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DEVELOPMENTS IN THE FIELD

Human Rights-Compatible International Investment Agreements: A Voice From Central & Eastern Europe and Central Asia

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This DiF paper analyses the 2021 Consultations for Central & Eastern Europe and Central Asia, conducted as part of the process underlying the United Nations Working Group 'Report on human rights-compatible international investment agreements'. These consultations led to three unique conclusions concerning International Investment Agreements ('IIAs'), which were absent in other consultations: (i) the 'regulatory chill' caused by IIAs with respect to human rights regulations is moot in authoritarian and 'hybrid' regimes in this region, (ii) IIAs tend to be perceived in this region as tools to protect human rights, which can spill over to other areas of socio-economic life, and as a source of inspiration and a model for building similar protections in such other areas, and with the potential to (iii) have a positive impact on the development of domestic laws (and their relationship with the rule of law and good governance reforms in developing host states).

Keywords: Central & Eastern Europe; Central Asia; international investment agreements; investment law; investor–state arbitration

I. Introduction

On 27 July 2021, the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises submitted to the United Nations General Assembly the 'Report on Human Rights-Compatible International Investment Agreements' (the Report).[1] As part of the process of preparing the Report, several regional consultations were convened,[2] including Consultations for Central & Eastern Europe and Central Asia (the CEE&CA Consultations), which took place on 21 April 2021 and gathered 31 participants from 15 states.[3] The Report recognized that it was informed by

[1] United Nations Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Report on Human Rights-Compatible International Investment Agreements', A/76/238 (27 July 2021).

[2] Similar consultations were held in all other regions. The full list is available at Office of the High Commissioner for Human Rights, 'Call for Inputs for the Report on Human Rights-Compatible International Investment Agreements', https://www.ohchr.org/en/calls-for-input/calls-input/2021/call-inputs-report-human-rights-compatible-international (accessed 8 November 2022).

[3] Office of the High Commissioner for Human Rights, *Summary of the Discussions from the Consultation on Human Rights-Compatible International Investment Agreements: Report from the Regional Virtual Consultation for Central and Eastern*

'rich insights gained from these consultations', and incorporated suggestions and conclusions reached in many of them.[4]

The CEE&CA Consultations led to some unique conclusions on International Investment Agreements (IIAs) when compared with the consultations held in other regions. This piece focuses exclusively on these unique conclusions of the CEE&CA Consultations, uncovered in other sources.[5] Given the nature of the 'Developments in the Field' and related word-count limits, the piece does not describe the conclusions shared with consultations held in other regions, reflected in the Report. For the same reason, it does not intend to address the intersections between international investment law and human rights in general.[6]

II. The Peculiar View on the Role and Effects of IIAs in Central & Eastern Europe and Central Asia

The key take-home message from the CEE&CA Consultations was that the issue of the *regulatory chill*[7] reportedly caused by IIAs[8] is considered a moot point in many of the jurisdictions in the region.

The *regulatory chill* is said to arise when the host state's willingness to regulate foreign investments to protect human rights is stifled by the threat of investment arbitration. In this regard, it was noted during the CEE&CA Consultations that the effect can only exist if the host state in question does, indeed, wish to engage in such human rights-promoting regulation; but often there is no such intention in the authoritarian and *hybrid* regimes of the region.[9] In these states, 'the potential regulatory chill caused by the IIAs is irrelevant in relation to those governments which are not interested in protecting and promoting human rights in the first place, and which are dependent on the inflow of capital from foreign investors because of the poor state of their own economies'.[10]

In effect, the often-discussed negative impact of IIAs on local communities in host states is less visible in at least some jurisdictions in the region. Rather, in those jurisdictions these treaties are often perceived almost symbolically as examples of good foreign standards and models to follow as far as protections for rights of individuals against the state's interference

Europe and the Central Asia region held on April 21st, 2021 *(Geneva: Office of the High Commissioner for Human Rights, 2021) (the Summary). Both authors had the privilege of moderating the CEE&CA Consultations and drafting the Summary.*

[4] United Nations Working Group Report, note 1, 5, para 9. See, for example, (i) calls for human rights due diligence, Summary, 3, para 11; Report, 20, para 66, 24, para 77(d); (ii) calls for more transparency, Summary, 3, para 12; Report, 23, para 76(k); and (iii) calls for periodic reviews of IIAs, Summary, 5, para 24; Report, 23, para 76(g).

