Investor “responsibility” to respect human rights in the context of the Energy Charter Treaty

Art. 4.1(b)
INVESTOR “RESPONSIBILITY” TO RESPECT HUMAN RIGHTS IN THE CONTEXT OF THE ECT

1. Do investors have human rights “obligations” under public international law?

2. Is the corporate “responsibility” to respect human rights relevant to investment protection under the ECT?
Do investors have human rights “obligations” under public international law?

A. Investment treaties?

B. Human rights treaties?

C. International business and human rights (“BHR”) instruments?
A. Investment treaties?

- No express human rights obligations for investors to date
- Proposals for investor human rights obligations not adopted
  - IISD’s Model (2005) imposes obligations on investors in Article 14:
    
    Investors . . . should uphold human rights . . . shall not undertake or cause . . . acts that breach such human rights . . . shall not be complicit with, or assist in, the violation of the human rights by others in the host state, including public authorities ... The Parties shall, at their first meeting, adopt a list of international human rights instruments to assist investors in complying with this Provision.

- Several investment treaties incorporate CSR standards
  - Brazil-Malawi Investment Agreement (2015), Article 9
    “Investors shall strive to . . . [adopt] a high degree of socially responsible practices…”
  - Canada-Colombia FTA (2008), Article 816
    “Each Party should encourage enterprises [within its territory or jurisdiction] to voluntarily incorporate internationally recognized standards [CSR]”.


B. Human rights treaties?

• Applicable to States, not corporations

  o J. Crawford, Amicus in Presbyterian Church of Sudan et al. v. Talisman Energy Inc. (23 June 2010)

    “True, it has been held that corporations may be beneficiaries of international human rights. But currently responsibility under all the human rights treaties, universal and regional, is exclusively that of the State. Thus, under current international human rights law, there is no basis for holding corporations directly responsible.”


    “In conclusion, it does not seem that the international human rights instruments discussed here currently impose direct liabilities on corporations.”
B. Human rights treaties?

- One recent ICSID award claims otherwise

  Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award (2016), paras. 1193,1210:

  “A principle . . . according to which corporations are by nature not able to be subject of international law and therefore not capable of holding obligations as if they would be participants in the State-to-State relations governed by international law ... has lost its impact and relevance...”

After reviewing CSR standards, the UDHR, ILO instruments, the Tribunal proclaimed, “an obligation to abstain, like a prohibition to commit acts violating human rights ... can be of immediate application, not only upon States, but equally to . . . private parties.”
C. BHR instruments?

1) Previous efforts

2) Current effort

3) Proposed treaty
C. BHR instruments?

1) Previous efforts

- UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003), Article 1

“Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.”
C. BHR instruments?

2) Current effort

- United Nations Guiding Principles on Business and Human Rights (“UNGPs”), Commentary to the Introduction

“The Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.”
C. BHR instruments?

Polycentric Governance Approach

1st Pillar
- States
  - Legal obligation to protect human rights from abuses

2nd Pillar
- Business Sector
  - Risk management of involvement in potential human rights abuses and due diligence approach

3rd Pillar
- Affected Communities
  - Effective access to judicial and non-judicial remedies
C. BHR instruments?

**UNGP No. 1:**

“States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”.

**UNGP No. 2:**

“States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”
C. BHR instruments?

UNGP No. 11:

“Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”

1. Definition

‘[The corporate] responsibility to respect is defined by social expectations’ – as part of what is sometimes called a company’s social license to operate … [and] “doing no harm” is not merely a passive responsibility for firms but may entail positive steps. To discharge the responsibility to respect requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts.’

SRSG Report 2008
C. BHR instruments?

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SRSG Report 2008
C. BHR instruments?

3) Proposed treaty

- UN Human Rights Council, 26th session, June 25, 2014 Res. 26/90

“The Human Rights Council […] 1. Decides to establish an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights, the mandate of which shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”.
INVESTOR “RESPONSIBILITY” TO RESPECT HUMAN RIGHTS IN THE CONTEXT OF THE ECT

1. Do investors have human rights “obligations” under public international law?

2. Is the corporate “responsibility” to respect human rights relevant to investment protection under the ECT?
Is the corporate “responsibility” to respect human rights relevant to investment protection under the ECT?

A. Jurisdictional clauses?

B. Applicable law clauses?

C. Entry points for human rights responsibility:
   1. Legality clauses?
   2. Implicit legality requirement?
   3. Counterclaims?
   4. Interpretive devices for substantive standards?
   5. Calculation of damages?
A. Jurisdictional clauses?

- Argentina – France BIT (1991), Article 8

  “[disputes] relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party.”

- ECT, Article 26(1)

  “[disputes] which concern an alleged breach of an obligation of the former under Part III.”
B. Applicable law clauses?

- Spain-Argentina BIT (1991), Article X(5)

“The arbitral tribunal shall make its decision on the basis of this Agreement and, where appropriate, on the basis of other treaties in force between the Parties, the domestic law of the Party in whose territory the investment was made, including its norms of private international law, and the general principles of international law.”

