Using International Investment Agreements to Address Access to Justice for Victims of Human Rights Violations Associated with Transnational Resource Extraction

By:

Penelope Simons
J. Anthony VanDuzer

November 4, 2019

Access to justice for victims of business-related human rights violations, including harm caused by transnational resource extraction projects, remains a pressing global concern. A 2018 study by the Office of the United Nations High Commissioner for Human Rights (OHCHR) notes that such victims "continue to struggle to achieve effective remedies for the harm they have suffered". This is despite the development and widespread endorsement by states and businesses of the Sustainable Development Goals (SDGs) and the United Nations Guiding Principles on Business and Human Rights. SDG 16.3 calls on

actors to “[p]romote the rule of law at the national and international levels and ensure equal access to justice for all”. A central pillar of the UNGPs is the need on the part of both state and non-state actors to ensure access to an effective remedy for victims of alleged business-related human rights violations. While neither document is legally binding *per se*, they reflect the international human rights law obligation of states to respect, protect and fulfil the right to an effective remedy as well as businesses’ responsibility to ensure access to an effective remedy “in terms of both process and outcome”.

Civil liability in home state courts of extractive multinational enterprises (MNEs) is one of the few mechanisms available for victims of alleged business-related human rights violations to seek justice and to hold MNEs to account. However, there are well-known legal, structural and practical obstacles to bringing such claims. Additionally, where an international investment agreement (IIA) is in place between the home and host state, the protections provided to investors under these agreements, which is typically coupled with a right to bring the host state to binding international arbitration, can impair host state efforts to respect, protect and fulfil human rights of individuals and groups affected by foreign investors’ activities, while providing no process for those affected to seek relief for human rights violations. In some cases, investors may be able to use investor-state dispute settlement (ISDS) and other mechanisms, to prevent victims from attaining reparations through civil litigation.

The pernicious effects of IIAs are far more wide ranging than the direct costs of claims.[1] Potential exposure to large awards and the substantial costs that states incur when forced to participate in ISDS, even when they win, means that IIAs can discourage states from regulating in ways that even might be the subject of an investor-state claim. This “regulatory chill” can and does discourage host states from discharging their obligation to protect individuals and communities from human rights violations perpetrated by private actors and ensure access to justice for harm caused. Extractive MNEs have been the subject of a significant proportion of allegations of wrongdoing and defendants in civil suits.[2] Additionally, a number of extractive MNEs, that have been implicated in human rights violations, have made ISDS claims and been awarded significant damages.

Some scholars argue that, given the well-recognized problems with IIAs and the ISDS system, states should refrain from negotiating and ratifying IIAs or at least dispense with ISDS. Others suggest that the problems posed by the international investment regime, including corporate impunity, might most effectively be tackled at the grass roots level through multi-actor contracts between local communities, the state and extractive MNEs.[3] We agree that there is strong argument that states should cease to negotiate IIAs. Nonetheless, to the extent that states continue to see IIAs as valuable instruments for the protection of their investors and therefore continue to negotiate and sign them, these agreements present an opportunity for activists and experts to encourage states to modify them in a manner that would ensure compliance with states' international human rights obligations to respect, protect and fulfil human rights in the context of transnational business activity. Such reform of the international investment regime needs to be tackled in a multifaceted way and the top-down approach proposed here would be complementary to bottom-up strategies for reform.

It is certainly arguable that the right to an effective remedy imposes an obligation on states, when negotiating an IIA, to ensure, not only that the provisions of the IIA do not undermine the right to an effective remedy, but that they operate so as to ensure an effective remedy for individuals and communities affected by investor conduct. The UN Human Rights Council has invited states in a number of resolutions to "work through relevant intergovernmental processes to enhance accountability and access to remedy for victims in cases of business involvement in human rights abuses".[4]The negotiation of IIAs is one such intergovernmental process.

