INTERNATIONAL INVESTMENT LAW: NEED FOR INCLUSION OF A HUMAN RIGHTS CLAIM MECHANISM

*Dr. Rashmi Nagpal**

I. Introduction

Transnational investment plays an important role in the prosperity and development of many countries, especially less developed countries. Without mechanisms to protect such investments, however, investors are reluctant to take the risk and bring their resources in a legally and politically turbulent foreign country. To address such concerns, several mechanisms have been developed to reduce the uncertainties associated with investing in such countries by providing assurances and security to foreign investors. International trade and investment are driving forces in the world economy and its increasing global interdependence and has long been a feature of an increasingly globalized world in which opportunities for foreign investment often exceed the prospects of home state investment. The quickening of modern transnational relations only serves to accelerate this process. These foreign investors, i.e. nationals of states other than the host state, have traditionally been considered to be particularly vulnerable to risks of a noncommercial nature such as nationalization and other regulatory measures interfering with the investors' legitimate expectations. The traditional remedy for aggrieved foreign investors was to petition their home state to take up their case on their behalf. This solution, known as diplomatic protection or espousal, however suffers from various drawbacks and has hence only played a comparatively marginal role. It subjects investors to the goodwill of their governments and the vagaries of international relations, putting control of litigation out of their hand.[1] Moreover, it does not in itself resolve the question of whether the host state's action was actually unlawful, which is a question of the law governing the investment and not a matter of the specific protection technique. Apart

* Ex Visiting Faculty, Nirma University, Ahmedabad. Ex.faculty Panjab University,Chandigarh. Amity University,Noida. Dr.Ram Manohar Lohia National Law University.,Amity University,Lucknow

1 P Muchlinski (ed), The Oxford Handbook of International Investment Law (1. edn Oxford Univ. Press, Oxford 2008) 16.

from the potentially suspicious domestic law of the host state, such rules governing the treatment of aliens and their property are found in public international law. Since customary international law standards on the protection of foreign investment were frequently marred by incessant disagreement, international treaties emerged as the principal source of norms in the international investment context. This treaty protection for investors first developed in the context of Friendship, Commerce, and Navigation (FCN) treaties; modern investment agreements are designed to facilitate the commercial interpenetration of nations.

International economic obligations have been designed to facilitate global trade, and thus can be seen as safeguarding the interests of private firms, even though their prosecution can only be undertaken through state-to-state dispute settlement. Moreover, through the development of a web of approximately more than 2000 bilateral treaties among approximately 170 countries, private actors have been provided with the right to prosecute core economic obligations through direct arbitration with a state. Mixed arbitration for the protection of foreign investors has actually existed for centuries, but until the 1960s it was normally pursued on an ad hoc basis through subrogation of a private actor's claim by its "home" state (i.e., the state of citizenship or incorporation). The exponential multiplication of bilateral investment treaties that has taken place since the 1960 which gained considerable steam in the 1980, has institutionalized the right of non-state actors to pursue mixed arbitration. Thus, on the economic front, international treaty norms have taken on a character that is clearly different from the state-centered obligations of past centuries.

Over roughly the same period, international human rights norms have also blossomed at an exponential rate. Much like economic obligations, most of these international human rights obligations possess the constitutional character of norms designed to protect individuals as against activities of the state. Analogous to economic obligations, international human rights obligations have become, in many cases, prosecutable by non-state actors before impartial, international decision-making bodies. However, despite the fact that international economic and human rights obligations share a focus on protecting non-state actors and often provide an individualized mechanism for enforcement, there is one notable distinction: the effectiveness of enforcement.

WTO provides the legal framework for the multilateral trading systems for goods and services, including its advanced system of dispute resolution. A significant body of WTO case law rules on the balance between the trading rules and other societal objectives, such as the protection of human health or the environment. WTO agreements also go beyond traditional market access issues into the realm of domestic regulation, to consider intellectual property rights and international product and food safety standards.

International Investment Law Arbitration has also become an important part of this programme. In this subject, a large network of bilateral investment treaties (BITs) set the legal frameworks for the treatment of foreign investors and for the settlement of their disputes by international arbitration. The growth of investor-state arbitral awards is evidence of the emerging importance of international investment law.

