scope of this legal duty to protect against the activities abroad of companies domiciled in the state? To what extent, if any, are home states *required* under international law to exercise jurisdiction to protect against human rights abuses of their companies abroad? To what extent *may* they do so? What are some of the trends we see in states' regulation of the activities of companies abroad? To what extent are any developments in this regard showing improvement in human rights conditions? These questions go to Sara.

7. A number of NGOs and a few states are advocating for a binding international instrument on corporate responsibility. Is such an instrument desirable? And how would such an instrument be structured to achieve legally binding human rights obligations for companies? These questions will be put to the entire roundtable, and all will be invited to offer a view along with any concluding remarks.

Resolution of Disputes Involving the Rights of Indigenous Peoples and Extraction of Natural Resources by Foreign Investors

By Ben Juratowitch[*]

The question put to me concerns a perceived tension between the state duty to protect human rights, specifically the rights of indigenous peoples, and other state obligations such as those owed to foreign investors under investment treaties. James Anaya's final thematic report as Special Rapporteur on the Rights of Indigenous Peoples noted that there are extractive projects that are in the interests of indigenous peoples in the area with the relevant natural resource, and also of non-indigenous investors.[1] That observation prompts me to remark that there is no inherent tension between rules of international law protecting the rights of indigenous peoples and rules of international law protecting foreign investment. The core substantive rules associated with most treaties concerning the protection of foreign investment include:

1. a prohibition on expropriation unless it is for a public purpose, non-discriminatory, and accompanied by the payment of appropriate compensation;
2. a prohibition on treating a foreign investor less favorably than a domestic investor or than an investor from a third state; and
3. that foreign investors must receive fair and equitable treatment.

The rights of indigenous peoples under international law relevant to the extraction of natural resources produce a longer list, but we could for discussion purposes perhaps summarize them as including:

1. the right to be consulted, in support of the protection of rights concerning:
   a. the environment, and
   b. a particular way of life,
2. and insofar as extractive activities are to take place on indigenous lands then,
   a. the importance of free, informed and meaningful consent to the project.

[*] Co-Head of the Public International Law Group of Freshfields Bruckhaus Deringer; Visiting Fellow at the London School of Economics; Lecturer at the University of Paris V.

[1] James Anaya, Report of the Special Rapporteur on the Rights of Indigenous Peoples: Extractive Industries and Indigenous Peoples, paras. 2, 8, 80, delivered to the Human Rights Council, U.N. Doc. A/HRC/24/41 (July 1, 2013).

There is nothing in that list of rules concerning the protection of foreign investment that is inherently in contradiction with any of those rights of indigenous peoples.

Tension can arise in particular factual circumstances. That is what gives rise to disputes, the proper resolution of which will vary with the facts. The starting point is to recognize that there is no inherent tension between the different applicable rules of international law. Those rules are expressed in broad terms. Tensions arise in the specific context of a particular project for the extraction of natural resources in a particular place, under a particular regulatory and contractual framework, and involving particular individuals, corporations and groups with their own characteristics and motivations.

The stage of a project at which such tensions might arise can have a material impact on how they might be resolved. If a decision is made by a state, after proper and non-discriminatory consultation and evaluation, that it is inconsistent with the rights of indigenous peoples for a proposed extractive project even to be granted regulatory approval to commence, one would not ordinarily expect to find a dispute about a breach of investment protection rules. Difficulties can arise if a project is approved and capital is sunk, and then the state changes the rules, possibly in response to changes over time in relevant interests and their expression. Since every case will be different, general answers are, of course, not possible, but it is possible to propose for discussion general mechanisms that might be considered for application to specific cases as they arise.

The first is the inclusion of human rights principles, and in particular rights of indigenous peoples, as part of a contract between the state and the foreign investor, or perhaps a multi-party contract also including an entity representing the relevant indigenous community. These kinds of contractual terms can express—in a form agreed by those concerned to be appropriate to the specific project—the rights and obligations of the various interested parties. Such a contract could stipulate one or more agreed methods to resolve any disputes that might arise over time. A contract of this kind might, as Professor Anaya noted in his reports as Special Rapporteur, involve equity participation of indigenous communities, and therefore a stake in both the rewards and the risks of the project.

