

Changes in the Balance of Rights and Obligations: Towards Investor Responsabilization

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- Introduction
- Classical approach: States have obligations and investors have rights
- Emerging trend in favour of a rebalancing of rights and obligations of States and investors
 - Increased attention to the definition of substantive provisions
 - Other standards of protection are gaining traction, e.g., the right of a State to regulate in the field of environmental and health protection
- Moreover, a move from investor protection to investor responsabilization
 - Recent treaties, and most notably in investment treaties and facilitation agreements negotiated on the African continent
 - Customary international law

1. Investor responsabilization in investment treaties and facilitation agreements

- Bilateral as well as regional treaties
- Focus on investment protection as well as on investment facilitation
- Growing embedment of idea that investors have rights but also obligations
- Responsabilization through the respect of domestic laws
- Responsabilization through the respect of specific treaty provisions
- Responsabilization through the respect of corporate social standards

1.1 Responsabilization through the respect of domestic laws

“COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made

- Article 13, Common Market for Eastern and Southern Africa (COMESA) Investment Agreement

“Investors and Investments shall comply with all laws, regulations, administrative guidelines and policies of the Host State concerning the establishment, acquisition, management, operation and disposition of investments”

- Article 11, Southern African Development Community (SADC) Model Bilateral Investment Treaty (BIT)

1.2 Responsabilization through the respect of specific treaty provisions

“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.”

- Article 9, Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference.

“[i]nvestors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the host State, including by public authorities or during civil strife.”

- Article 15-1, SADC Model BIT

1.3 Responsabilization through the respect of corporate social standards

“In addition to the obligation to comply with:

- all applicable laws and regulations of the host member State;
- and the obligations in this Supplementary Act and in accordance with;
- The size, capacities and nature of an investment, and taking into account;
- The development plans and priorities of the host State;
- The Millennium Development Goals and;
- The indicative list of corporate social responsibilities agreed by the member States”

Article 16 (1), Economic Community of Western African States (ECOWAS)
Supplementary Act on Common Investment Rules for the Community

1.4 The “highest level of protection” to be reflected in corporate social standards

“Where standards of corporate social responsibility increase, investors should endeavor to apply and achieve the higher level standards”

- Article 16 (2), Economic Community of Western African States (ECOWAS) Supplementary Act on Common Investment Rules for the Community

“The investor and investments shall strive to carry out the highest level possible of contributions to the sustainable development of the host State and the local community, by means of the adoption of a high degree of socially responsible practices, taking as a reference the voluntary principles and standards defined in Annex II ‘Corporate and Social Responsibility’”

- Article 10, Cooperation and Facilitation Agreement between Brazil and Mozambique, December 2010

1.5 Other types of references

“Each Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption”

- Article 16, Canada – Benin Bilateral Investment Treaty, January 2013

2. Investors' obligations and customary law

“It is evident to the Tribunal that the same holds true in international investment law and that the ICSID Convention’s jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles. To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs”

Phoenix Action Ltd. v Czech Republic ICSID Case No ARB/06/5, *Award* v 15.4.2009, para. 75

2.1 The *Urbaser* case: context

- Argentina: privatization of drinking water in the 1990s
- Later takeover by state entities
- Urbaser is one of the numerous shareholders companies that entered into a concession agreement with Argentina following Argentina's economic crisis and privatization
- As a concessionaire, Urbaser supplied water and sewerage services in the Province of Buenos Aires replacing the public manager

2.2 The *Urbaser* case: interpretation of the applicable law

“1195. The Tribunal may mention in this respect that international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities’ operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law. On the other hand, even though several initiatives undertaken at the international scene are seriously targeting corporations human rights conduct, they are not, on their own, sufficient to oblige corporations to put their policies in line with human rights law. The focus must be, therefore, on contextualizing a corporation’s specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual”

Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, para. 1195

2.2 The *Urbaser* case: interpretation of the applicable law

“1198. The International Labor Office’s Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy (of 1977, as amended in 2006) states that all parties concerned by this Declaration should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations (principle 8)”

Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, para. 1198

3. Further options for responsabilizing investors

3.1 Use of Counter-claims by States

- “The fact that the Contracting Parties imposed treaty obligations on investors (which the Claimant assented to by accepting the open offer of investment arbitration made by the Respondent in the OTC Agreement) confirms the interpretation of Article 17 that permits counterclaims by the respondent state”
- Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, 2014, para. 667

3.2 Further options for responsabilizing investors

Role of domestic courts

- “Investors and Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State. 17.2. Home States shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investors in relation to their Investments in the territory of the Host State”
- Article 17, Southern African Development Community (SADC) Model Bilateral Investment Treaty (BIT)



Thank you for your kind
attention

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