CORPORATE SOCIAL RESPONSIBILITY UNDER INTERNATIONAL INVESTMENT TREATIES

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With the world awaiting the decisions coming out of COP26, responsibility, accountability and international co-operation are fast becoming the new direction of travel. This movement is also affecting international investment treaties, where a shift towards greater scrutiny of investors' commitment to CSR principles is changing the symmetry of such agreements.

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In the past 10 years, at least 65 multilateral international investment agreements ("**IIAs**") have included references to principles of corporate social responsibility (**"CSR"**) and human rights. Of these, nearly 30 were concluded in the past 3 years.

Investors should take note, since these developments are altering the balance of IIAs and thus have implications for disputes.

- Increasing references to CSR principles in IIAs evidence a desire on the part of States for tribunals to consider such principles when assessing investment claims.
- Some IIAs call on arbitral tribunals to consider the investor's violation of CSR principles when determining the amount of compensation for a breach of the IIA.
- It may become increasingly difficult for investors who have failed to comply with CSR principles to successfully file claims against foreign States.

Today few would deny that corporations are responsible for the social and environmental implications of their business operations. The safeguard of

human rights, such as the right to a clean environment, forms part of a corporation's CSR and it has become increasingly common for IIAs to refer to "CSR" and/or to "internationally recognized standards" in areas such as labour, the environment, human rights, and the fight against corruption.[1] Other IIAs refer to standards, guidelines, and/or principles established by the United Nations (such as the Sustainable Development Goals, the UN Global Compact, the UN Charter, and the Universal Declaration of Human Rights), the International Labor Organization, and the OECD.[2]

IIAs are however, between States, not between States and corporations, so they do not bind corporations or comprise CSR provisions that are legally enforceable against corporations. Traditionally, these provisions in IIAs are addressed to States and call on them to encourage corporations to comply with these standards.[3]

Such CSR provisions are appearing in IIAs in different places and forms. First, they often appear in treaty preambles. For instance, in the preamble of the 2010 Canada-Panama Free Trade Agreement (FTA), States resolved to encourage enterprises to respect internationally recognised CSR standards and principles.[4] Similarly, under the preamble to the 2014 Georgia-Switzerland bilateral investment treaty (**"BIT"**) the States are determined to encourage investors to respect internationally recognised CSR standards.[5]

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[1] *E.g.* Hong Kong-Mexico BIT (2020), Art. 13; Republic of Korea-Indonesia CEPA (2020), Art. 7.18; Hungary-Kyrgyzstan BIT (2020), Preamble; Belarus-Hungary BIT (2019), Preamble; Argentina-Japan BIT (2018), Art. 17.

[2] *E.g.* EU-Vietnam FTA (2019), Art. 13.10; Japan-UK CEPA (2020), Art. 16.5; UK-Moldova Strategic Partnership, Trade and Cooperation Agreement (2020), Art. 36; Brazil-United Arab Emirates BIT (2019), Art. 15.1.

[3] *E.g.* the Investment Agreement between Australia and Hong Kong (2019), Art. 16.See also, Argentine-Japan BIT (2018), Art. 17.

[4] Canada-Panama FTA (2010), Preamble.

[5] Georgia-Switzerland BIT (2014), Preamble.

Secondly, CSR provisions are increasingly appearing in the operative part of the treaties.[6] For instance, the 2020 Brazil-India BIT provides that "Investors and their investments shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State 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 […]."[7] Similarly, Article 12 of the 2019 India-Kyrgyzstan BIT states that investors "shall endeavour to voluntarily incorporate" internationally recognised CSR principles in their practices and internal policies.[8]

Lastly, some IIAs call on arbitral tribunals to consider the investor's violation of CSR principles when determining the amount of compensation for a breach of the IIA by the State.[9] For instance, the 2019 Dutch Model BIT affirms that a tribunal "in deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises."[10]

Investors who fail to comply with CSR principles, or violate human rights, may find it increasingly difficult to successfully file claims against the foreign States in which they have invested and which may have breached the IIA in some way. Subject to the language of the IIAs and governing laws (international and domestic), the host State may challenge the tribunal's jurisdiction and/or argue that the foreign investor's claims are inadmissible or must be rejected on the merits.[11]

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[6] *E.g.* Hong Kong-Mexico BIT (2020), Art. 13; Brazil-India BIT (2020), Art. 12; India-Kyrgyzstan BIT (2019), Art. 12. See also Morocco-Nigeria BIT (2016), Art. 18(2) providing that "Investors and investments shall uphold human rights in the host state."

[7] Brazil-India BIT (2020), Art. 12.

[8] India-Kyrgyzstan BIT (2019), Art. 12. See also Belarus-India BIT (2018), Art. 12; Brazil-Suriname BIT (2018), Art. 15; Brazil-Ethiopia BIT (2018), Art. 14.

[9] See Dutch Model BIT (2019), Art. 23.

[10] Dutch Model BIT (2019), Art. 23.

[11] *Phoenix Action v Czech Republic*, Award, ICSID Case No ARB/06/5 (15 April 2009), para. 78 ("… nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights...").

They may also argue that the tribunal must consider the investor's violation of CSR principles when considering the level of compensation to award the investor for the State's breach of the IIA.[12]

These developments are shaping the scope and nature of CSR and the accountability of investors before international tribunals.

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[12] In *Copper Mesa v. Ecuador* for example, the tribunal reduced the damages by 30% because of the Claimant's contributory negligence with regard to grave and violent acts committed on site. See *Copper Mesa v. Ecuador*, Award, PCA Case No 2012-2 (15 March 2016), paras. 6.99-6.102.