee.”\(^ {21} \)

As can be noted, there is an emerging trend that provides for obligations to be respected by investors. Besides requirements to abide by domestic law, other obligations prescribe specific behavior to be followed. The content of these obligations is defined in light of existing international law norms and principles whose customary law status is rather widely accepted, albeit with certain specifications and qualifiers. One can think for example of the duty to carry out an environment impact assessment.\(^ {22} \)

Corporate social responsibility standards also contribute to the shaping of investors’ obligations.

\(^ {19} \) Ibid.


\(^ {22} \) See the statement of the International Court of Justice on the customary nature of this principle, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, para. 204.
Respect for corporate social standards

In some treaties, the path to responsibilizing investors is through respect for corporate social standards. The structure of the international legal order explains the recourse to these standards. Traditional channels for the creation of rules in international law often fail to accommodate the needs of the diverse range of actors. Even though international treaties and custom play a fundamental role, they cannot cover the vast sphere of international activity\(^{23}\). This is why soft law, standards and guidelines perform a role complementary to the application of general principles in international investment law. They are resorted to as vehicles of socialization for promoting values. They also contribute to strengthening the accountability of the actors involved in investment activities.

In this context, the growth of eco-friendly and socially responsible standards applicable to investors allows for possible synergies between societal values and investment protection. Investors can be required to abide by corporate social standards as, for example, with the OECD Guidelines on Multinational Enterprises\(^{24}\) or the ILO Tripartite Declaration of Principles concerning Multinational investments and Social Policy.\(^{25}\)

The Supplementary Act on Common Investment Rules for the Community adopted in 2008 by the Economic Community of Western African States (ECOWAS)\(^{26}\) has, for example, a provision dedicated to corporate social responsibility. As such, Article 16 states that:

(1) In addition to the obligation to comply with:
- all applicable laws and regulations of the host member State;
- and the obligations in this Supplementary Act and in accordance with;
- The size, capacities and nature of an investment, and taking into account;
- The development plans and priorities of the host State;
- The Millennium Development Goals and;
- The indicative list of corporate social responsibilities agreed by the member States\(^{27}\).


\(^{27}\) Ibid.
It is noteworthy that respect for corporate social standards is to be understood in a progressive manner, such that the standards in question should be those that provide for the highest level of protection. In other words, by referring to these standards, investment agreements make reference to evolving commitments that can only be perfected and refined.

The Cooperation and Facilitation Agreement between Brazil and Mozambique of December 2010 provides that:

The investor and investments shall strive to carry out the highest level possible of contributions to the sustainable development of the host State and the local community, by means of the adoption of a high degree of socially responsible practices, taking as a reference the voluntary principles and standards defined in Annex II ‘Corporate and Social Responsibility’ (Article 10).

Article 16-2 of the ECOWAS Supplementary Act on Common Investment Rules for the Community stresses that corporate social responsibility standards should be understood in the most favorable way possible. It says:

(2) Where standards of corporate social responsibility increase, investors should endeavor to apply and achieve the higher level standards.

For its part, the Investment Cooperation and Facilitation Agreement between Brazil and Malawi (2015) provides in Article 9 for corporate social responsibility as follows:

1. Investors and their investment shall 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 this Article.

2. The investors and their investment shall develop their best efforts to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host Party receiving the investment:

a) Stimulate the economic, social and environmental progress, aiming at achieving sustainable development;

b) Respect the human rights of those involved in the companies’ activities, consistent with the international obligations and commitments of the Host Party;

c) Encourage the strengthening of local capacities building through close cooperation with the local community.

Rather than formulating direct obligations for investors, some investment treaties may ask contracting State parties (both the home States and host States) to encourage investors to take on board and implement corporate
social standards. As an example, the Canada – Benin BIT (9 January 2013) states in its Article 16 that:

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.  

In this latter case, although the provision does not establish a requirement for investors to comply with corporate social standards, its inclusion might receive attention when substantive investment standards, such as fair and equitable treatment, are invoked by Claimants. In other words, when assessing the conduct of a Respondent, the behavior of the investor will also be looked at.  

The inclusion of corporate social responsibility standards in investment treaties and facilitation agreements bring them into the realm of investment treaty frameworks. These standards do not however become binding per se through their incorporation in these treaties. They nonetheless acquire an objective status as due diligence parameters for assessing the conduct of investors. As the contracting State parties themselves have inserted these standards in their agreements,  they can act as legitimate benchmarks for assessing the conduct and accountability of investors. They make explicit the obligations resting on investors to behave in accordance with certain standards.

II. INVESTORS’ OBLIGATIONS AND CUSTOMARY INTERNATIONAL LAW

Some awards have highlighted that obligations for investors may exist even though there is no explicit reference to these obligations in an investment treaty or in another international treaty that would find application.

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When discussing issues of jurisdiction, the Phoenix award offers several insights to the extent that:

It is evident to the Tribunal that the same holds true in international investment law and that the ICSID Convention’s jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles. To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.\(^3\)

Another tribunal has considered in the Urbaser case\(^4\) that obligations incumbent on non-State actors can derive from the fact that investors are subjects of international law and thus bound by certain principles of international law. It considered that resort to international law was allowed both by the applicable bilateral investment treaty as well as Article 42 of the ICSID Convention.\(^5\) Interestingly, in the context of this award, some of the vehicles that allow for responsabilizing investors are the corporate social responsibility standards, such as the Ruggie principles,\(^6\) which set out that enterprises have certain obligations in respect of human rights.

The Tribunal said the following:

1195. The Tribunal may mention in this respect that international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities’ operations conducted in countries other than the country of their seat or incorporation.\(^7\) In light of this more recent

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\(^{31}\) Phoenix Action, Ltd. v. The Czech Republic, ICSID/ARB/06/5, Award, 15 April 2009, para. 78.