[5] While the Report needs to draw and build on similarities, it is important not to lose sight of those aspects that are unique for the region, as only a realistic assessment of the situation on the ground can help adopt a more adequate approach to IIAs in that region.

[6] The academic literature on this subject matter focuses mainly not on the protection of investors' rights, but on the protection of individuals and communities whose fundamental rights may be interfered with by investors and refers to the human rights obligations of foreign investors (on which IIAs are typically silent). See, e.g., Surya Deva, 'International Investment Agreements and Human Rights: Assessing the Role of the UN's Business and Human Rights Regulatory Initiatives' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds.), *Handbook of International Investment Law and Policy* (Singapore: Springer, 2021) 1733–1758.

[7] United Nations Working Group Report, note 1, 7–8, para 21.

[8] See, e.g., Markus Krajewski, 'A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application' (2020) 5:1 *Business and Human Rights Journal* 105, 112.

[9] For definition, see: The Economist Intelligence Unit Limited, *Democracy Index 2021: The China Challenge* (London: The Economist Intelligence Unit Limited, 2022). Only some states from the region classify as authoritarian or *hybrid* – 39–47.

[10] Office of the High Commissioner for Human Rights Summary, note 3, 2, para 9. See also: Summary, note 3, 6, para 31(iv): 'IIAs do not create "regulatory chill" in authoritarian regimes and/or States where the governments do not respect human rights'.

are concerned. Some participants underlined that for example in Belarus, IIAs are the only available legal mechanism assuring protection of legal rights of private parties *vis-à-vis* the omnipotent state. It was also 'highlighted that in conflict-affected regions, IIAs can serve as a tool for the protection of some human rights more effectively than classic human rights instruments. This can be relevant for both State-to-State and investor-State cases and refers in particular to the right to peaceful enjoyment of possession'.[11]

Protections provided by IIAs to foreign investors against, e.g., expropriation or discrimination, are seen as cognate to the rights enshrined in conventions like the European Convention on Human Rights (ECHR), in particular the right to the peaceful enjoyment of possession as guaranteed by Article 1 of Protocol 1 or the prohibition on discrimination set forth in Article 14 ECHR or Article 1 of Protocol 12 to the ECHR.[12] Essentially, in Central & Eastern Europe and Central Asia, IIAs are not necessarily perceived as contrary to the rule of law, but rather as contributing to better governance in the states concerned.

This was an unexpected conclusion from the CEE&CA Consultations, as their starting point was different. The first part of the event was intended to 'map the current situation in the region and provide space to share specific examples of how IIAs regimes and investor-State dispute settlement (ISDS) decisions had *negative* impact on human rights and sustainable development' (emphasis added).[13] Yet, the discussion started with a statement from one of the participants that 'IIAs do not prevent the governments from standing up for their communities, and that those communities do have effective ways to demand government intervention when their interests are threatened by foreign investments'.[14]

Several participants stressed that IIAs had a positive effect on the domestic legal systems of their origin (which would typically be host states, i.e., respondents in investor-state arbitrations). They:

> shared the view that IIAs can generally have a positive effect on the host States. For instance, an example was given of how the notion of legitimate expectations, enshrined in the fair and equitable treatment standard present in many IIAs, had an indirect, positive impact on development of national laws in the home State.[15]

While the participants recognized possible conflicts between IIAs on one side, and human rights and regulatory space on the other, 'the proposed solution was to "absorb" the IIAs standards and case law of treaty based arbitral tribunals into States' domestic laws, paying due attention to each State's individual social condition'.[16] The conclusion was that:

> in authoritarian regimes and/or States where the governments do not respect human rights, IIAs can actually play a role of increasing the level of protection of human rights standards, by elevating the discussion from the level of domestic law (where no effective human rights regulations and/or enforcement mechanisms exist) to the international level (where IIAs can become relevant).[17]

[11] Ibid, 5, para 25. See also: ibid, 6, para 32(ii).
[12] See, e.g., Filip Balcerzak, *Investor–State Arbitration and Human Rights* (Leiden: Brill|Nijhoff, 2017) 115.
[13] Office of the High Commissioner for Human Rights Summary, note 3, 2, para 5.
[14] Ibid, 2, para 7.
[15] Ibid, 5, para 26.
[16] Ibid, 5, para 27.
[17] Ibid, 6, para 31(v).

