

Gaffney, John

Research Report

Helping ensure respect for the SDGs under bilateral investment treaties: The case of human rights

Columbia FDI Perspectives, No. 380

Provided in Cooperation with:

Columbia Center on Sustainable Investment (CCSI) - A joint center of Columbia Law School and the Earth Institute, Columbia University

Suggested Citation: Gaffney, John (2024) : Helping ensure respect for the SDGs under bilateral investment treaties: The case of human rights, Columbia FDI Perspectives, No. 380, Columbia University, Columbia Center on Sustainable Investment (CCSI), New York, NY

This Version is available at:

<https://hdl.handle.net/10419/289490>

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Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Chioma Menankiti (clm2249@columbia.edu)

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No. 380 April 1, 2024

Helping ensure respect for the SDGs under bilateral investment treaties: the case of human rights

by
John Gaffney*

The 2030 Agenda for Sustainable Development, established to end extreme poverty, includes 17 Sustainable Development Goals (SDGs) to tackle inequality and injustice and safeguard against climate change. The SDGs are [complemented](#) by 169 targets that also reflect international human rights standards. While the SDGs are not legally binding, governments are expected to take steps to implement them. Moreover, the SDGs assume the participation of business to support the achievement of the goals.

An earlier [Perspective](#) proposed that governments could comply with the [UN Guiding Principles](#) on Business and Human Rights by ensuring that the victims of human rights abuses occurring in the context of business activities could have access to effective remedies in an investment context. That [Perspective](#) suggested merging [Gary Born's bilateral-arbitration-treaty concept](#) (a bilateral treaty providing that all of a particular category of commercial disputes between their respective nationals shall be resolved, as a default mechanism, by international commercial arbitration) into bilateral investment treaties (BITs), which enable investors to arbitrate their investment disputes with host countries without a traditional arbitration agreement contained in an underlying commercial contract (known as "[arbitration without privity](#)").

This [Perspective](#) suggests that there is no reason in principle why this concept of "arbitration without privity" could not be utilized in future BITs to ensure respect for SDGs. Utilizing this concept by analogy with the [bilateral-arbitration-treaty](#) concept would be in line with the contracting States' commitments under [SDG 16.3](#), "[\[p\]romote the rule of law at the national and international levels and ensure equal access to justice](#)" for host State individuals and communities impacted by investment in host States and would thereby facilitate peaceful

transitions to sustainable development in those countries.¹

And in line with [SDG 17](#)—which provides for the strengthening of “the means of implementation and revitaliz[ing] the global partnership for sustainable development”—the bilateral-arbitration-treaty concept could be adapted to help promote the implementation of the SDGs by requiring future BITs² to:

- a. Oblige a home countries’ investors to respect specified human rights standards (including the right to development), as reflected in the relevant SDG targets, in connection with their FDI in host countries.
- b. Provide that claims by a host country’s nationals relating to alleged failures to respect those human rights standards by a home country’s investors in their FDI activities shall be resolved by arbitration pursuant to specified [procedural rules](#).³
- c. Condition a host country’s standing consent to the arbitration of investor-State claims on the existence, and functioning, of the mechanism referred to in (b) above.

The consequences of the foregoing provisions would vary. Under (a) above, the host State would, in principle, be entitled to advance a counterclaim in any investor-State proceedings initiated by an investor under the BIT where the investor failed to respect the relevant, specified human rights standards in connection with their FDI in the host country.

Under (b) above, claims by a host State’s nationals relating to alleged failures to respect those human rights standards by the home State’s investors in their FDI activities would, in contrast to (a), not be advanced in investor-State proceedings. Rather, they would be resolved by arbitration. Hence, as has been suggested in an earlier [Perspective](#), claims under (b) would not directly involve the contracting States, consistent with the bilateral-arbitration-treaty concept above.

The consequences of (c), which would hinge on the existence, and functioning, of the mechanism referenced in (b), would be felt in investor-State proceedings, such that the absence of the mechanism referenced in (b) would curtail or quash the jurisdiction of an investor-State tribunal over claims advanced by a home State investor under the BIT, for want of consent by the host State to the arbitration of investor-State claims (except where this was attributable to an act or omission of the host State).

The establishment by the home country of its investors’ standing constructive consent to international arbitration for the resolution of human rights claims by a host country’s nationals in connection with their investments in the host country—in consideration of the host country’s standing consent to arbitration of investor-State claims—would thus contribute to the implementation of the SDGs. It would also help minimize any negative impact that FDI might have on sustainable development and on the enjoyment by local communities of their rights.

* John Gaffney (JGaffney@ucc.ie) is an Adjunct Professor at UCC School of Law. The author wishes to thank Kabir A.N. Duggal, Catharine Titi and an anonymous peer reviewer for their helpful peer reviews.

¹ To ensure respect of SDGs, some BITs and other IIAs include binding CSR provisions and limit protection to investment projects aligned with SDGs.

² See also the recommendations in UN document A/76/238, “Report on Human rights-compatible International Investment Agreements (IIAs)” by Surya Deva.

³ The revised 2010 UNCITRAL Arbitration Rules could serve as suitable procedural rules and the PCA could serve as an administering institution.

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