Research note nº 2

The Duties of Business Companies in International Investment Law

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Abstract

If international investment law was originally designed to protect foreign investors and business companies and guarantee their rights, this law field has gradually evolved to therein include corporate duties. This research note explains how such duties have been incorporated to international investment law, namely through the corporate social responsibility provisions in international investment agreements. It further discusses how these duties are construed and applied by international arbitral tribunals. Resultantly, against the general background of international investment law and arbitration, the note depicts the techniques to build an international framework of duties, accountability and liability applicable to business companies whilst highlighting its limits.

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Introduction

International investment law is a law field specialized in the protection of foreign investors and business companies. If the rights and guarantees bestowed upon these are numerous, the provision made for their corresponding duties vis-à-vis their host States is however still incipient when it comes to binding rules. If the activities of transnational companies and investors can be beneficial to their host States, they can also produce negative externalities. Absent an international legal regime of corporate duties, accountability and liability, the activities having negative impacts on the host State and its population remain unregulated. Undoubtedly, there is a concern to regulate the duty of due diligence of companies, namely in the value chain. This is, for instance, illustrated by the 2024 European Union's Directive on Corporate Sustainability Due Diligence. A draft binding instrument on business and human rights is also under negotiation before the United Nations Human Rights Council. Some investment agreements, like the Brazilian ones or the models championed by the African Union, include a legal regime to regulate the conduct and practices of business companies, in search of a more balanced distribution of rights and obligations between States and companies. These corporate duties are often included in a corporate social responsibility (CSR) provision. The latter, despite being a valuable first stepping-stone, is still flawed for at least two reasons. Firstly, many provisions on CSR are not legally binding. Secondly, some of these provisions, like those of the Brazilian investment agreements, are not arbitrable, that is, they cannot be the object of an arbitration. These two problems show the limits of the current legal regime on business companies' duties. These limits are not insurmountable. The CSR provisions have an interpretative purpose. They can be referred to while construing the other provisions on the level of protection due by the State to the foreign companies and investors. The level of protection will be determined according to the level of diligence showed by the company or investor to operate its activities in line with the CSR provision. Additionally, business companies' duties can be — and have been — discussed during counterclaims procedures. In conventional investment arbitration, investors and companies are usually the claimants against the defendant States. In counterclaims procedures, the States can sue private companies and seek its liability for damages caused during its investment operations. Therefore, even though the field of international investment law was primarily designed to grant international legal protection to transnational companies, there is scope therein to discuss corporate duties and liability.

Development

Business companies' duties have entered the realm of international investment law mostly through the incorporation of CSR provisions in international investment agreements. CSR is often associated to self-regulation and as stated, it sometimes appears as a dead letter in international investment law because of its apparently non-binding and non-arbitrable character. This note's main argument is that CSR provisions do have a legal function in international investment law and arbitration, namely in interpreting the standards of treatment and protection of business companies. The protection granted to these companies can be construed by considering the extent to which their corporate social conduct matches the CSR provision. This is a means to give a purposeful effect to the CSR provisions. Within the context of an international arbitration, if a company's conduct falls below the minimum standard of CSR provided by the investment agreements, it could be argued that its claim is inadmissible. Should the arbitral tribunal still consider that there is no inadmissibility bar, the corporate social misconduct could be considered to evaluate — and consequently reduce — the value of a reparation claimed by the company. When the CSR provisions are drafted in a binding way, they can be the object of a counterclaim, that is a procedure whereby the State becomes the claimant against the investing company for the same case but on a separate legal question. As such, the company's liability can be sought. In international investment law, a company's liability for environmental damages has already been recognized in a counterclaim procedure (Burlington v. Ecuador, 2017). In that case, however, the liability was based on the violation of Ecuador's domestic law. Binding CSR provisions would enable to engage company's liability in counterclaim procedures without referring to the home State's domestic law.

Results

The main results evidence the possibility of providing a function to CSR provisions in international investment agreements, especially when they are drafted in a non-binding way. As mentioned, these functions are for the moment mainly interpretative. If such functions might seem limited in its scope, they still result in a reinterpretation of international investment law by including the examination of companies' misconduct in the investment equation. The aim is to discuss if companies have the right to the same level of protection set in international investment agreements even if they engage in corporate malpractices. I argue that their conduct is regulated by the CSR provisions in that the companies' level of protection will be determined by the diligence shown in incorporating the CSR standards set in the investment agreements in their operations. The CSR provisions can be used by the arbitral tribunals to construe the level of protection due to the companies. Should an arbitral tribunal not consider the CSR standards in the case of a company with proven corporate malpractice and grant it a reparation for damages, it would create the conditions for an unjust enrichment.

Strategies to further develop the research topic

The main line of discussion of this research topic which can be further explored is to understand the extent to which the CSR provisions, especially when they are detailed like in the Brazilian investment agreements, implicitly provide for a duty of due diligence to investing companies. It is relevant to study if the duty of due diligence can be implied by CSR provisions in investment agreements or if they must be explicitly mentioned in the latter.

ABOUT THE AUTHOR

Nitish Monebhurrun holds a PhD in International Law from the Sorbonne Law School, France. He has master's degrees in international Economic Law (Sorbonne Law School) and in International Law (University Jean Moulin, Lyon III, France) and a Diploma from the Hague Academy of International Law. He is a Tenured Law Professor at the University Center of Brasilia, Brazil, where he coordinates the Business, Human Rights and Public Policy Clinic. He is also a visiting Professor at the University of Sabana, Colombia. Nitish is an associate researcher at the Department of Latin American Studies of the University of Brasilia and a researcher of the Observatory of International Migrations, Brazil. In 2022, he was awarded the Honorary Prize for the Getulio Vargas Foundation ESDRAS PRIZE for Legal Teaching. He is a consultant in international law and acts as arbitrator (ALAM/CAMESC). Since 2023, Nitish is a member of the Pool of Experts (PoE) of the United Nations Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects. He acted as visiting professor or speaker in many universities worldwide and has published extensively in matters of international investment law, corporate social responsibility, duties of companies in international law. He is the coordinator of the Project entitled The minimum standards of protection and duties of multinational companies: building Brazil's position in a comparative perspective (Financed by FAP/DF). He also coordinates the Research Pole of the Project Strategies for constructing the corporative due diligence for the prevention of human trafficking and slave labor in the supply chain (Financed by the Brazilian Ministry of Justice and executed by the Observatory of International Migrations). He is a researcher in the following ongoing projects: International Research Project ALCOM, Latin American Jus commune in matters of transitional justice, of environmental protection and of corporate responsibility within the context of social and environmental impacts of economic activities (Financed by the French CNRS and coordinated by the Sorbonne Law School); Environmental Litigation as a means of conservation and of the sustainable use of environmental resources (Financed by the FAP/DF and coordinated by the Law Faculty of the University of Brasilia); Governance of the Blue Amazon (Amazônia Azul): Interdisciplinary methods combining social and natural science (Financed by the CAPES and coordinated by the Law Faculty of the University of Brasilia).

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