- ECT, Article 26(6)

“A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.”
C. Entry points for human rights “responsibility”

1. Legality clauses?
2. Implicit legality requirement?
3. Counterclaims?
4. Interpretive devices for substantive standards?
5. Quantification of damages?
1. Legality clauses?

- Organization of the Islamic Conference Investment Agreement (1981), Article 9

  “The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.”

- ECT has no legality clause
1. Legality clauses?

- These are admissibility or jurisdiction clauses (i.e., denial of investment projection)

- One recent UNCITRAL award clamed otherwise (i.e., substantive obligation for the investor)

_Hesham T. M. Al Warraq v. Republic of Indonesia_, UNCITRAL, Final Award (2014), paragraph 663

“Article 9 imposes _a positive obligation on investors_ to respect the law of the Host State, as well as public order and morals. An investor of course has a general obligation to obey the law of the host state, but _Article 9 raises this obligation from the plane of domestic law (and jurisdiction of domestic tribunals) to a treaty obligation binding on the investor in an investor state arbitration_.”
1. Implicit legality requirement?

- Admissibility or jurisdiction denied for illegal investments on the basis of:
  - Good faith
  - Clean hands doctrine
  - International public policy

- Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (2008), paragraph 138.

  “Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law.”
3. Counterclaims?

• Argentina-Spain BIT (1991), Article X(3)
  “The dispute may be submitted to an international arbitral tribunal (...) \textit{at the request of either party} to the dispute”

• ECT, Article 26(2)
  “the \textit{Investor party to the dispute} may choose to submit [the dispute] for resolution”

• ICSID Convention, Article 46
  “Except as the parties otherwise agree, the Tribunal shall, if requested by a party, \textit{determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute} provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.”
3. Counterclaims?

- No counterclaims based on any human rights “obligations” or “responsibilities” of investors

- One recent ICSID award claimed otherwise

_Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award (December 2016), paras. 1183, 1189, 1208, 1210_

“There is no provision stating that the investment’s host State would not have any right under the BIT...Recourse to the ‘general principles of international law’ [in the applicable law clause] would be meaningless if...the BIT [had as its] sole purpose protecting investments through rights exclusively granted to investors...”

“The human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation of for performance on part of an company providing the contractually required service...An obligation to abstain, like a prohibition to commit acts violating human rights ... can be of immediate application, not only upon States, but to ... private parties.”
4. Interpretive devices for substantive standards?

a) Preambles
b) Systemic integration
c) Proportionality analysis
d) Due diligence obligation
e) Interpretive declarations
4. Interpretive devices for substantive standards?

a) Preambles

- Establish object and purpose within the meaning of Article 31(1) VCLT
- No human rights obligations of investors in preambles to date
- Proposals for investor human rights obligations not adopted
  - IISD’s Model (2005), Preamble
    “Seeking an overall balance of rights and obligations in international investment between investors, host countries and home countries . . .
    “Affirming the progressive development of international law and policy on the relationships between multinational enterprises and host governments as seen in . . . the United Nations’ Norms and Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”.
- Several preambles incorporate CSR standards
4. Interpretive devices for substantive standards?

b) Systemic integration

- Derives from Article 31(3)(c) VCLT: take into account “any relevant rules of international law applicable in the relations between the parties”
- Required under the ECT, Article 26(6)

Tribunals shall decide in accordance with “applicable rules and principles of international law.”

c) Proportionality analysis

- Derives from specific systems of regional and domestic law
- Contested as a principle of international law
4. Interpretive devices for substantive standards?

d) Due diligence obligations

- Derive from nature of certain substantive standards, including:
  - Full protection and security
  - Fair and equitable treatment
  - Non-discrimination
- Also constitute the foundation of the corporate responsibility to respect
4. Interpretive devices for substantive standards?

e) Interpretive statements

• Endorsed by VCLT Article 31(3): take into account “[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”

• NAFTA Free Trade Commission’s “Notes of Interpretation of Certain Chapter Eleven Provisions”

• Permitted by ECT, Article 1(13)

  “[A] non-binding instrument, the negotiation of which is authorized and the text of which is approved by the Charter Conference, which is entered into by two or more Contracting Parties to complement or supplement the provisions of this Treaty.”
5. Quantification of damages?

- All of the other techniques can play a role in quantum (e.g., due diligence, proportionality, good faith, clean hands)

- Investor’s conduct can reduce or eliminate damages
  - *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (2004), para. 246
    
    “[T]he Tribunal considers that the Claimants should bear the consequences of their own actions.”

  - *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (2016), para 847
    
    “The protection afforded by the standard of fair and equitable treatment cannot provide redress where the failure of the Concession is predominantly attributable to the failure on part of Claimants to make the required investment (…) Consequently, the Tribunal dismisses Claimants’ requests for payment of damages in this respect.”
5. Quantification of damages?

• Damages mitigation possible under the ECT

_Yukos Universal Limited (Isle of Man) v. The Russian Federation_, UNCITRAL, para. 1633

“[A]n award of damages may be reduced if the _victim of the wrongful act of the respondent State also committed a fault_ which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility.”
Art. 4.1(b)