

Sustainable Views

On the spot

Will investors end up in court over the right to development?



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What is the right to development and why does it matter?

The right to development is a right which the UN General Assembly proclaimed in 1986 as an inalienable human right held by individuals and peoples that entitles them to active, free and meaningful participation in economic, social, cultural and political development, and in the fair distribution of the benefits that flow from that development. The UN Sustainable Development Goals (SDGs) 2030 agenda reaffirms the right to development and says that there is a symbiotic relationship between the right to development and sustainable development.

While states may comply with their obligations vis-à-vis their own people, within their own jurisdiction, when you look at the international arena and the level of international cooperation, you could say that compliance with the right to development has, in fact, failed.

Has anyone gone to court over it?

We are not talking about a right which has been litigated in international courts as such. Having said that, there have been express references to the right to development in cases before the African Commission on Human and People's Rights. And there have been cases where sustainable development, which is one aspect of the right to development, has been mentioned specifically in various international tribunals, including the International Court of Justice.

Since the adoption of the SDGs in 2015, about 224 international investment agreements have been concluded and nearly a third (31%) of those include provisions that address the

SDGs directly. That means that sustainable development is now an integral part of investment agreements which are going to govern the relationship between two or more countries, and states and investors, for years to come. While that 31% is not a big figure, it is an indisputable, if modest, step forward.

Should investors prepare for litigation?

In some countries, they will at least need to prepare for a battle over whether or not they enjoy the protection of bilateral investment treaties (BITs). For example, the definition of 'investment' in the 2016 Morocco-Nigeria BIT requires a foreign investor to make a contribution to the sustainable development of the host country. As this is a new treaty, we do not yet know how this provision is going to be interpreted and enforced in practice. But on the face of it, if the investment does not contribute to the sustainable development of the host country, the investor will not be protected by the treaty. It may well be that there is no remedy for that investor, even if it has suffered a loss. This and other new treaties (such as the 2016 Canada-Mongolia BIT or the 2021 Georgia-Japan BIT) demonstrate that sustainable development is no longer merely an aspiration, but a legal reality that affects the rights and obligations of states and investors, and in turn ordinary people in the host countries of the investments.

Are these measures actually going to bite?

For the reasons given above, these new provisions in BITs will have an effect. What is not yet clear is how strictly these provisions will be interpreted. Will the investor have to prove a quantifiable and significant or meaningful contribution to the development of the host state? Or is the provision merely describing the hope that investment in general will contribute to sustainable development? The answers to these questions may depend partly on technical interpretations. Irrespective of these, states may now use any lack of contribution to sustainable development as a basis on which to deny that the investment enjoys the protection of the treaty. The presence of sustainable development in investor-state dispute settlement is here to stay.

The views expressed herein are personal and do not necessarily reflect the views of the UN.