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How Can Investment Law Be Reformed to Better Incorporate the SDGs and Promote Sustainable Economic Development?

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Abstract. Challenges to sustainable economic development have arisen in international investment. Foreign investment often poses sustainable development problems for host countries, sometimes even affecting social well-being and exacerbating poverty. The role of international investment law as influencing and regulating international investment behavior needs to be reformed and reinterpreted to accommodate the requirements of sustainable development and elimination of poverty. In the reform of international investment law, the interests of developing countries, which are among the most vulnerable to compensation, are particularly in need of protection. By analyzing three typical cases in the ICSID relating to the influence of treaties on domestic policy-making, the privilege of certain investors, and the interpretation of international investment law, this paper makes recommendations for international investment law reform, arguing that international investment agreements should allow more space to domestic policymaking, that sustainable development should be incorporated in its interpretation, and that the existing fragmented international investment law framework should be reformed, preferably by building an institution for a consensus towards the formulation of IIAs.

Keywords: international investment law, SDG, developing states, poverty

1. Introduction

At present, several challenges have emerged in the realm of international investment. Foreign investments are sometimes having detrimental effects on the sustainable development of host countries, and these effects can, in some cases, indirectly worsen poverty in various developing nations. Consequently, there is a need for reforms in international investment law to tackle the issue of sustainable economic development. The reform should especially focus on certain aspects, such as reserving space for domestic regulation and integrating sustainable development in the interpretation of provisions of treaties and good faith.

2. Challenges in international investment law reform on sustainable development

International investment law should be reformed and interpreted to promote sustainable development by fostering an equitable relationship between states and investors.

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One of the primary challenges to international investment is the privileged position occupied by investors in foreign investments, which poses a threat to the sustainable development and well-being of host states. This is pronounced in the context of investment dispute settlement. The space for host states to implement policies to incorporate sustainable development could often conflict with certain international investment agreements and lead to massive compensation, which results in financial pressure. The potential imposition of reparations stemming from these issues, among other factors, may deter these nations from advancing sustainable development within their domestic policies. Furthermore, fostering domestic investment policymaking represents one of the most direct and essential approaches to enhancing sustainable development and alleviating poverty.

There have been efforts to incorporate sustainable development into the interpretation of international investment law, particularly within the framework of dispute resolution, but often ending up with a failure, putting an obstacle to sustainable economic development.

This paper will first discuss the challenges with international investment law and put up possible solutions for reform; case studies will be used to examine the necessity and feasibility of possible reform associated with sustainable development within the framework of international investment law. It aims to identify the obstacles that hinder sustainable development and poverty resolution, particularly in developing countries, and to propose potential solutions through the reform of international investment law. It will be concluded with recommendations for reform.

3. Literature review

There are a number of researches focused on international investment law and sustainable development, especially foreign investment in developing countries. Also relevant to this paper is previous work exploring reform in international investment law, such as the procedural reforms of ISDS, the IIAs, the main problems to solve are lack of transparency, efficiency of the procedure of dispute settlement, the relation between IIAs and domestic jurisdiction and the interpretation of the investment law, etc. which results in a disadvantage for developing states in international investment. The existing literature on international investment law and sustainable development, poverty and developing countries, and reforms on international investment law are reviewed.

3.1. Challenges of sustainable development caused by foreign investment in host states

The problem of poverty is related to social rights and social welfare, and violation of social rights by foreign investors could also exacerbate poverty, which in turn further adversely affects social welfare, and this is the significance of the research. And a more direct way to redistribute wealth is to set up programs at domestic levels, and international investment law is not the source of poverty and imbalance of wealth distribution, which is argued by Steven R. Ratner [1], by criticizing the researchers, but this does not mean that poverty eradication and sustainable development cannot be promoted through reform of international investment law. What can be envisaged is whether the international investment law could be reformed to promote the initiative of the indigenous communities, as was argued by Gathii, James, and Harrison Mbori [2].

Gathii, James, and Harrison Mbori [2] mentioned that one of the main problems in international investment law lies in the ISDS, which has often been claimed as lack of transparency and efficiency, but previous procedural reforms to the dispute settlement mechanism did not address the substantive issues, which are the unfair, unjust, unequal rules. Meanwhile, the privileged investors should be put to an end.