Much has been written about the relative effectiveness of World Trade Organization (WTO) dispute settlement process in comparison to other forms of dispute settlement. But less has been written about the superior effectiveness of investor-state arbitration, under which a state must submit itself to commercial arbitration with a foreign investor (based upon a general statement of consent contained within the relevant treaty). While a mixed claims tribunal can only award compensation as relief, its award is normally eminently enforceable in most developed countries. With its inclusion in the North American Free Trade Agreement (NAFTA), mixed claims arbitration has become increasingly more popular, as investors have brought claims under investment rules that heretofore would have been brought, if at all, by their home states. Increased usage of these mechanisms has brought with it increased notoriety. Mixed claims arbitration has thus become the cause of anti-globalization groups concerned that the phenomenon of globalization has had a deleterious effect on living conditions throughout the world, particularly in the developing world. When it became widely known that states holding membership in the Organization of Economic Co-operation and Development (OECD) had begun negotiations on a multilateral investment protection agreement in 1996, concerned activists argued that the agreement would constitute a “corporate bill of rights” with no corresponding obligations to regulate the activities of its beneficiaries.

What these activists were essentially calling for is a quid pro quo: in exchange for international protection from potential abuses at the hands of host governments, corporations were to be held accountable for abuses for which they would be responsible under international law. This is different from the exchange that has historically typified such relationships, where the corporation submits itself to the disciplines of local law in exchange for international protection for its investment. In other words, the exchange had always been international protection in exchange for a foreigner's commitment to invest. Has the time come for a change?

This new legal order is one that increasingly recognizes individual rights, as against state action, in an almost quasi-constitutional pattern. This new legal order is one in which a plethora of treaties and international judicial doctrine have established and refined minimum standards for government action. However, notable cleavages remain between the effectiveness of enforcement mechanisms in the economic fields of trade and investment, as compared to the equally important fields of human rights, environment, and labor. The definition of investor and investment is key to the scope of application of rights and obligations of investment agreements and to the establishment of the jurisdiction of investment treaty-based arbitral tribunals. This factual survey of state practice and jurisprudence aims to clarify the requirements to be met by individuals and corporations in order to be entitled to the treatment and protection provided for under investment treaties. As far as the definition of investment is concerned, most investment agreements adopt an open ended approach which favours a broad definition of investment. Nevertheless recent developments in bilateral model treaties provide explanatory notes with further qualifications and clarifications of the term investment.

II. Lack Of Respect For Human Rights

Critics of foreign direct investment in developing countries argue that there is a pressing need for rules governing the conduct of multinational enterprises (MNEs). As one author has noted: "such entities are inherently difficult [domestic] regulatory targets, with enormous economic and political strength and the ability to move assets

and operations around the world." Other critics have stated: Many MNEs' revenues today surpass the gross domestic products of several independent nation-states. MNEs' wealth, resources, and information technology make them key players not only within the nation-states in which they operate, but also in the international arena. Some MNEs have more to say about policies that govern international trade and finance than do many of the less developed countries. Yet, driven by the search for profit, MNEs are often unaware of, or simply disregard, the adverse impact that their activities may and often do have on the spectrum of human rights. The international scene is no longer just about formal, diplomatic relations between states, it has witnessed the emergence of increasingly powerful non-state actors; powerful in the sense that their activities have a major and direct impact on the lives of millions of people . . . . The problem is that their power is not matched by a corresponding degree of responsibility and accountability. Some MNEs have a budget that far exceeds that of many developing countries and still, there is no mechanism to hold them accountable for the violations of human rights that their activities generate. In many developing countries where these MNEs operate, the rule of law is ineffective; there are no legal remedies, and no possibilities of redress, which goes to say that the MNEs can act in near-total impunity.

It has accordingly been argued that a downward regulatory spiral (or a "race to the bottom") has ensued from competition among developing countries in order to attract foreign direct investment. Faced with competition, developing countries may relax or fail to enforce domestic regulatory standards, including human rights standards to the detriment of the health and well-being of their citizens. Whether the proof exists to sufficiently justify these theories on a macroeconomic level is an open question. Is it fair to say that foreign direct investment, once it has been committed to a particular country, is as highly mobile as these theories would suggest? Is it also fair to say that large, wealthy transnational corporations are really more powerful than the governments or leaders of numerous developing countries?

While it may not be clear that transnational corporations (both large and small) wield the power alleged by some of their harshest critics, there is a considerable amount of evidence to suggest that foreign

enterprises operating investments in the developing world have committed, or been complicit in, environmental, labor, and human rights abuses.