A second mechanism is that which has has been included in some more recent investment treaties, a provision concerning the regulatory freedom of states in fields such as environmental protection and health policy. That could equally include protection of indigenous rights. This is the subject of an observation that the United Nations Working Group on the Issue of Human Rights and Transnational Corporations made to the General Assembly last year about the importance of states preserving their freedom of action to regulate as necessary.[2] Examples like the investment treaty between Canada and Venezuela,[3] the 2012 United States model bilateral investment treaty,[4] the International Institute for Sustainable Development Model International Agreement on Investment for Sustainable Development,[5] and the draft Norwegian model bilateral investment treaty,[6] provide guidance on the regulatory freedom of the host state of the investment, rather than leaving the interpretation of broadly expressed

[2] Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, para. 16, delivered to the General Assembly, U.N. Doc. A/68/279 (Aug. 7, 2013).

[3] Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, Annex art. 10, July 1, 1996, C.T.S. 1998/20.

[4] Government of the United States, U.S. Model Bilateral Investment Treaty, arts. 8(3)(c)(ii), 12(3)–(5), 2012.

[5] International Institute for Sustainable Development, IISD Model International Agreement on Investment for Sustainable Development, arts. 21, 25(A)–(B), Apr. 2005.

[6] Government of Norway, Draft Model Agreement for the Promotion and Protection of Investments, preamble paras. 3, 7, 8, 10, arts. 8(2), 9(3)(ii)(d), 12, 24(ii), 24(iv), 24(v), 27, Dec. 19, 2007.

investment protections such as the fair and equitable treatment standard to be applied by specific tribunals in specific cases without further guidance from the state parties to the treaty on how they intended such protections to operate.

A third mechanism is harmonious interpretation, an interpretive technique reflected in Article 31(3)(c) of the Vienna Convention on the Law of Treaties. One example is the case brought against South Africa by foreign investors challenging a change in South Africa's regulation of the mining industry. The continuation of a right to mine was made subject to an obligation on mining companies to have a specified percentage of their equity owned by historically disadvantaged South Africans. This regulatory change was defended by South Africa in part on the basis that apartheid had placed South Africa in breach of a peremptory norm of international law. South Africa emphasized that the economic consequences of apartheid were ongoing, making it subject to a continuing obligation to remedy those consequences. The Committee on the Elimination of Racial Discrimination had recognized the importance of affirmative action measures of this kind for South Africa.[7] South Africa's position was that it had obligations under customary international law to remedy the ongoing consequences of its historical breach of a peremptory norm, and under the Convention on the Elimination of Racial Discrimination—both of which should be taken into account by a tribunal interpreting the meaning of fair and equitable treatment in investment treaties invoked to allege that regulatory measures designed to address the economic legacy of apartheid were contrary to the rights of foreign investors. That is an example of a state requesting that an international tribunal harmoniously interpret different rules of international law binding on the states concerned and relevant to the subject matter of the dispute.

That brings us to soft law instruments, the fourth point. Harmonious interpretation under Article 31(3)(c) of the Vienna Convention on the Law of Treaties, of course, concerns rules of international law, and it is difficult to see how the interpretive rule in that particular article would support the use of soft law principles like the United Nations Guiding Principles on Business and Human Rights, or the Equator Principles, as tools for treaty interpretation. In some cases principles of that kind might, however, be relevant to evaluating conduct, including where that evaluation is performed by human rights courts, or by tribunals applying investment treaties in circumstances where the conduct of an investor may be legally relevant.

The fifth and last suggestion I will make, before welcoming further comments that others might have, is a procedural one. When international tribunals, whether human rights courts, investment treaty tribunals, or others, adjudicate disputes involving the rights of indigenous peoples and extraction of natural resources by foreign investors, the participation of non-disputing parties may in some cases be a way to facilitate all relevant points of view being before an international tribunal vested with jurisdiction to resolve a dispute. The different perspectives that might be put before the tribunal in this way may concern matters of law or of fact.

So our starting point is that there is no inherent contradiction between rules of international law concerning the rights of indigenous peoples and those concerning protection of foreign investment. Tensions may arise in the application of those rights to specific facts, and in the taking into consideration of potentially competing interests. Those are five mechanisms through which such tensions might, or might not, be addressed in specific cases.

[7] Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations on the Report Submitted by South Africa, para. 10, U.N. Doc. CERD/C/ZAF/CO/3 (Oct. 19, 2006).