

PROTECTING HUMAN RIGHTS AND PRESERVING THE BENEFITS OF ISDR

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It is a privilege to participate in the ASIL Annual Conference. My hope in doing so is to learn from the other panelists, and to provide a perspective that does not appear to be well represented in ASIL discussions—that of the corporate investor. The practical realities seen from that perspective are often missing from academic presentations, and are not fully covered by presenters from the private bar who represent investors. When ASIL convenes panels to discuss international law topics that involve business, including a corporate participant may add value to the discussion.

Under the heading of “Balancing Rights and Obligations of States and Investors,” this panel takes up at least three separate topics: First, the benefits of voluntary corporate social responsibility efforts in the field of human rights with special attention to the UN Guiding Principles on Business and Human Rights. Second, the assertion that the rights and obligations of states and investors in investor-state dispute resolution (ISDR) need to be “rebalanced” because the current system unduly favors investors at the expense of states. Third, whether human rights obligations on corporations should be made part of ISDR through the addition of parties or the assertion by governments of broad human rights claims as part of ISDR.

My perspective on these topics is the following: first, the approach to corporate social responsibility reflected in the UN Guiding Principles offers great potential benefits to both investors and citizens, particularly by establishing a principled framework for identifying potential human rights issues and defining with specificity the investor’s role in preventing them at the outset of a project. Second, the assertion that ISDR needs rebalancing because it unduly favors investors lacks any empirical basis and instead represents an attempt to politicize and diminish a dispute resolution process that facilitates private investment. Third, with respect to ISDR and human rights: to the extent concrete and specific obligations on the part of investors are made explicit at the outset of a project, both national courts and ISDR give states ample opportunity to enforce them, but inclusion of vague principles and obligations into ISDR in the name of human rights will serve only to complicate and diminish the utility of ISDR as a neutral adjudicatory process.

Chevron has been active with respect to CSR as reflected in the UN Guiding Principles on Business and Human Rights since at least the 1990s, culminating in the adoption of a corporate Human Rights Policy in 2009. Chevron was one of the first of its peer companies to adopt a formal human rights policy. The implementation of that policy has involved training for all employees, and more specialized training for those directly involved in projects where human rights issues are deemed more likely to arise. It has involved human rights–related assessments at the outset of project planning and execution. And it has involved the creation and maintenance of frameworks for consultation and discussion with communities in the vicinity of projects. These types of activities can lead to very positive outcomes in terms of defining and addressing potential issues up front and avoiding the types of grievances and incidents that can lead to claims of human rights violations. Experience has shown that in some instances host governments are not necessarily enthusiastic about addressing these types of issues, because some of the needed steps may not maximize the government’s take from the project.

The early development and adoption of a corporate human rights policy at Chevron was not without controversy. Some folks said, essentially:

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You've got to be kidding, this is nothing more than an open door for plaintiff's lawyers to come in and try to extract money on behalf of various groups, subject the company to discovery requests, to do all sorts of things that are harmful to the company and its shareholders.

Others, on the contrary, said:

This is a terrific opportunity, and if we take a leading position on adopting a human rights policy this will protect our right to operate, we will be embraced by the CSR community, and they will even stand up for Chevron when we are falsely accused of misconduct by unscrupulous plaintiff's lawyers or political attackers.

Suffice it to say that neither prediction quite proved to be true.

Turning to proposals for the so-called "rebalancing" of obligations in ISDR, they are generally an exercise in question begging. There is no empirical evidence that ISDR is tilted toward investors and against governments in the first place. Investors undertake tremendous obligations, expenditures, and risks in developing projects that are sufficiently long-lived that fair enforcement of project agreements is essential if there is to be any predictable return on the investment. The investor must comply with contract provisions and with national laws and regulations. Chevron's experience is that governments are very adept at defending their rights and have ample avenues to protect themselves and to assert their legitimate interests in the context of ISDR. The contention that ISDR is somehow stacked in favor of corporate interests and against governments is contrary to the empirical evidence. The June 2016 UNCTAD report on ISDR indicates that by the end of 2015, 444 ISDR proceedings have concluded, with 36 percent decided in favor of the state, 26 percent in favor of the investor, and 26 percent settled. Likewise, with respect to the asserted loss of government regulatory space as result of ISDR, it is difficult to identify any specific instances where governments have been unable to regulate for the public good. Rather, in numerous cases government "public interest" assertions have been rejected because existing regulations had been abused by the government as a pretext for seizing an investment or violating contract terms. For those interested in the actual evidence with respect to ISDR and the attacks leveled against it, I highly recommend a comprehensive article by Charles N. Brower and Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 *COL. J. TRANSN'L L.* 689 (2014).

Finally, some comments on the introduction of "human rights obligations" on investors as part of ISDR. Critical to any meaningful discussion of this topic is the level of generality of the obligation discussed. If, as discussed above with respect to the UN Guiding Principles, objective, concrete, and specific obligations on the part of investors that will also improve the lives of citizens can be identified at the outset, ISDR already provides means for their enforcement. But if instead the proposal is to inject into ISDR by general treaty language vague concepts and principles under the label of "human rights," then the primary result is likely to be the introduction of delay, confusion, and uncertainty that will undermine the beneficial purpose of ISDR. That purpose is to allow resolution of contractual and property rights disputes with a host government in a neutral forum not controlled by that government. That purpose, while limited, is a worthy one that makes a positive contribution to rule of law, particularly in places with less independent and well-developed judiciaries. None of this is to say that ISDR cannot be improved. Increased transparency, addressing lengthy delays in ISDR, expansion of the pool of arbitrators, and other issues merit discussion. But the insertion of additional parties and vague claims would undermine the effectiveness of ISDR without any promise of practical benefit.