This may pose a challenge, but tribunals have shown that they can adapt through processes of interpretation—environmental considerations were introduced into WTO law less by agreement of the parties and more by the actions of WTO panels and the WTO Appellate Body—famously in the *Shrimp* case but also in *Asbestos* and *Brazil-Tyres*.[7] But, nonetheless, for many these changes have been only incremental and do not go far enough. And so, leaving matters of human rights, environmental concern, and public health to the vagaries of panel or investment tribunal decision is unlikely to be regarded as a satisfactory solution.

Further, notwithstanding the rhetoric and the modifications that have been made in new agreements or in model bilateral investment treaties, it is not clear that states are really committed to rethinking substantive obligations in investment agreements. Simply taking the language of General Agreement on Tariffs and Trade Article XXIV and inserting it into investment agreements as if what works for trade agreements must work for investment agreements, or dusting off old proposals on dispute settlement made to the WTO and presenting them as new innovative proposals for investment agreements, or taking the language that exists in investment case law and presenting it as a new approach to substantive provisions in investment agreements, is hardly rethinking approaches to investment agreements at either the substantive or the procedural level. And they all give rise to difficulties of interpretation that they were meant to displace. Nor do I think these problems will be miraculously solved by appointing to dispute settlement tribunals individuals with judicial rather than arbitral experience, particularly if they have no background or expertise in international investment law.

What has to be done, then, not just by scholars, nongovernmental organizations, and other commentators, but by states themselves, is to engage in serious thinking about existing substantive obligations, about how new obligations are to be worded and what effect they will be given through interpretation in dispute settlement. Only in this way will issues such as human rights, environment, and public health be able to find a significant place in investment agreements.

Rebalancing Rights and Duties of States and Investors

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*By Marcos Orellana**

The debate over rebalancing the rights and duties of states and investors requires a broader view of the actors implicated in investment disputes. Rebalancing also requires addressing asymmetries apparent in the legal mechanisms of accountability.

Rebalancing Requires a Broader View of the Actors Involved—Not Only States and Investors

The attention received by investor-to-state arbitration as a means to addressing investment disputes can lead to an erroneous perception or false predicament: that only the rights and duties of states and investors matter in the search for balance in the investment field. But investment law and

[7] Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998); Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/R (Apr. 11, 2001), and Add.1, as modified by Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS135/AB/R (June 12, 2007) and Panel Report, WTO Doc. WT/DS332/R, as modified by Appellate Body Report, WTO Doc. WT/DS332/AB/R.

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policy is broader than investor-to-state arbitration; it involves other actors that are directly and indirectly affected or concerned about the impacts of investments. Furthermore, investment law cannot be rebalanced in isolation of other areas of law and policy relevant to the rights and duties of actors active in the investment landscape.

A clear example of other actors in the investment landscape is local communities affected in their means of subsistence by extractive industries. How many times have we seen reports of a local community deprived of access to clean water and food as a result of an investor polluting the river upon which its sustenance depends? The impairment of the right to a healthy environment, the right to water, or the right to food cannot be ignored in the efforts at rebalancing. Moreover, the proliferation of conflicts over environment and natural resources is leading to increasing attacks against environmental defenders, as was reported by the Special Rapporteur on Human Rights Defenders to the UN General Assembly last year.

Another set of actors relevant to the investment landscape is civil society. Public interest civil society organizations investigate and expose economic activities that profit from the gradual destruction of the planet. Those situations involve individual and community interests as well as global public interests. Capturing those interests in a debate over rebalancing rights and duties calls for a broader view of the actors that appear in the investment landscape. While civil society organizations are often invisible in investment arbitration, especially when it is conducted without transparency and public participation, their rights cannot be ignored in the efforts at rebalancing rights and duties of states and investors.

Rebalancing is not just about convening a broader set of actors to the conversation, however. It is also about the legal tools needed to ensure that investors respect fundamental rights. Corporate social responsibility is in this regard an important but insufficient element in the effort at building bridges between the various actors involved. Rebalancing is not just about setting up a company foundation to support schools and educational programs. Charity does not substitute for actual respect for rights. Moreover, so often foundations are used to try to divide communities to pave the way for corporate interests. The case of Pacific Rim in El Salvador is a case in point. The presence of the company and its associated foundation in the community resulted in the murder of environmental defenders.

