Editorial

Rebalancing Investors' Rights and Obligations

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It is sometimes forgotten that the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises are part of the OECD Declaration on International Investment and Multinational Enterprises. Both constitute the two faces of the same coin: on the one side, the rights granted to enterprises to secure their investments when they invest on a foreign territory; on the other side, standards to ensure that the operations of these enterprises are in harmony with government policies and strengthen the basis of mutual confidence between enterprises and the societies in which they operate. The Guidelines aim at helping improve the foreign investment climate and enhancing the contribution to sustainable development made by multinational enterprises.

The initial message was thus reasonably balanced and fair. Why it seems to have been forgotten over the years is unclear? Instead of trying to figure an answer to that question, which may need deep historical research beyond our abilities, it is preferable to analyze two among the many questions that, concretely, need to be clarified to reconcile investors' rights and obligations: (1) how to counterbalance hard law and standards, and (2) how to make use of all the powers enjoyed by judges and arbitral tribunals (adjudicators), including inherent powers.

1 How to Counterbalance Hard Law and Standards

On the one hand, in the OECD Guidelines, as with many other provisions on the protection of investments, the right of protection enjoyed by investors may be characterized as 'hard law'. There is no doubt that investors' protection must be granted as an obligation for States when all conditions set forth in the applicable treaty or contract are met. It is a matter of legal certainty. It is the *raison d'être* of investment law without which investors' protection would be a *chiffon de papier*, as an international treaty was once characterized.¹

On the other hand, reasonable business conduct (RBC) principles have been much more challenging to establish.² RBC comprises many different fields of law such as the protection of the environment, human rights, fight against corruption, corporate social responsibility, to name only four of them. Positivist lawyers would look at specific provisions of RBC and determine which ones provide for specific hard law obligations for private actors, including investors, which ones are obligations only for States and which ones are just loosely defined soft aspirations that need a voluntary application by private actors.

The reality is more complex than the dichotomy of hard law versus soft law just mentioned. Indeed, among hard law principles, many may be subject to changes operated by the actors' will. Among the many soft law principles, some norms may be harder than others. This is why instead of an opposition between the two categories of norms, instead of an 'either/or' analysis, it is more fruitful to think in terms of a continuum that may enjoy variations depending upon the context, the actors, the method through which the applicable norms have been implemented and several other factors that will have to be taken into account.

One example may better explain the idea of a continuum. The Ruggie Principles³ are generally understood to be 'voluntary', and many consider, consequently, that they belong to the 'soft law' category. However, John Ruggie

1 Larry Zuckerman, *The Rape of Belgium: The Untold Story of World War I* (New York UP 2004) 43. When the German Empire invaded Belgium in August 1914 in violation of the treaty, the British declared war on 4 August. Informed by the British ambassador that Britain would go to war with Germany over the latter's violation of Belgian neutrality, German Chancellor Theobald von Bethmann-Hollweg exclaimed that he could not believe that Britain and Germany would be going to war over a mere 'scrap of paper'.

2 I will not recall here the very long history of UN efforts to 'regulate' transnational corporations, conduct. Suffice it to say that it is only in 2011 that a clear Business and Human Rights set of principles could be adopted by the UN Council on Human Rights (The Ruggie Principles), the same year the OECD added a Human Rights Chapter to its Guidelines.

3 United Nations General Principles on Business and Human Rights (UN Council of Human Rights, adopted 16 June 2011).

himself made clear that the principles set forth, notably, in the second pillar, those directed to corporations, are not an option for them. The commentary to each principle of the second pillar easily convinces the reader that, if there is flexibility, the thrust of what the principles provide must be taken into account by all actors. Indeed, the principles themselves do not carry their sanctions. But that is not the end of the reasoning. Indeed, other international and national law norms will complement the Ruggie Principles and provide the necessary sanctions if need be. In other words, the Ruggie Principles function like a 'nudge' to incite corporations to be good citizens; in the same vein, Kofi Annan urged them to act in his address at the turn of the 21st century.

This is also why so many voices (Ruggie, the first one among them) have criticized the preparation of a UN binding instrument to 'implement' the Principles. One knows how complex and uncertain international negotiations are. When reading the current draft available, it is also quite apparent that so many of the rules included in the draft have never been the object of an international treaty with potentially so many States (the 197 UN Members) to rally. These are norms difficult to embody in clear rules acceptable for a large number of legal traditions. These are also norms that exist at the national level, and many States will not want to give up their long-standing solutions to add another layer of rules that will complicate the judges' work. This state of affairs is unfortunate because the proposed binding instrument is needed to implement the third pillar of the Ruggie Principles – the one that is less developed, the *parent pauvre* of the otherwise very clever and useful scheme put in place thanks to the tireless efforts by Ruggie to make reasonable business conduct part and parcel of our society.