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M. Rafiqul Islam [3] argued that an environment that is too liberalized for foreign direct investment leads to a range of problems, such as overexploitation of resources in developing states, adding a threat to social welfare, social rights, and sustainable development, ultimately leading to disadvantages for developing states, so reforms and policies are supposed to be carried out to regulate the investors. However, the recommendation was given that the ISDS should be accepted after exhausting domestic judicial remedies, and it's the blank in domestic policy for FDI that has to be filled; it is also mentioned that the ISDS is usurping the domestic jurisdiction for fear of violating the BITs, etc. This situation has exacerbated poverty in developing countries. Put Similar opinions were argued by Ole Kristian Fauchald [4], that the IIAs and associated ISDS were restricting the policy space and for developing states. On this point, the question is whether there is the possibility to reform the international investment law to reserve policy space for domestic policies and jurisdiction, in addition to promoting the international consensus on foreign direct investment to preserve the space for sustainable development, especially in developing states.

3.2. Reform of international investment law

As for the reform on international investment law, Barnali Choudhury [5] suggested that one important issue was investor protection and sovereign state regulatory rights. Marie-Claire Cordonier Segger [6] suggested that reforming the interpretation of International Investment Agreements could contribute to the integration of sustainable economic development, particularly in the fight against poverty.

The recent research addressing the international investment law and sustainable economic development has highlighted the problem of the injustice in IIL (international investment law), mainly through the IIAs and ISDS, and the reforms to the IIL are supposed to be focused on the protection of indigenous community and industry. And this paper will discuss the reform of IIL through the promotion of space for domestic policies.

4. Statement of hypotheses

Hypothesis 1: For the aim of solving poverty and promoting sustainable economic development, international investment law should be reformed to allow more places for developing states to regulate foreign investment.

A number of developing states suffer from the disadvantages of foreign investments, such as overexploitation of resources, undermining of social well-being, and difficulty in developing Indigenous industries. And the more direct way to regulate foreign investment is through domestic jurisdiction. Meanwhile, the major problem is that the regulation of foreign investment of states is restricted by the rules of IIL, mainly treaties, and fails to provide sufficient protection to developing states. While the developing states might lack rule-making capacity, perhaps they can be guided in the formulation of relevant provisions through international investment law.

Hypothesis 2: The reform of international investment law should get rid of special privileges for certain investors.

One major source of the poverty and difficulty of sustainable development in developing states is that the status of different investors and developing states are not equal, with some privileged investors. The problem is also that the dispute-resolution mechanism is biased in favor of investors rather than the host state, and the reform is supposed to focus on calling for an end to the privilege of certain foreign investors and the interest of indigenous industries of developing states.

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If the privileges of some investors were eliminated, the impact of their actions on the social interests and sustainable development of those countries would be reduced, since many of the actions taken by investors that jeopardize sustainable development, such as the overexploitation of resources, are due to privileges that lead to a lack of discipline.

Hypothesis 3: International investment law should be interpreted to incorporate sustainable economic development

The international investment law consists of IIAs and the ISDS; as it is a fragmented system, the feasible reform of the rules of international investment law to incorporate the problem would be complicated. Reform through treaty amendment would also be time-consuming, as it would require ratification by numerous states and other sectors such as international organizations and a period of entering into force, but it may be more productive to address concerns about the scope of investment law through their interpretation in the context of investor-state dispute settlement. To this extent, a more proper and efficient way to solve the problem is through the interpretation of the IIAs, as sustainable development could be regarded as good faith [7], for the reason that deliberate neglect of sustainable development might lead to a violation of good faith. Good faith serves to inhibit decision-makers from fluctuating in their objective evaluation of the factual circumstances or in the application of legal principles to those facts, as established through objective reasoning. Arbitrators may be disposed to solutions that favor businesses over host-country public interests and social welfare, which cast a menace on sustainable economic study in these countries, the majority of which are developing countries. It also functions as a mechanism for tribunals to address or adapt to alterations in the arbitration environment and, importantly, acts as a conduit through which external standards may influence arbitration rulings.

5. Case study analysis

In this section, three cases are studied to examine the three hypotheses. The first case is used to test the first and the third hypotheses, the second is to test the second hypothesis, and the third case is to test the third hypothesis related to the interpretation of investment law.

5.1. Eco Oro Minerals Corp. v. Republic of Colombia (ICSID Case No. ARB/16/41)

To test the first and third hypotheses, the case Eco Oro Minerals Corp. v. Republic of Colombia (ICSID Case No. ARB/16/41) was studied. The claimant was Eco Oro Minerals Corp., and the respondent was the Republic of Columbia. This case, which was arbitrated in ICSID, was a case of mining concession belonging to the economic sector of Oil, Gas, & Mining, with the rules of the ICSID Convention and Arbitration Rules applied. The case was registered on December 29, 2016, and the tribunal of ICSID rendered its award on July 15, 2024, with a dissenting opinion by arbitrator Horacio A. Grigera Naón and a declaration on costs by arbitrator Philippe Sands. Since international investment in developing countries is mostly confined to the primary and secondary sectors, and much of it is related to mining, the exploitation of environmental resources, and the preservation of the ecosystem, which in turn is closely linked to sustainable development, this case was chosen to test the hypothesis.

