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Perspectives on topical foreign direct investment issues

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Materializing corporate social responsibility in investor-state dispute settlement

by

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Increasing references to the concept of corporate social responsibility (CSR) are a relatively recent phenomenon in international investment agreements (IIAs).[1] Most CSR provisions serve only as a reaffirmation by contracting parties of the importance of encouraging enterprises to voluntarily incorporate international CSR standards into their internal policy: this may reflect the understanding of CSR as action beyond legal requirements.

However, in today's context, considering CSR as only a series of voluntary commitments is no longer tenable. CSR increasingly interacts and integrates with legal obligations in various ways, as discussed below. Accordingly, there are circumstances in which a breach of CSR commitments by a corporation may cause legal responsibility. In investor-state dispute settlement (ISDS), this suggests the possibility that a host country may pursue an investor's CSR-based responsibility through counterclaims.

Host countries may turn CSR commitments into legal requirements through such actions as requiring them as a condition to receive licenses for the operation of businesses.[2] However, even in the absence of such a direct legal relationship, a corporation's voluntary commitments may give rise to legal responsibility, in different ways. First, when an MNE's internal regulations are found to set the required standards for the group's operations in multiple jurisdictions, corporate conduct that falls below required standards and results in damage may cause corporate liability through domestic law. The *Erika* case, concerning an oil spill on the French coast, is an example of how such conduct formed the basis of corporate liability through criminal law.[3]

Second, corporations often publish their codes of conduct, CSR reports and other types of commitments. They do so for different reasons, including to express their affirmation that they do bear social responsibilities, marketing purposes and responding to reporting requirements. It should be noted here that, since the beginning of the 21st century, the EU,[4] as well as certain countries,[5] have introduced laws and regulations that make social and environmental reporting a mandatory requirement. Once they are

published, they may create expectations in host countries and their societies that, when there is a gap between stated commitments and local standards, investors would apply the former. Societal expectations thus created may affect the determination of the standard of diligence or required conduct as an element of duty,[6] and thereby contribute to the establishment of tort liability in situations where a corporation's conduct fell below the stated standards and resulted in damage.

The judgment of the Ontario Superior Court of Justice in *Choc v. HudBay Minerals Inc*. is suggestive in this regard. In this case, the court concluded that the parent Canadian mining company directly owed a *prima facie* duty of care to the victims with respect to the harm caused by security personnel it authorized. In reaching this conclusion, the court stated, *inter alia*, that the expectations of local people concerning the standards of corporate conduct created by "public representations" made by the parent company gave rise to "sufficient proximity" between the parties, justifying the imposition of a duty of care on the parent company.[7]

More generally, when an investor's CSR-based legal responsibility is established by reference to the domestic law of the host country in the ways described above, it may provide legal grounds for counterclaims by host countries, provided that the conditions for filing counterclaims are met.

Given the discussed practical implications of CSR, and in light of the increasingly felt need to address the "one-sidedness" in investment-dispute settlement, future negotiations of IIAs should take the importance of CSR one step further. A progressive approach is adopted in Article 19 of the Morocco-Nigeria BIT, which requires investments to meet or exceed "national and *internationally* accepted standards in corporate governance" (emphasis added), as well as establish and maintain "local community liaison processes."[8] This is the direction that advances responsible investment in the IIA regime, and it should be taken in future IIA negotiations.

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[1] Among 1,000 randomly analyzed treaties, 59 IIAs mention this concept; 54 of them were signed after 2010.

[2] See, e.g., Oman's Mining Law (Royal Decree No. 27/2003) and executive regulations under Ministerial Decision No. 77/2010.

[3] "Communiqué relatif à l'arrêt no. 3439 du 25 septembre 2012 (10-82.938) de la Chambre criminelle" (Press release relating to judgment no. 3439 of Sept. 25, 2012 (10-82.938) of the Criminal chamber).

[4] On 21 April 2021, the EU revised the Non-Financial Reporting Directive based on the European Commission's proposal for a Corporate Sustainability Reporting Directive and extend the scope of companies subject to the reporting requirement and the scope of sustainability information to be disclosed. The first set of EU sustainability reporting standards will be adopted by October 2022.

[5] For a list of domestic laws on non-financial reporting of different countries, see "Global CSR disclosure," *Initiative for Responsible Investment*.

[6] Hervé Ascensio, "Les activités normatives des entreprises multinationales," in Laurence Dubin, Pierre Bodeau-Livinec, Jean-Louis Iten, and Vincent Tomkiewicz, eds., *L'entreprise multinationale et le droit international*, (Paris: Pedone, 2017), pp. 275–6.

[7] Angelica Choc v Hudbay Minerals Inc., ONSC 1414 (2013), para. 69.

[8] Morocco-Nigeria BIT (2016), Art. 19(1).

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