Finally, one wonders whether it is not better to trust judges and arbitrators to use the full range of their powers to implement, in each case, the norms available to them with reasonableness and proportionality. If the answer is 'yes', then it confirms the necessity of a focused binding instrument.⁴

2 The Role of Judges and Arbitral Tribunals

In a field as complex as investors' duties to counterbalance their rights, adjudicators are indispensable.⁵ Indeed, as explained in the previous section, only

4 Whether the UN is the proper forum for the negotiation of such an instrument remains to be demonstrated.

5 This is not the place to discuss whether judges are preferable over arbitral tribunals and vice-versa. Many fora, particularly the United Nations Commission on International Trade Law

adjudicators have the capability and power to complement hard law norms with soft law norms, when needed, to find an adequate solution for the particular case and context at stake. Adjudicators enjoy the power to use the general pronouncements of a treaty (or contract) preamble to import into their reasoning or analysis norms other than the provisions *stricto sensu* of the treaty or contract. If, for example, the preamble of a bilateral investment treaty (BIT) recalls that both States are members of the UN, is it not in the adjudicator's power to conclude that they are members in good standing of the 'international community' and have, consequently, agreed, albeit implicitly, to have the large body of UN soft norms as a background to the obligations set forth in the treaty or contract. Nowadays, the Ruggie Principles form part of the 'new normal'. They form the foundation of 'responsible business conduct', to use the foundational expression so aptly crafted by the OECD.

For judges, what is proposed above is more manageable than for arbitral tribunals. Judges render decisions within a legal and judicial system that forms the juridical context that they have a duty to apply when deciding a controversy or dispute. As developed by the highest courts in the country, the general principles of law would certainly be applicable if there is a gap or uncertainty in the norms applicable to the case.

For arbitral tribunals, the reasoning is somewhat more complex. There is undeniably an argument that, because arbitral tribunals result from the will of the parties, their legitimacy is restricted precisely to what the parties have agreed to submit to the tribunal seized of the matter. If the basis for the dispute is a contract, the usual expression is to say that the tribunal is limited by the 'four corners of the contract'. If the dispute is based upon a BIT, the same analysis requires that the tribunal be limited to that BIT's provisions. As strong as this argument may seem to be, there exist counterarguments. First, suppose it is true that arbitral tribunals do not render their decisions in the name of a specific legal system. In that case, it is nonetheless sure that they do participate in the evolution of international law (particularly in investment law) and that they do have the status of an 'international court', to borrow an expression used by the French *Cour de cassation* for arbitral tribunals deciding international commercial cases.⁶ The late and regretted Emmanuel Gaillard went so far as proposing that there is an 'arbitral legal system', and although he probably

(UNCITRAL), do discuss the potential reforms investment arbitration may need. Readers interested in these debates will find all the information they may need on the UNCITRAL website, among others.

6 *PT Putrabali Adyamulia v SA Rena Holding*, Court of Cassation (France), Civ 1, 05-18053 (29 June 2007) Rev Arb 507, with comment by Emmanuel Gaillard.

meant to include far and foremost procedural issues, he also included aspects of the arbitral process such as the applicable law reasoning and the like.⁷

Second, even the proponents of the most restrictive conception of the mission of an arbitral tribunal would agree that such tribunal does enjoy inherent or implied powers.⁸ Indeed, they do render justice. As such, they have the power and the duty towards the parties and the society at large that will be impacted by their decision⁹ to make sure that the full spectrum of issues stemming from the dispute is decided according to the norms that regulate the situation at stake. Of course, many of these norms do not have the status of public policy, and, therefore, arbitral tribunals enjoy relatively large freedom to interpret them. Nonetheless, it is their duty to include in their analysis leading to the decision all norms that are applicable to the dispute.

Business and Human Rights and Corporate Social Responsibility norms are now the basic principles that citizens can expect corporations to respect. Consequently, how could an arbitral tribunal disregard these principles if they are applicable to the case at hand?

7 Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, 2010).

8 See notably ILA, 'International Commercial Arbitration Resolution on the Report on Inherent and Implied Powers of Arbitral Tribunals' (77th Conference, Johannesburg, 2016) Resolution No 4/2016.

9 Many corporations do recognize now that there is no separation to be made between the traditional objective of making profit in favour of their shareholders and the general interest of society. See for example Kenneth Frazier, Merck CEO, in conversation with the American Law Institute's President during the 2021 virtual annual meeting of the Institute <www.ali.org/annual-meeting-2021/spotlights/>; and in France the work accomplished by the Observatoire Social International <www.observatoire-social-international.com/> both accessed 5 October 2021.