These observations confirm the long-expressed view that international investment law and human rights should be seen as related and convergent regimes. It has been argued in academic writing that there is a place for human rights in treaty-based arbitration, and that even old-generation IIAs allow for a harmonious interpretation in line with the requirements of human rights.[18] While this view is recognized in the Report itself, it is added that 'it does not necessarily mean that human rights considerations have received adequate weight from arbitrators'.[19]

III. Tips from Central & Eastern Europe and Central Asia for the Discussion of IIAs Reform

The discussions at the CEE&CA Consultations require giving attention to a different aspect of the problem, in addition to the above. They did not substantiate the claim that arbitrators in treaty-based investor–state arbitrations tend to be insufficiently concerned with human rights or that they lack legal tools to incorporate human rights into their consideration – even less that they need to be made aware of the need to do so by adding clauses to IIAs explicitly recognizing the host state's right to regulate to protect and fulfil human rights.[20]

As rightly observed during the event, the key problem is that 'even the most progressive human rights clauses in the IIAs remain on paper, because the host States are not interested in enforcing them'.[21]

Indeed, as was also noted, the lack of transparency of public affairs prevents civil society from knowing (i) the actual dynamics of the relations between host states and foreign investors and (ii) whether the lack of effective regulation arises from the *chilling effect* of IIAs or, rather, from indolence and lack of goodwill on the part of undemocratic governments.[22] Without access to information, which is a lifeblood of civic society, IIAs can indeed become tools for authoritarians and semi-authoritarians to sustain themselves by ensuring, in secret, that foreign investors enjoy the treatment required to invest the capital those governments need to continue in power, while at the same time the relevant protections are not extended to local communities.[23]

The sentiments expressed during the CEE&CA Consultations support the view that the discussion of reform for IIAs should not have as its primary focus the downgrading of the remedies available to foreign investors. Constructive criticism of the current, outdated system of *old* IIAs is needed.[24] The solution suggested in the Report, to 'terminate or reform urgently all existing international investment agreements in line with the recommendations made by UNCTAD and in the present report',[25] does not seem, in

[18] See, e.g., Balcerzak, note 12, 149–217. However, the prevailing position is that no human rights obligations can be read from IIAs.

[19] United Nations Working Group Report, note 1, 15, para 48. In its recommendations the Report calls for interpreting IIAs 'in a holistic manner, considering in particular the international human rights obligations of States, the human rights responsibilities and obligations of investors and the human rights of individuals and communities' (Report, para 78(a)).

[20] This does not deny, however, the existence of the problem of legitimacy of investment arbitration as a forum to decide issues concerned with public policy based on broadly stated standards.

[21] Office of the High Commissioner for Human Rights Summary, note 3, 2, para 9.

[22] Ibid, 3–4, paras 12–15, 18.

[23] Ibid, 3–4, para 16. A negative feedback loop is possible because of this lack of transparency, where the fact that local communities are deprived of information needed to pursue their rights, is an unconscionable incentive for the investors to invest and pursue more exploitative strategies.

[24] See, e.g., United Nations Working Group Report, note 1, 6, para 15, considering IIAs as 'an embodiment of three characteristics: imbalance, inconsistency and irresponsibility'.

[25] Ibid, 23, para 76(c).

the view of this regional event, to be effective as a stand-alone step. This could play into the hands of authoritarian and *hybrid* states, which eagerly extended those protections to attract foreign capital, but would now gladly dispose of them to avoid liability for wrongful conduct. Instead, the discussion should aim at finding ways to level up the protections and guarantees available to civil society and individuals in host states, so that impediments to equally vigorous enforcement of their human rights can be removed. This would balance the protection found in two regimes – international investment law and international human rights law – by levelling up the available legal protection, rather than lowering it down.[26]

This is more important than ever. Until recently, the potential use of IIAs to seek legal remedies for human rights violations was articulated mainly with respect to Belarus, which was unique in Europe for its position of being a party to numerous IIAs, but not being party to the Council of Europe and therefore party to the ECHR. These observations will become even more relevant in the years to come, after Russia's expulsion from the Council of Europe, following its military invasion of Ukraine.[27]