\(^{32}\) Urbaser S.A., Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 8 December 2016.

\(^{33}\) Ibid., para. 1202


\(^{35}\) Note that footnote 434 of the Urbaser award reads as follows: The basic document is today the UN Special Representative John Ruggie’s Final Report on “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (A/HRC/17/31, 21 March 2011). According to these principles, business enterprises should respect human rights (No. 11). This responsibility refers to internationally recognized human rights (No. 12). It requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts (No. 13). In all contexts, business enterprises should: (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate; (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law. On the other hand, even though several initiatives undertaken at the international scene are seriously targeting corporations human rights conduct, they are not, on their own, sufficient to oblige corporations to put their policies in line with human rights law. The focus must be, therefore, on contextualizing a corporation’s specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual.


1199. At this juncture, it is therefore to be admitted that the human right for everyone’s dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.

Although the Tribunal did not take a specific stance with respect to the content of the obligations at stake, be they positive or negative, the language used suggests that these obligations are “do-not-harm” type obligations.36 Besides stating that both public and private actors are bound by human rights obligations, the Tribunal alluded to the fact that these obligations may be different depending on whether they are incumbent on States or on private parties. In this context, laying down the principle that investors may be bound by obligations under international law, the tribunal did not go as far as to say that in the said case the investor had an obligation under customary international law to fulfill the right to access to water and to sanitation as was claimed by the Respondent.37

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36 Ibid, para.1210. “... the investor’s obligation to perform has as its source in domestic law; it does not find its legal ground in general international law. The 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 (...”).

37 Ibid, paras. 1211 ss.
III. INVESTORS’ OBLIGATIONS AND THEIR IMPLEMENTATION

The conclusion that investors have obligations raises the issue of their implementation. A first point of interest is related to the temporal scope of application of these obligations, that is to say when they should find application. The relevant temporal phases may include the pre-investment phase, the investment phase and the post-investment phase.

Some treaties contain explicit provisions on this temporal issue while others do not. The ECOWAS Supplementary Act on Community Rules on Investment states in its Article 13(1) that “[i]nvestors and their investments shall prior to the establishment of an investment or afterwards, refrain from involving themselves in corrupt practices...”. In its Article 14 dealing with Post-Establishment Obligations, it says that

(1) Investors or investments shall, in keeping with best practice requirements relating to their activities the size of their investments strive to comply with on hygiene, security, health and social welfare rules in force in the host country. (2) Investors shall uphold human rights in the workplace and the community in which they are located... (3) Investors shall not by complicity with, or in assistance with others, including public authorities, violate human rights in time of peace or during socio-political upheavals.

Another issue is related to the implementation of investors’ obligations, as well as possible remedies in case they are breached. One way is through the use of counterclaims by respondent States. Another way is before the domestic courts of the host State or the home State of the investor.

Counterclaims are a means for challenging investors’ implementation of their obligations. The *Hesham T. M. Al Warraq* tribunal considered that:

The fact that the Contracting Parties imposed treaty obligations on investors (which the Claimant assented to by accepting the open offer of investment arbitration made by the Respondent in the OTC Agreement) confirms the interpretation of Article 17 that permits counterclaims by the respondent state.\(^{38}\)

Most recent African investment treaties contain provisions dealing with counterclaims.\(^{39}\) The inclusion of these provisions is another indication of the recalibrated approach between rights and obligations of States and investors. They allow for claims to be brought against investors. For counterclaims to


be declared admissible it is necessary that, besides the dispute settlement provision of a treaty allowing that the investor’s alleged breach be taken into account, the condition of connexity between the claims and the counterclaims is met, or in the words of Article 46 of the ICSID Convention, that “counterclaims arise directly out of the subject-matter of the dispute”. Recent awards, such as the above-mentioned Urbaser award, give an indication as to how to interpret this condition through a factual prism as well as in the context of international law. Other tribunals, while stressing the factual nexus between the claims and the counter claims, have relied on the gateway provided by Article 42 of the ICSID Convention, and its reference to domestic law for grounding the obligations incumbent on investors. Including provisions dealing both with investors’ obligations and the possibility to bring counterclaims, the investment treaties negotiated on the African continent bring greater clarity to the implementation of these provisions. They offer the possibility for civil liability-type remedies at the international level.

As well as the possibility of bringing counterclaims against investors before an investment tribunal, domestic courts may also play a role. In this context, some treaties foresee the possibility of civil liability claims in the home State of an investor for damage caused to third parties in the host State through the conduct of the investment. Article 17 of the SADC Model Bilateral Agreement entitled “Investor liability” reads as follows:

17.1. Investors and 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.

17.2. Home States 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 domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investors in relation to their Investments in the territory of the Host State.41

In addition to counterclaims before investment tribunals and civil actions before domestic courts, some are referring to the establishment of a special mechanism that would allow for investors’ obligations to be dealt with specifically. There is undoubtedly a need to reflect further on the corollary of

an obligation, that is to say its implementation and to the remedies that can be granted.

CONCLUDING REMARKS

The emerging acknowledgement of obligations for investors leads to a new balance of rights and obligations between States and investors in the investment field. Some treaties have made forays in specifying the content of these obligations. When investment treaties do not provide for these obligations, it has recently been considered that reference may be made to general international law. These developments prompt the need for further consideration as to the potential obligations incumbent on investors. Various norms and standards can be referred to in this context. Investment treaties are serving as a vehicle for corporate social standards, which in turn act as benchmarks for assessing the conduct of investors. A further issue deals with the implementation of investors' obligations. In this respect, counterclaims before investment tribunals are perceived as possible gateways and investment treaties also refer to actions before domestic courts. Overall, the emerging investor responsabilization trend brings with it many questions which merit further reflection.