IIAs can address the well-known obstacles faced by victims of business-related human rights violations in seeking justice in home state courts. These obstacles include (i) the difficulty of framing the harms suffered as torts, (ii) convincing domestic courts of the home or host state to assert jurisdiction over a claim involving an MNE, and (iii) defending a variety of motions brought by investors to stay, dismiss or strike the case such as motions based on *forum non conveniens*, the impugned action being immune from review as an act of state, comity and failure to disclose a cause of action, that may (have to) be litigated or defended all the way up to the highest court. Each of these motions may be

fatal to the suit and thus undermine the right to an effective remedy. One of the largest stumbling blocks for plaintiffs bringing civil claims for business related human rights abuses is the separate legal personality of entities within an MNE which has implications at both the jurisdictional and merits stages of a civil suit. While we address all of these issues in our full paper, we confine our remarks here to the question of how to modify an IIA to address the separate legal personality of the entities within an MNE (investor) to facilitate access to justice for victims through civil claims.

The principle that a corporation has a separate legal personality insulates shareholders from liability for corporate acts. MNEs can exploit this principle through complex organizational structures that involve tiers of corporations linked through shared ownership. Separate legal personality allows shareholder corporations to avoid liability for the actions of the corporations in which they hold shares. Rigidly applying this principle in the context of the global activities of MNEs constrains the ability of individuals and groups who have suffered from the actions of MNEs to obtain relief in at least two ways. First, if the local subsidiary corporation operating in the host state has insufficient assets to pay compensation awards in favour of local people, shielding the parent corporation and others in the MNE group from liability will prevent full recovery. Second, domestic courts may refuse to hold corporations in an MNE group liable on the basis that only the local subsidiary directly implicated in wrongdoing is responsible. Attempts to get domestic courts to push the boundaries of corporate law to disregard the separate personality of corporations in a corporate group have been largely unsuccessful.[5] Similarly efforts to get domestic courts to attach direct liability to parent corporations or its executives based on their being a party to the subsidiary's actions or their failure to discharge a duty of care under domestic tort law to prevent a subsidiary from abusing the human rights of individuals and groups in the host state have typically failed.[6] Other legal regimes have grappled with how to hold corporate groups responsible for the acts of one member of that group. [7]

With these kinds of models in mind, what provisions would be needed in an IIA to address separate legal personality in the context of civil suits by victims of investor-related human rights violations? First, there would need to be an obligation on the investor to respect human rights either in the IIA or in the

domestic law of both parties, as well as an obligation in the IIA on the party states to provide a civil remedy for an investor's violation of this obligation. Direct civil liability for breaching such an obligation could be imposed on all entities within an MNE group without a requirement for an independent finding of fault against a particular entity within the group so long as one entity in the group had committed a breach.

Doing so would require an IIA provision that defines what links are sufficient to connect a particular entity to the group. Corporations or other entities that control (directly or indirectly through intermediary entities) (here called "Controlling Entities") the entity directly responsible for the human rights violation should be held responsible on the basis that they are the ultimate beneficiaries as well as the controllers of the business in which the human rights abuse occured. Ownership of equity sufficient to create a relationship of legal control should create a rebuttable presumption of control, but control should include contractual and other control mechanisms that give control in fact.

Apart from Controlling Entities themselves, entities they control that are engaged in carrying on the business in connection with which the human rights abuses occurred should also be responsible on the basis that they too benefit from the business with respect to which the human rights abuse occurred. Liability could also be extended to (i) all entities linked by ties of control (here called a "Controlled Group") even if they do not participate in carrying on the business in which the human rights abuse occurred (resource extraction) and (ii) entities outside the Controlled Group, such as to sub-contractors and suppliers, who are have some specified close relationship to the group and benefit from the business in which the human rights abuse occurred.