International investment law can be seen as an ally, and not a foe, in the goal of promoting human rights from this perspective, especially if it is coupled with the development of binding human rights due diligence obligations in capital-exporting states. The CEE&CA Consultations confirm that the fair and equitable treatment (FET) standard, enshrined in virtually all IIAs, is closely related to the rule of law and can be a tool to improve good governance. This relationship has been presented in academic literature arguing that the FET standard, and even IIAs in general, should be understood as an embodiment of the rule of law.[28] The event also confirms the academic observations that FET can help to implement the rule of law domestically, particularly in developing countries.[29] As the Report observed, IIAs problematically provide 'privileged access to remedy for investors,' whereas a preferred situation is to 'strengthen national rule of law for all affected parties rather than only for the selected few'.[30] However, the CEE&CA Consultations indicated that IIAs can have a positive spill-over effect, and at the same time they recognize the host states' rights and duties to regulate to protect human rights. This can be seen in the example of the awards in cases initiated by tobacco companies with regard to the host states' rights to take legitimate measures to protect the right to health.[31] If foreign investors enjoy effective protection in developing states, and are at the same time effectively bound by duties to protect and promote respect for human rights along their supply chains and across all fields in which they have an

[26] Stanisław Drozd, 'The Real Cause and the Hard Cure for the "Regulatory Chill" of International Investment Agreements', *In Principle. Legal Studies and Analyses* (21 April 2021), https://codozasady.pl/en/p/the-real-cause-and-the-hard-cure-for-the-regulatory-chill-of-international-investment (accessed 8 November 2022).

[27] Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe (adopted by the Committee of Ministers on 16 March 2022 at the 1428ter meeting of the Ministers' Deputies).

[28] See, e.g., Velimir Živković, 'Fair and Equitable Treatment Between the International and National Rule of Law' (2019) 20:4 *Journal of World Investment & Trade* 513, 525–526 or Kenneth J Vandevelde, 'The Liberal Vision of the International Law on Foreign Investment' in Chin L Lim (ed.), *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (Cambridge: Cambridge University Press, 2016) 43, 61–62. Only a few awards explicitly recognize the direct relationship between the FET standard and the rule of law.

[29] Stephan W Schill, 'International Investment Law and the Rule of Law', ACIL Research Paper 2017-15, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932153 (accessed 8 November 2022).

[30] United Nations Working Group Report, note 1, 9, para 27.

[31] Ibid, 7–8, para 21, with relation to the 'tobacco cases', *Philip Morris v Australia*, PCA Case No. 2012-12 and *Philip Morris v Uruguay*, ICSID Case No. ARB/10/7. However, the Report criticizes IIAs for allowing proceedings to be conducted which 'entailed spending unnecessary time and resources in defending claims that should not have existed in the first place'. Such a strongly worded observation is striking. Procedural rights are no less important than substantive ones. Even if a claim is considered 'frivolous' by observers, in many domestic legal systems the courts must conduct a full proceeding before they can dismiss such a claim.

impact (imposed either in IIAs or in the home states' regulations), this may indeed lead to real positive change in developing states.

This is not to deny that the ultimate responsibility for protection and promotion of human rights must rest with the states. The responsibilities imposed on businesses in their overseas operations cannot substitute for proper interstate cooperation in enhancing respect for human rights across borders.

IV. Conclusions

The present paper is not intended to undermine the Report's analysis, conclusions or recommendations. Rather, its aim is to draw attention to three issues which seem unique for the 'stuck in transition' region of Central & Eastern Europe and Central Asia: (i) the regulatory chill caused by IIAs with respect to human rights regulations is moot in authoritarian and *hybrid* regimes in the region, (ii) that IIAs tend to be perceived in the region as tools to protect human rights, which can spill over to other areas of socio-economic life, and as a source of inspiration and a model for building similar protections in such other areas, and with the potential to (iii) have a positive impact on the development of domestic laws (and their relationship with the rule of law and good governance reforms in developing host states).

Further analysis is needed to go beyond the empirical value of the discussions held during the CEE&CA Consultations, and to determine why similar voices have not been heard with respect to *hybrid* and authoritarian regimes in other regions.

The role of IIAs may be seen differently in authoritarian and *hybrid* regimes, where governments are not motivated to regulate investments to protect human rights and are, therefore, not hindered by IIAs in their attempts to achieve that. Additionally, their role may be seen differently in states where good-willing governments act from a position of weakness towards powerful foreign investors – an imbalance that the IIAs may exacerbate.

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