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Protecting FDI contributing to host countries' development: The rise of the "forgotten" Salini criterion as part of the definition of investment

by
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The definition of covered investment of certain recent international investment agreements (IIAs) incorporates the "contribution to the development of the host State" criterion as one of the characteristics of a covered investment.[1] First delineated as part of the *Salini* criteria[2] and subsequently abandoned by most investor-state dispute settlement tribunals due to its tricky application, this approach could lead the way forward.

While some definitions of investment in IIAs use "economic development"[3] and others simply refer to "development",[4] a few adopt the more comprehensive term of "sustainable development".[5] Some of these provisions mandate that the "contribution" should take place in "effective",[6] "sufficient",[7] or "significant"[8] ways. The Slovakia – United Arab Emirates BIT (2016) is peculiar, as its formulation gives three different alternatives: "a certain contribution", or "any kind of contribution" or a "positive impact" on the development of the host State.[9] The Morocco – Nigeria BIT (2016), Article 1 makes the "contribution to the development of the host State" a mandatory requirement. The Morocco Model BIT (2019), Note 3.3, goes even further by listing certain indicators to measure such "contribution", i.e., the increase in production capacity, economic growth, quality of jobs created, duration of the investment, technology transfer, and poverty reduction.

To date, no arbitral tribunal has been faced with jurisdictional questions pertaining to such a requirement. Once a claim is brought under one of these agreements, tribunals will be confronted with the fundamental question of how (economic/sustainable) development should be interpreted and what benchmarks should be used to assess the "positive", "significant" or "effective" nature of such a contribution, absent explicit treaty language.

Although the inclusion of the "contribution to the development of the host-State" criterion may seem reasonable for those countries wishing to restrict IIA protection to quality FDI, such language opens

a Pandora's box, given the complexity of the notion of (sustainable) development. Policy makers need to be cautious on how they translate the concept into legal language to avoid undesirable outcomes, e.g., denying protection to small investments whose contribution may not be "significant" enough.

One possibility to avoid interpretative issues is for countries to specify a set of indicators to assess the investment contribution to development and how substantial it needs to be, similar to Morocco's Model BIT. While the identification of specific sustainable development indicators remains a daunting task, the work done by, e.g., the OECD and scholars may guide host countries to determine which ones to include in an IIA's definition of investment. Notably, tribunals have already considered some of these indicators, such as contribution to infrastructure,[10] technology transfer,[11] local employees training,[12] and generation of government revenue.[13]

Alternatively, countries can promote quality FDI by imposing obligations on investors or through a denial of benefits clause. Obligations may include corporate social responsibilities provisions, which have been introduced in many IIAs. Also, states may incorporate specific multilateral legal instruments (e.g., on the protection of human and labor rights, the environment) in their IIAs, which has become a trend in recent free trade agreements.

These approaches show that IIAs can do more than encourage an economic contribution to host countries and can, indeed, support "sustainable development", as reflected in the United Nations' Sustainable Development Goals.

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[1] 2,015 of the 3,600 IIAs analyzed include a reference to "economic development" or "sustainable development" in their preambles. Only 16 of those IIAs incorporate the "contribution to the development of the host State" criterion also in the definition of investment as one of the characteristics of a covered investment. See, Egypt-Mauritius BIT (2014), Iran-Slovakia BIT (2016), Morocco-Nigeria BIT (2016), Slovakia-UAE BIT (2016), Turkey-Ukraine BIT (2017), Turkey-Burundi BIT (2017), Argentina-Chile (2017), Turkey-Uzbekistan BIT (2017), Argentina-United Arab Emirates BIT (2018), Belarus-Turkey BIT (2018), Belarus-India BIT (2018), India-Taiwan Province of China BIT (2018), ECOWAS Investment Code (2018), COMESA Investment Agreement (2018), Morocco-Congo BIT (2018), Turkey-Burkina Faso BIT (2019), India-Kyrgyzstan BIT (2019).

[2] The *Salini* test requires that the alleged investment satisfy four criteria to be considered an investment under ICSID Article 25(1): a contribution; a certain duration; a risk; and a contribution to the economic development of the host State.

[3] Iran-Slovakia BIT (2016), Argentina-Chile FTA (2017), Argentina-UAE BIT (2018), Belarus-Turkey BIT (2018), ECOWAS Investment Code (2018), Turkey-Burundi BIT (2017).

[4] Slovakia-UAE BIT (2016), India-Belarus BIT (2018), India-Taiwan BIT (2018), India-Kyrgyzstan BIT (2019).

[5] Mauritius-Egypt BIT (2014), Morocco-Nigeria BIT (2016).

[6] Iran-Slovakia BIT (2016), Art. 1.

[7] India-Taiwan Province of China BIT (2018), Art. 1.

[8] ECOWAS Investment Code (2018), Art. 1.

[9] Slovakia-United Arab Emirates (2016), Art. 1.

[10] *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 622 (July 23, 2001), para. 52 *et seq.*

[11] *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 66 (July 24, 2008), para. 240 *et seq.*

[12] *Inmaris Perestroika Sailing Services v. Ukraine,* ICSID Case No. ARB/08/8, Decision on Jurisdiction, 58-60 (March 8, 2010), para. 26 *et seq.*

[13] *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 109 (November 8, 2010), para. 312 *et seq.*

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