With respect extending liability to all entities in category (i), the main justification for liability would be that it is necessary to minimize the risk that MNEs will segregate assets outside the reach of victims of human rights abuse and improve the chances of recovery by plaintiffs. With respect to entities in category (ii), liability could be justified based on their close connection to the business in which the human rights abuse occurred and benefits they derive from that business. An alternative to imposing liability on all entities in category

(i) would be to hold only Controlling Entities in the Controlled Group responsible, either strictly or only where they could not establish that they had been duly diligent to prevent the human rights abuse. International human rights law obliges states to provide an effective remedy for victims of alleged human rights violations associated with business activity. But ensuring access to justice and redress for victims of human rights violations committed by or with the complicity of extractive MNEs is a complex issue that requires a multifaceted response.[8] IIAs provide an opportunity to address some of the barriers faced by victims in bringing civil claims in the MNE's home state, but such measures are only a small part of necessary broader reform. The proposed revisions to IIAs discussed here are not sufficient on their own to address fully access to an effective remedy in this context. A range of modifications to IIAs are needed to tackle the imbalances of these treaties and the problems they pose for the protection of human rights and host state regulatory capacity. We have considered how to undertake more holistic reform in our book, *Integrating Sustainable Development Into International Investment Agreements*.

---

[1] Zoe Williams, "Investor-State Arbitration in Domestic Mining Conflicts," (2016) 16 Global Environmental Politics 32, at 32.

[2] UNHRC, "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie - Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse, Addendum" (23 May 2008) A/HRC/8/5/Add.2, p. 9 Figure 1; Menno T. Kamminga, "Company Responses to Human Rights Reports: An Empirical Analysis" (2016) 1 BHRJ 95 at 100; Jonathan Drimmer, "Human Rights and the Extractive Industries: Litigation and Compliance Trends" (2010) 3:2 J World Energy L & Bus 121 at 121-123; and Directorate General for External Policies of the Union, "Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries" (2019) at 5, online: < http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)60347 >.

[3] Odumosu-Ayana, I. T. “Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Agreement Framework” (2014) 15:2 Melbourne J of Intl Law 473, at 478-482. See also, James Gathii & Ibironke Odumosu-Ayanu, “The Turn to Contractual Responsibility in the Global Extractive Industry”, (2015) 1:1 *BHRJ* 69.

[4] See also UNHRC, Business and Human Rights: Improving Accountability and Access to Remedy, 38th Sess, UN Doc A/HRC/RES/38/13 (18 July 2018) at para 5.

[5] Regarding the UK, see Martin Petrin & Barnali Choudhury, “Group Company Liability” (2018) 19 European Business Organization Law Review 771, at 774-5. For some other jurisdictions, see Siel Demeyere,“Liability of a Mother Company for Its Subsidiary in French, Belgian, and English Law” (2015) 3 European Review of Private Law 385.

[6] This kind of claim was made unsuccessfully by members of the local community affected by the investor in the *Piedra v Copper Mesa Mining Corporation*, *supra* note 91. Cases in the United Kingdom are surveyed by Bueno (Nicolas Bueno, “Corporate liability for violations of the human right to just conditions of work in extraterritorial operations” (2017) 21 International Journal of Human Rights 565, at 575-578). See Ma Ji, “Multinational Enterprises’ Liability for The Acts of Their Offshore Subsidiaries: The Aftermath of *Kiobel* and *Daimler*” (2015) 23 Michigan State International Law Review 397. Ji deals with the distinctive experience of the United States.

[7] Eg, France’s recently enacted Law of Vigilance, Loi n° 924 du 21 février 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre; and EU competition law (see Case C-41/90, *Klaus Höfner and Fritz Elser/Macrotron GmbH*, 1991 E.C.R. I-1979, at 21, Case 48/69, *Imperial Chemical Industries/Commission*, 1972 E.C.R. 619, Case C-440/11P, *Commission/Stichting Administratiekantoor Portielje*, ECLI:EU:C:2013:514. Recent academic proposals and some other reform efforts in this regard are discussed in Petrin & Choudhury, note 5 at 779-782.

[8] P Simons & A Macklin, The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage (Routledge 2014) at 271.

View online: Using International Investment Agreements to Address Access to Justice for Victims of Human Rights Violations Associated with Transnational Resource Extraction

Provided by Afronomicslaw