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Faculty of Law and Administration

International Investment Law and Human Rights

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International investment law – public perception

example:

“A secret court system that allows fossil fuel investors to sue governments for vast amounts of money [...]”

The Guardian, 14 November 2022

MODEL SITUATIONS

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graph TD; A[MODEL SITUATIONS] --> B[FIRST MODEL SITUATION]; A --> C[SECOND MODEL SITUATION]; A --> D[THIRD MODEL SITUATION]; B --> E[The respondent (i.e. a host state defending a BIT claim) invokes its international human rights obligations in an attempt to justify measures which are alleged to be in breach of the BIT.]; C --> E; D --> F[The claimant (investor who presents a claim based on a BIT) invokes his own human rights.];
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FIRST MODEL SITUATION

An investor who presents a claim based on a BIT has not been involved in any human rights violations in the territory of the host state during any moment of its activities.

SECOND MODEL SITUATION

An investor who presents a claim based on a BIT has been involved in human rights violations in the territory of the host state.

THIRD MODEL SITUATION

An investor is a victim of human rights violations committed by the host state where the investment is located.

The respondent (i.e. a host state defending a BIT claim) invokes its international human rights obligations in an attempt to justify measures which are alleged to be in breach of the BIT.

The claimant (investor who presents a claim based on a BIT) invokes his own human rights.



Standard jurisdictional clause

Art. XII Canada – Uruguay BIT:

“Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach [...]”

Narrow jurisdictional clause

Art. 9 Poland – Cyprus BIT:

“[a]ny dispute between either Contracting Party and the investor of the other Contracting Party concerning expropriation of an investment [...]”



Wide jurisdictional clause

Art. IX Norway – Lithuania BIT:

“Any dispute which may arise between an Investor of one Contracting Party and the other Contracting Party in connection with an investment on the Territory of that other Contracting Party [...]”



Art. 31 of the Vienna Convention on the Law of Treaties

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

[...]

3. There shall be taken into account, together with the context:

[...]

(c) any relevant rules of international law applicable in the relations between the parties.



Contributory fault – Art. 39 ILC Draft Articles

“In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.”

Art. 33(2) ILC Draft Articles:

“This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.”



Discussion

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