Human Rights Watch[2] has published extensive reports that purport to document human rights abuses undertaken in connection with foreign direct investment in numerous locations. For example, in India, a subsidiary enterprise of Enron Corporation had allegedly maintained extremely close ties to a local government that has allegedly engaged in the violent and unlawful repression of local protesters against the development of a hydroelectric project. Similarly, in the Niger Delta, political protests against the participation of transnational oil companies, such as Chevron and Shell, have allegedly met with brutal, systemic repression by government security forces. Others have noted how transnational corporations have benefited from the lower production costs that can be obtained through systemic violations of core labor and antidiscrimination standards in Asia and Latin America.[3]

III. Human Rights Claim Mechanism: An Alternative Solution?

As discussed earlier, there have been suggestions that a quid pro quo exchange of obligations should be imposed upon transnational investors who wish to take advantage of the protections afforded by an international investment treaty. While the prospect of a multilateral agreement on investment appears to be far off,[4] states continue to agree upon bilateral investment protection treaties. The potential exists for insertion of an enforcement mechanism in these bilateral agreements, an

2 Human Rights Watch, The Enron Corporation: Corporate Complicity in Human Rights Violations, available at http://www.hrw.org/reports/1999/enron/

3 The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations, U.N. ESCOR Commission on Human Rights, 51st Sess., Agenda Item 4(c), para. 34, U.N. Doc. E/CN.4/Sub.2/1999/9 (1999).

4 The OECD negotiations on a multilateral investment agreement collapsed in 1997 under the weight of fundamental disagreements as to the scope and coverage of an agreement between OECD members and because of the relative lack of interest on the part of international businesses (who appeared unwilling to publicly support the negotiations when they came under a belated attack by anti-globalization groups

enforcement mechanism, for the prosecution of human rights violations committed by private parties whose activities will be protected under such agreements.

The major flaw of existing codes of corporate conduct and of the use of domestic tort mechanisms, such as the U.S. Alien Tort Claims Act, is their lack of enforceability or corporate codes, additional flaws exist in the lack of an impartial, independent adjudicatory mechanism to forge meaning out of indeterminate legal terms. Inclusion of an enforcement mechanism in bilateral investment agreements would largely address such weaknesses. This is because awards made under such a mechanism could be made enforceable on the same basis that awards made against a state party for a successful investment claim are enforceable by a claimant. The adjudication of human rights claims brought by affected individuals could be undertaken by an ad hoc tribunal established and operated on a basis similar to that under which investment claims can be pursued under the relevant treaty.

Most bilateral investment treaties provide the investor with a choice of commercial arbitration rules under which to bring a claim. The appropriateness of these rules for investment disputes has been questioned over the past few years, particularly with regard to whether hearings should be held in camera. However, the drafters of future treaty texts need only make minor changes to ensure openness of future proceedings. The rules themselves are general in scope, leaving considerable leeway for a tribunal to adopt the practices and procedures that suit the circumstances of the claim to be heard. Accordingly, the addition of potential compensation claims for the violation of human rights by an investor/investment would not be difficult to accommodate.

Investment treaties also generally provide for the claimant's choice of at least one of the would-be arbitrators, as well as designation of an appointing authority. Whereas investment claimants might choose economic law scholars or lawyers, human rights claimants would probably choose human rights scholars or adjudicators (i.e., persons who have experience sitting on state-to-state human rights tribunals).

Moreover, whereas the integrity of domestic regulators and courts could be questioned with respect to the uniform and nondiscriminatory application of international human rights norms in any given country, tribunals established under a human rights protection mechanism, such as the one proposed herein, would not necessarily suffer from similar attacks on their credibility or impartiality. An international tribunal would hear prospective claims of illtreatment at the hands of an investor/investment, with an international mandate and international law expertise rather than a local tribunal with no international law experience and potentially conflicting mandates.

The proposed claim mechanism would provide for the opportunity to receive compensation directly from the offending investor/investment. Such a mechanism would potentially represent a considerable improvement over the use of a trade-sanctions mechanism for alleged human rights violations. The proposed mechanism would simply be more economically efficient than the establishment of any trade-sanctions mechanism, because trade-sanctions mechanisms contemplate one state punishing another through application of some form of duty, quota, or ban for failure to enforce human rights norms domestically. Claims for compensation that are targeted against an individual firm for specific conducts are far more economically efficient and do not raise the potential for conflicts with multilateral trade regimes.

More importantly, however, the inclusion of a mechanism such as the one proposed herein improves upon the existing trends in international law, which have been leading towards the protection of individual rights by individuals as against individuals. It is recognized that the international legal landscape contains far more actors and interests than those of nation-states. The possibility of compensation being awarded under the proposed mechanism also provides a possible incentive for effective monitoring and prosecution of individual claims by NGOs[5]. The remedy of compensation for the breach of a human rights obligation has a long history in international treaty practice. While most

5 Under international investment agreements and mixed claims jurisprudence, the only remedy for a breach is the payment of compensation. Compensation would accordingly be the only remedy available under the proposed human rights protection mechanism.

treaties also provide for various forms of special or declarative relief, the prospect of receiving compensation not only provides the victims of human rights abuses with recognition and acknowledgement of the wrongs that have been committed, but it also provides them with a means of beginning to rebuild their lives. Accordingly, the principle of entitlement to compensation has been included in a draft Statement of Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law. In particular, the draft text provides: "In cases where the violation is not attributable to the State, the party responsible for the violation should provide reparation to the victim or to the State if the State has already provided reparation to the victim."[6]