Rebalancing Requires Addressing Asymmetries in the Mechanisms Available for Accountability

Even where the rights of local communities affected by investments are recognized, the mechanisms established to secure their respect suffer from serious limitations. Asymmetries penetrate deep in international legal structures. A clear example is an old norm of customary law: the international law on state responsibilities for injuries *to* aliens. But where is the law on state responsibility for injuries *by* aliens?

Expert commentary informing the debate at the UN International Law Commission on its Articles on State responsibility was not silent on this question. Particularly apposite was the analysis of the responsibility of home states for the export of dangerous technologies that resulted in harm to numerous individuals, such as the tragedy in Bhopal, India. Those questions are not going away, and indeed they are returning under the frame of extraterritorial human rights obligations. Human rights treaty bodies, monitoring bodies, and special rapporteurs have addressed these obligations, elaborating on their bases of jurisdiction, content, and scope. Nongovernmental organizations are seeking ways to hold home states accountable where investors of their nationality, i.e., corporations that exist by virtue of the internal law of that state, impair the rights of individuals and local communities abroad.

Addressing asymmetries apparent in the mechanisms available for accountability also calls for attention to the inadequacy of ISDS. The critique of ISDS is no longer an esoteric legal discussion entertaining a specialist legal community. Broader audiences and public opinion are debating its

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democratic deficits and how it entrenches privileges only available to the powerful in society. The independent expert on the promotion of a democratic and equitable international order has denounced how ISDS is an affront to democracy and the rule of law. For many years, nongovernmental organizations have voiced concerns regarding the loss of regulatory space for the protection of human rights and the environment. Or, in other words, how ISDS is posing an obstacle to sustainable development, at a time when the global scientific consensus is calling for urgent measures to safeguard planetary boundaries in the face of destructive investments.

ISDS is not just inadequate, however; investigative journalists have exposed how criminals resort to ISDS to avoid prosecution. For example, their reports show how corrupt businesses use ISDS to avoid investigations in Egypt and elsewhere. Nongovernmental organizations similarly have decried how ISDS has been abused by corporations to blackmail governments to adopt policies in their favor, such as in the case of Pacific Rim versus El Salvador mentioned above. In that case, when the government did not provide the company with mining permits—to which it had no right under internal law—and when the government did not change the mining law to favor the company, the investor initiated ISDS claims.

Addressing asymmetries in the mechanisms for accountability should also confront impunity where investors harm the rights of communities. Confronting impunity may require reforming the Rome Statute of the International Criminal Court, so that when the Office of the Prosecutor receives a complaint from indigenous communities decimated by the systematic and widespread destruction of the Amazon rainforest perpetrated by an oil company, it may have the authority to investigate. Legal changes due include establishing criminal responsibility of corporations and clarifying the environmental dimensions of crimes against humanity.

Confronting impunity was also an important driver for the UN Guiding Principles on Business and Human Rights, adopted by the Human Rights Council in 2011. But their voluntary character also evidences their limitations. States such as France are beginning to adopt internal legislation for mandatory due diligence, including in respect to extraterritorial elements of supply chains. The efforts to establish legal standards for corporate accountability resonated also at the council in 2014, when it decided to negotiate a treaty on transnational corporations and human rights. That discussion is in its early stages, and it has already identified key elements of the debate, including international duties of businesses, mechanisms for international cooperation, and effective remedies for victims. While it is still early to gauge progress, the initiative is in itself an expression of renewed efforts at addressing asymmetries in the mechanisms for accountability.

Heading Off Disputes by Paying Attention to Human Rights in Foreign Investor/Host State Contract Negotiations

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*By John F. Sherman III**

Other panelists have talked about the increasing relevance of human rights to bilateral treaty arbitrations between governments and foreign investors. This is a very important development.

* General Counsel, Shift New York. Shift, Who We Are, *at* https://www.shiftproject.org/who-we-are/team/john-f.-sherman-iii/. My remarks draw heavily from Professor John Ruggie's Keynote Remarks at the Association of International Petroleum Negotiators in Washington, D.C. (April 20, 2012), *at* https://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-remarks-association-intl-petroleum-negotiators-20-apr-2012.pdf [hereinafter Ruggie]. I also wish to thank Andrea Saldarriaga of the London School of Economics for her advice.