In the case, the Eco Oro Minerals Corp, a corporation constituted under the laws of Canada, had claimed that the measures of Columbia had cast harm on its values, including violations of treaties and fair and equitable treatment, through frequent amendments to law, tax, and expropriation of Eco Oro's investment without timely, adequate and effective compensation. It was also mentioned that one of the reasons that Columbia took measures to prevent Eco Oro from mining was to protect the

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ecosystem of paramo, but Columbia still failed to protect the ecosystem of the region by failing to effectively prevent the incursion of hundreds of illegal miners into the area and caused pollution in that area, so the explanation of Columbia could not be accepted according to the Eco Oro, but whether the failure of the host state on the protection on ecosystem should be regarded as evidence against the measure of interdiction to mining is debatable.

According to the award, Colombia shall compensate Eco Oro for any adverse effects that may arise from its tax authorities imposing a double taxation liability, should the award's declaration, which states that the award is free from Colombian taxes, not be acknowledged as sufficient proof of payment. The result of the case reflected from a certain point of view that the sustainable economic development

What is worth considering in the case is the principle of good faith and the reform of domestic policies. Columbia was accused of carrying out excessive policies and laws that obstacle the implementation of the treaty of the Free Trade Agreement between Canada and the Republic of Colombia. It was the treaty that posed restrictions on the policy making to regulate foreign investment and ultimately promote sustainable development. Although there might exist flaws in domestic regulations to foreign investments, the space of policy-making should be enlarged for environmental protection and sustainable development.

And from the perspective of good faith, which includes the protection of social rights and promotes "environmental and social goals and their environment and human right obligations", reflected that the status of application of the good faith principle might be mediocre and unconvincing on some occasions, compared with other rebuttals such as rules in the Treaty. From the perspective of this case, incorporating sustainable development in the interpretation of international investment law is still a challenge under the existing framework of international investment law. In the meantime, the case could not prove that the reform through interpretation of international investment law is not feasible and indicates the space for the reform through interpretation, as the case has reflected certain problems in the paradigm of IIL, especially the IIAs, not just changes in MST provisions [8].

It is also important to highlight that the claimant's argument hinges on the assertion that Colombia has permitted illegal mining activities within the paramo ecosystem, resulting in the lack of protection for its ecosystems. However, this premise is not pertinent to the claims that the claimant intends to advance. Colombia's failure to prevent miners from illegal incursion does not grant Eco Oro the legal right to mine in the area, nor does it mean that it is not legal to prohibit Eco Oro mining in the region in order to protect the ecosystem. Even the principle of fair and equitable treatment is not able to justify its claims. This seems to reflect Eco Oro's privilege as an investor.

The case demonstrates the necessity of reform in international investment law focusing on promoting domestic regulations on foreign investment and reform through the interpretation of good faith combined with sustainable development. Therefore, it is necessary to seek out contrasting examples in order to support the argument for the feasibility of this reform.

5.2. Rockhopper Italia S.p.A., Rockhopper mediterranean ltd, and Rockhopper exploration plc v. Italian Republic (ICSID Case No. ARB/17/14)

The case between Rockhopper and the Italian Republic is used to test the second hypothesis.

The case of Rockhopper v. Italian Republic, registered on May 19, 2017, is a case in the economic sector of oil, gas, and mining, whose subject of the dispute is oil, gas exploration, and production. The claimants Rockhopper initiated an investment arbitration against the Italian

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Republic under the Energy Charter Treaty (ECT) and the International Center for Settlement of Investment Disputes Convention (ICSID Convention).

The case involves a group and the nation of Italy. Despite Italy's status as a developed state, this fact does not significantly influence the application of the case in support of the hypothesis. It is also of some reference for the restructuring of the relationship between developing states and foreign investors.