IV. The Basis For Liability Under The Proposed Mechanism

Under conventional international human rights law, states are obliged to ensure that each of their citizens enjoys basic rights and freedoms–not only insofar as states must not breach such rights or freedoms–but also by ensuring that the necessary legal and political conditions exist that will promote and protect the enjoyment of such rights and freedoms. This general obligation also includes the need to safeguard the rights of citizens as against the conduct of non-state actors. This line of reasoning was elaborated in the Velasquez Rodriguez Case,[7] in which the Inter-American Court of Human Rights concluded that Honduras was responsible for the extrajudicial disappearance of Mr. Rodriguez at the hands of individuals acting as government agents.

The court further concluded that the failure of the state apparatus to provide any sort of protection or remedy for Mr. Rodriguez constituted a violation of his rights under the American Convention on Human Rights. The existence of such a duty implies that at least some, if not many, forms of non-state activity must be relevant for the protection of individual human rights. It is interesting to note that most international investment agreements actually contain a customary international law

6 Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx

7 Velasquez Rodriguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, reprinted in 9 Hum. Rts. L.J. 212, 242–43 (1988).

exhortation to provide "full protection and security" to the investments of foreign investors. If such an obligation is to be imposed on states in respect of how they treat aliens and foreign investments, surely it must exist in respect of the kinds of treatment that must today be provided to individuals under modern international human rights law.

But what kind of "activities" undertaken by the investor/investment should be the subject of a human rights claim? International law purists might argue that international human rights conventions impose little or no obligations on the activities of non-state actors and, to the extent that they do impose obligations, their breach is a matter of dispute between the states that are party to the applicable treaty. As discussed above, this is far too narrow a reading of the state of the international legal order today. Non-state actors have disparate and easily identifiable interests that do not necessarily conform to those of any particular state. These interests may themselves conflict among different types of non-state actors (here, the interests of transnational corporations, potential human rights claimants, and NGOs). In addition to possessing international legal interests, it would appear only prudent to conclude that non-state actors might also possess positive duties to act under such obligations.

If human rights are aimed at the protection of human dignity, the law needs to respond to abuses that do not implicate the state directly. . . . this does not mean that everything that a corporation does that might deleteriously affect the welfare of those in the corporation's sphere of operations is a human rights abuse, just as, for example, a tax increase that makes some people worse off financially is not a human rights abuse. Nor does it require ignoring the nexus to state action; as such a linkage may well serve to help clarify certain duties of corporations. But it does suggest that the recognition of some duties of corporations, far from being at odds with the purpose of international human rights law, is wholly consonant with it.

Based upon this analysis, there appear to be three grounds for investor liability for human rights abuses under the proposed mechanism. First, there is responsibility for the ways in which an investor/ investment abets, or can be seen as complicit in, human rights abuses perpetrated by state officials. Second, there is responsibility for acts

of the investor/investment that constitute a de facto exercise of state power, whether delegated on an implicit or explicit basis. Finally, there is responsibility for acts of the investor/investment if its activities are clearly contemplated within the scope of the applicable norms in question.

The first of these categories is perhaps the easiest to independently establish. How can the breach of an international human right be absolved simply because one of the perpetrators does not hold public office, particularly if the right in question is regarded as fundamental (with individual liability likely attaching)? Ratner correctly notes that there should be certain lesser (or "secondary") treaty breaches that might only be amenable to activities of the state; however, insofar as such obligations can be perpetrated by a non-state actor, Ratner would hold them liable.[8] For example, if reports were accurate that Shell Oil's subsidiary in Nigeria provided the equipment used by state security forces to violently repress opposition to its investment and even paid their salaries, complicity in the violation of relevant obligations, such as the right to life and security of the person, would rest with Shell and its investment.

V. Conclusion

The international legal landscape has undergone a sea of change over the past five decades, and two of the most prominent areas that have affected, and been affected by, this change are international economic law and international human rights. Both systems of law have moved towards the articulation of non-state rights and interests in both norm development and in prosecution of norms. By grafting a human rights claim mechanism onto the existing structure of international investment protection treaties, one can both recognize the growing place of the transnational corporation in human rights law and practice and improve upon the Achilles heel of human rights effective enforcement. Through the establishment of an effective enforcement mechanism (perhaps based upon the draft provisions appended below), voluntary codes

8 Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, Yale L.J. 443, 466–67 (2001).

of corporate conduct can move from the realm of a public relations exercise to the role of an educative compliance mechanism. Without effective enforcement, human rights law will remain the weak sibling of international economic law.