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The Post COVID-19 Recovery: A Stringent Test for the Business and Human Rights Discourse

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Although the global economic outlook seems to be improving for the rest of 2021 and 2022, such benefits seem to only affect developed economies, while furthering the gap with emerging markets and developing economies. This shows that ‘recovery for all’ will remain gloomy for several years, as access to the COVID-19 vaccine continues to showcase the global inequalities between the rich and the poor. In this scenario, States require to make full use of their regulatory and policy space to protect and promote the human rights of all people and persons in their jurisdictions, including the right to health, while safeguarding the necessary fiscal space towards guaranteeing development expenditures to build back fairer and better. It is time for reducing inequalities rather than increasing the gap between developed and developing nations.

Introduction

History has us taught us that there are certain events in time that require us to look back and learn from our mistakes, understand our weaknesses and transform the *status quo*, in search for a better future for all. The United Nations (UN) Secretary-General António Guterres recognized that the COVID-19 crisis is “the most challenging crisis since World War II.”¹ Mr. Guterres also considered that we are now living in a world facing new predicaments, what he calls “a moral indictment of the state of our world ... an obscenity”,² a world where “[w]e passed the science test. But we are getting an F in Ethics.”³

Unfortunately, Mr. Guterres is right. Although the global economic outlook seems to be improving for the rest of 2021 and 2022, such benefits seem to only affect developed economies, while furthering the gap with emerging markets and developing economies.⁴ This shows that ‘recovery for all’ will remain gloomy for several years, as access to the COVID-19 vaccine continues to showcase the global inequalities between the rich and the poor.⁵

¹ See: <https://abcnews.go.com/US/wireStory/chief-covid-19-worst-crisis-world-war-ii-69905340>

² See: <https://unric.org/en/covid-19-un-secretary-general-says-the-world-has-failed-an-ethics-test/>

³ See: <https://unric.org/en/covid-19-un-secretary-general-says-the-world-has-failed-an-ethics-test/>

⁴ See: <https://www.imf.org/en/Publications/WEO/Issues/2021/07/27/world-economic-outlook-update-july-2021>

⁵ See: <https://www.weforum.org/agenda/2021/08/vaccine-equity-covid-economic-recovery/>

In this scenario, States require to make full use of their regulatory and policy space to protect and promote the human rights of all people and persons in their jurisdictions, including the right to health, while safeguarding the necessary fiscal space towards guaranteeing development expenditures to build back fairer and better. It is time for reducing inequalities rather than increasing the gap between developed and developing nations.

Mainstreaming human rights in the reform of international investment agreements (IIAs)

The compatibility of international investment agreements with internationally recognized standards on human rights has had a predominant position in business and human rights discussions.⁶ International investment agreements have a long history, and there is a need to rethink and re-orient the international investment regime to ensure that its contribution materializes towards the needs and priorities of peoples around the world.

Achieving such objective will require mainstreaming human rights in the reform of past and negotiation of new international investment agreements. This systemic and structural reform process could consider a two-pronged approach.

The first one is to re-orient the aim of these agreements from promoting and protecting investors' rights to one enabling and advancing investments that add value to the developmental process of States and the achievement of the 2030 Agenda for Sustainable Development, including the promotion and protection of human rights.

New model bilateral investment agreements (BITs) have followed an approach pursuant to guaranteeing policy space for States to adopt any measures necessary to address social, health and environmental concerns.⁷ Likewise, other investments agreements have considered the inclusion of corporate social responsibility provisions, with the aim of fostering responsible business conduct.⁸

Nevertheless, there is a long road between the word of the law and the practice. A systemic and deep reform of investment agreements should not only touch on how BITs are negotiated or reformed, but also on how they are interpreted, and by whom.

International investment arbitration has been the centre of concern for various developed and developing countries, particularly as investor-state dispute settlement (ISDS) has been criticized for the lack of democratic accountability and legitimacy.⁹ Recent cases have shown that even carve-out provisions safeguarding State policy space for attaining legitimate objectives have not

⁶ See for example: Howard Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities* (International Institute for Sustainable Investment, 2008); The London School of Economics and Political Science, *Guide to implementing the UN Guiding Principles on Business and Human Rights in Investment Policy Making* (2016); and Daniel Uribe and Danish, *Designing a Legally Binding Instrument on Business and Human Rights* (Geneva, South Centre 2020); among others.

⁷ See for example the Free Trade Agreement between the Government of Australia and the People's Republic of China, and the Reciprocal Investment Promotion Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria.

⁸ See for example the Model Agreement on reciprocal promotion and protection of investments of the Kingdom of the Netherlands, and the Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India.