The main element of the dispute was Rockhopper's claim that Italy had violated the provisions contained in the ECT, in particular those concerning unfair and unequal treatment and unlawful expropriation. Rockhopper argued that Italy's rejection of its application for a license to produce oil in the Ombrina Mare area off the Italian coast constituted a violation of the provisions of the ECT. Scholars have mentioned that the role the international investment law and the ISDS played in the case was too forceful, which led to privileged investors and limited the space of the host state to regulate the foreign investment to respond to the climate issues for the menace of the compensation [9]. Scholars also argued that in this case, the international investment law was shown to limit the space of states to utilize the precautionary principle, which was evidence of the limitation posed by IIL on domestic measures on foreign investment [10]. Italy, as a developed state, possesses a relatively robust capacity to provide compensation. However, the risk of compensation claims arising from the imbalanced relationship between investors and host states, as outlined in international investment law, affects all states within the international legal framework. Consequently, the adverse consequences for developing countries, which typically have a diminished capacity to meet compensation obligations, are likely to be more severe. So this is the reason for getting rid of the privileged investors through the reform of international investment law. This case, therefore, provides a strong indirect test of the second hypothesis.

5.3. Uniper SE, uniper benelux holding B.V. and uniper benelux N.V. v. kingdom of the netherlands (ICSID Case No. ARB/21/22)

This case is mainly used to test the third hypothesis that the reform of international investment law should be through the interpretation, which should be combined with concerns on sustainable development.

In this case, the claimant, Uniper, was required a shutdown of the claimant's coal-fired power plant at the end of a 10-year transitional period on 1 January 2030 for the 2019 law prohibiting the use of coal for electricity production. Finally, the proceeding was discontinued, and the request for cost of the respondent, Netherlands, was dismissed.

According to scholars, the interpretation of international investment law is supposed to be of integrity to reconcile International Climate Law and address climate change [11]. Since the tribunal has the discretional power, the interpretation could be carried out. It is also noted that if the ECT is interpreted in conjunction with international climate law, especially where the ECT and international climate law are in conflict, it would seem to reduce the likelihood of a stay of proceedings. And if such an interpretation can be carried out, it can also reduce the occurrence of disputes. In the context of investment dispute resolution, it may be beneficial for developing countries to comprehensively integrate sustainable development principles into the interpretation of international investment law.

This case illustrates the viability of incorporating sustainable development into the interpretation of international investment law, which is expected to yield beneficial outcomes. Consequently, such reforms are both necessary and attainable.

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6. Conclusion

The research has delved into the problems that international investment law has posed on sustainable economic development. The challenges mainly lie in the unequal relationship between investors and host states and the lack of purpose combined with sustainable economic development in treaty-making and interpretation. Therefore, international investment law should be reformed.

Since provisions that impede sustainable development, such as those that impede domestic policymaking of environmental protection with respect to foreign investment, seem to be a frequent occurrence in international investment treaties, and the liberalized international investment agreement-making squeezed especially the space for domestic regulations, which tend to protect the interest and social well-being of residents. Reform of international investment law, therefore, needs to focus its efforts on treaty-making. However, given that international investment law appears to lack a definitive principle to guide the process of treaty formulation and that considerations of sustainable development are insufficiently integrated into this process, it is imperative to establish such a guiding principle. If such a principle were established, at least some reasonable domestic policy towards foreign investment for sustainable economic development would not face the threat of sanctions for violating the provisions of the treaty. The principle will be implemented mainly on the new treaties and will progressively evolve into a component of customary international law adhered to by states.

Additionally, according to the cases, the interpretation of international investment law sometimes fails to incorporate sustainable development; for example, in the Eco Oro v. Colombia case, the interpretation of good faith, which integrated environmental protection, was rejected, and Colombia finally faced a compensation for its policy urging investors to protect the ecosystem.

As the framework of international investment law is quite fragmented, it leads to difficulties of integral reform, which could pose an obstacle to the promotion of the principle of sustainable economic development. An institution should be founded and is supposed to be similar in some aspects of the WTO.

Most of the functions of institutions for international investment are focused on dispute settlement, and there is a lack of institutions with agreement-making guidance and monitoring functions, resulting in provisions that may not be conducive to sustainable economic development. Therefore, the main function of the institution would focus on guiding and monitoring investment agreements and ensuring the provisions are in line with sustainable development. As the ICSID has already served as an institution of dispute settlement in international investment, the function of dispute settlement would not be considered. It is supposed to be an institution for negotiation and information sharing body, which will possibly lead to a consensus of the agreement-making principles combined with sustainable economic development among the member states and a more equitable relationship between investors and host states. In contrast to ICSID, the functions and powers of this body will be concentrated prior to treaty-making.

Model investment agreements could also provide clear guidance for agreement-making and could be regarded as a means for implementation of the principle of sustainable economic development in agreement-making. The Netherlands Model Investment Agreement, with the principles related to sustainable development [12], has placed sustainable development at a high priority. The proposed model, if widely adopted, represents an effective approach to advancing International Investment Law (IIL) in support of sustainable development. However, the challenge lies in determining the methods for its broader acceptance and dissemination.

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