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Recognizing the state's "*duty* to regulate": the mindset needs to shift

by

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This *Perspective* argues that a multilateral statement reiterating states' duties to use their policy space to achieve internationally recognized goals—such as on climate, biodiversity, deforestation, and human rights—could help achieve meaningful change in procedural and substantive aspects of investor-state dispute settlement (ISDS) and in investment policy reform more generally. In other words, the international investment regime could benefit from its own "Ruggie moment".

John Ruggie was the Special Representative for Business and Human Rights of the UN of the Secretary-General. He created the UN Guiding Principles on Business and Human Rights (UNGPs) that were endorsed unanimously by the UN Human Rights Council in 2011. Ruggie did not create new law for states. The UNGPs merely elaborate what existing international human rights law requires of states and how that would apply in the context of business enterprises and their activities. This elaboration, however, helped achieve a collective mindset shift about the differentiated roles of states and companies. This was not an obvious distinction at the time.

In the early 2000s, when the business and human rights discussion was beginning in earnest at the UN, the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights laid out a code of conduct for companies. It set out company duties as essentially equal to state duties. This was one of the key reasons that Ruggie quickly set the Norms aside in his first interim report.

The UNGPs' first pillar elaborates states' role regarding business and human rights: states' duty to protect human rights. This seemingly simple affirmation of the state's role to protect set in motion a mindset shift that has made a meaningful difference regarding business and

human rights. It has dramatically accelerated broad stakeholder support for legislative initiatives and national action plans on business and human rights. Fifty-two states have published (or are working on) national action plans regarding business and human rights; the Global Business Initiative on Human Rights is currently tracking 70 countries where business-and-human-rights legislation reflecting the UNGPs has either been put in place or has been proposed. These trends are global. For example, laws have been passed in France, Germany and Norway, and have been tabled in Brazil, Mexico and the Republic of Korea. Meanwhile, Japan has instituted new business-and-human-rights requirements for public procurement. Furthermore, it has become so commonplace for *companies* to actively call on states to regulate human rights and environmental practices that the Business and Human Rights Resource Centre has created a database containing 140 public statements by large companies just since 2020.

In sum, the UNGPs reinforce the idea that states have specialized duties to protect human rights in the context of business activities. This has shifted the mindset of what stakeholders accept—and indeed expect—as the legitimate exercise of sovereign discretion in the area of business and human rights.

A strong multilateral statement reiterating state duties under international agreements in the areas of climate action, international environmental norms and regarding human rights would help to shift the mindset of how investors, arbitrators and lawyers view the exercise of sovereign discretion in the context of ISDS. This would influence both the procedure and the substance of how ISDS is currently carried out, and indeed could positively influence investment policy reform more generally.

- Procedurally, it would help parties recognize that ISDS is a vertical process: a process between parties with differentiated roles—investors and sovereigns exercising their discretion. As was forcefully argued in the 2023 Alexander Lecture, carrying out ISDS under the commercial arbitration procedural model artificially negates the vertical relationship between sovereigns and investors, which carries with it a number of adverse consequences. More explicit recognition of the vertical nature of ISDS could help arbitrators, lawyers and investors recalibrate their approach to such procedural issues as transparency. Moreover, it would encourage greater access for stakeholders to participate in ISDS processes if the duties of state parties to broader stakeholder groups are viewed as integral aspects of disputes.

- Substantively, a mindset shift that recognizes states as sovereign duty holders to broader publics beyond investors would help arbitrators to consider the complexities faced by states that must comply with international obligations emanating from sources outside investment treaties. This could directly influence how arbitrators adjudicate on key treaty provisions and concepts.

- More broadly, a mindset shift that places the specialized role of states at the center of efforts to achieve global goals, such as climate action, is a good starting place for forging a positive reform agenda on international investment law more generally.

Where to start? Several opportunities exist. Brazil could spearhead this conversation under the 2024 presidency of the G20, or states could agree on a multilateral statement at COP 29. Wherever the statement originates, it should be driven by the clear purpose to build consensus amongst states and other stakeholders that states' obligations on climate, the environment and human rights are part of the context for understanding and adjudicating ISDS claims.

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