⁹ See discussion of the United Nations Commission on International Trade Law on the Investor-State Dispute Settlement Reform – Working Group III.

been sufficient for States to defend the adoption of measures directed towards protecting human rights or the environment.¹⁰

Therefore it is necessary to rethink how we envision and negotiate international investment agreements, posing more attention towards its role in the promotion and protection of all human rights, particularly the right to development, and promote a more inclusive, free, active, and meaningful participation of all stakeholders in the negotiation of these agreements.

The second approach requires States to deeply consider the cohesiveness and coordination of their legal systems, particularly their international human rights obligations, with their investment promotion and protection agreements. This approach will allow them to safeguard their regulatory space and prevent the so-called 'regulatory chill'.

Long-term investment and risk reduction strategies and policies will be key for designing more inclusive and development-oriented international investment agreements while reducing countries' exposure to claims from foreign investors against States' measures aimed at promoting and protecting human rights and fundamental freedoms, including environmental protection.

Therefore, building internal cohesiveness between the promotion of investments on the one hand, and States' obligations under international human rights law and environmental law, could build a framework for foreign investment that adds value to the development process of States and prevents IIAs to bite through ISDS mechanisms.

Responsible investment and businesses' human rights obligations

Due to the COVID-19 pandemic, economic, structural, and social policy deficiencies have been exacerbated in developed and developing countries. Recovery efforts might require public and private initiatives, including foreign investment. Therefore, the importance of the private sector in the COVID-19 recovery efforts is evident, but it should not come without deep discussions on their responsibilities to prevent any violation of human rights.

The discussion on the need to encourage just and fair labour practices, gender and aging equity and equality, and full exercise of human rights through all business operations, is part of responsible investment practices. Although the United Nations Guiding Principles on Business and Human Rights (UNGPs) have provided an important framework for clarifying these principles, they have proven insufficient for building a corporate culture that respects and promotes human rights. Several initiatives have been developed at the domestic level for responding to the need of strengthening corporate accountability through legal binding rules, with respect to prevention of human rights violations in the context of business operations.¹¹

National legal initiatives supporting binding rules for businesses *vis-à-vis* human rights and the environment are a welcome improvement, but these national efforts should not be isolated. It is necessary to reinvigorate multilateralism to deviate from 'business as usual' and challenge how the current economic model allows outsourcing the risks and responsibilities of the private

¹⁰ See *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic* (ICSID Case No. ARB/07/26) and *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41)

¹¹ See for example the experience of Germany, which recognised in its National Action Plan the need for moving from voluntary guidelines of corporate behaviour to binding rules in case of a failure from business enterprises to introduce and comply with human rights due diligence requirements.

sector through a complex web of business relationships, and for strengthening the role of the State for the promotion and protection of human rights.

The discussions on the adoption of a legally binding instrument on business and human rights carried out by the Open-ended Intergovernmental Working Group on Business and Human Rights¹² could serve the purpose of promoting responsible conduct by business enterprises, including the mainstreaming of human rights in the negotiation of investment agreements, and guaranteeing the participation of communities not only at the entry stage of the investment but throughout the complete cycle of businesses, including the enjoyment of benefits stemming from such investments.

Prof. John Ruggie, former Special Representative of the UN Secretary-General on Business and Human Rights, considered that the UNGPs take the discussion of the business and human rights beyond the issue of ‘mandatory vs. voluntary’ measures, but reaffirmed that the duty to protect human rights includes the creation of “legally binding rules” and the provision of judicial remedy.¹³

Agreeing with Prof. Ruggie is not difficult. A legally binding framework on business and human rights could crystalize the international standards on the protection of human rights in the context of business operations and is just the culmination of a long-term evolution of international law and multilateralism, one that started with the UNGPs, and one that has found one of its stringent tests in the current COVID-19 crisis.

Conclusion

The COVID-19 crisis has created a ‘perfect storm’ for the *status quo* of international relations. It has exacerbated a number of social, economic and power imbalances that affect States at the domestic and multilateral levels. This is not a time for relying on business as usual’. On the contrary, to allow us to build back better from the pandemic, we not only need to strengthen inclusive multilateralism, solidarity, and urgent action, but particularly protect the vulnerable people, including by transforming business practices.

State measures will be needed to respond to the new challenges deriving from the social and economic impacts deriving from the COVID-19 pandemic. Setting up fiscal packages and stimulus for the national economy, and bolstering the public health and social protection systems, will require collaborative measures with all stakeholders, including the private sector.

Therefore, changing for the better will need perseverance and resilience to make the impossible possible. The fact that more and more States are stepping together towards the implementation of the United Nations Guiding Principles and the negotiation of the legally binding instrument on business and human rights are a demonstration that the political will is there to support multilateral efforts for achieving more inclusive and responsible investment for building back a better, fairer, and greener world for all.

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¹² See: <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx>

¹³ See: John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton Global Ethics Series) (W. W. Norton & Company, 2013), p. 125.

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