

Debating the Role of Human Rights Provisions in Foreign Investment Agreements

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I. FORMAT

In an exciting Mock-trial format, the moderator, Judge Ameli, will pose a hypothetical situation based on an investment agreement between two parties, which includes a human rights clause. One of the parties breaches this clause. The other party promptly seeks redress in an international arbitration tribunal. What is the likely outcome? Arguments pro and con will be elicited from panelists who will be timed and appropriately guided by the moderator. At the end, the audience will be asked to vote as judges on one outcome or the other.

II. ROLES:

- A. Arbitral Tribunal: Members of the audience
- B. Counsel for Claimant, Western Crab Oil Company: Ms. Lamm, White & Case LLP, former ABA President,
- C. Counsel for Respondent, State of Oilmanistan: Prof. Caron, Berkeley Law School, former ASIL President,
- D. Counsel for Non-disputing party, Obayah Townships: Mr. Wali, President of Nigerian Bar Association.

III. FACTS AND CONTENTIONS

The foreign investor, Western Crab Oil Company, a private company organized and existing under the laws of the Kingdom of Westland, has instituted an arbitral proceeding before the International Center of Investment Disputes (ICSID) asserting that the failure of the host government, Oilmanisatan, to meet its human rights duties to the local inhabitants of Obayah Townships under the Project Agreement for a 1500 kilometers

oil pipeline across the country, has resulted in Western Crab's inability to deliver several phases of the Project and in the loss of billions of dollars in investment and lost profits. When constructed, the pipeline would carry the crude oil produced by Western Crab in the north oil fields to the open sea port in the south of Oilmanistan. The villagers have no confidence in the independence of Oilmanistan Judiciary and are concerned about intimidations and retaliatory actions by the public prosecutor and law enforcement officials. They have resorted to official complaints to Oilmanistan and peaceful demonstrations and sit-ins in the pipeline workstations and access roads, resulting in long work and schedule disruptions for Western Crab. The Oilmanistan security forces have severely mistreated the demonstrating villagers, their families and human rights workers, some arrested and some missing altogether. Western Crab's grievance board and the Oilmanistan-Western Crab Joint Project Implementation Commission have been unable to resolve the complaints of inhabitants of Obayah Townships, mainly due to the failures of Oilmanista to meet its commitments. The villagers state that Oilmanistan in effect uses their complaints to seek illegal payoffs from Western Crab.

The Obayah Township farmers and herders have complained through human rights and public interest groups that Western Crab has not respected their international human rights and Oilmanistan has violated its international human rights obligations concerning the oil pipeline project that goes through their communities. They allege grave concerns about the consultation process over the pipeline's route and availability of documents; land expropriation and compensation; and intimidation over freedom of expression. They assert that Western Crab and/or Oilmanistan have:

- Exerted undue influence on the regulatory process;
- Obtained exemptions from social, labor, tax and

- environmental laws;
- Failed to promote sustainable development;
 - Failed to consult with them;
 - Undermined the community's ability to react to threats to the environment, human health and safety;
 - Expropriated without compensation their lands and other property;
 - Relocated them to camps in an uninhabitable, non-arable land with no pasture for their herds or a fishing ground rather than rerouting the pipeline to some distances away from their lands, pastures and rivers and close enough for those villagers who wished to work on the pipeline with some training; and
 - Arrested, tortured and made disappear several of the villagers, human rights workers and their families.

The human rights groups, through on-the-ground fact checking in Oilmanistan, including video testimonies from villagers, have supported the truth of the villagers' statements, resulting in several exchanges by them and the Parties, i.e., Oilmanistan and Western Crab, that were submitted over a period of several months to the Arbitral Tribunal organized under the auspices of ICSID.

Oilmainstan asserts that the Arbitral Tribunal does not have jurisdiction over the claims of villagers, which, it argues, are subject to exclusive jurisdiction of Oilmanistan courts. Oilmanistan also asserts that in any event all its actions have taken place under Oilmanistan court orders and prosecutor's directions to keep peace, maintain internal security and ensure that Oilmanistan can meet its obligations under the Project Agreement with Western Crab. Oilmanistan denies any role in tortures and disappearances, arguing that corporal punishment under domestic law is not torture.

IV. AGREEMENTS

The Project Agreement between Western Crab and Oilmanistan is subject to the laws of England. It provides for arbitration of disputes arising from the Project Agreement before ICSID. Both Oilmanistan and Kingdom of Westland are State parties to the Washington Convention on the Settlement of Investment Disputes. Oilmanistan and Kingdom of Westland have also concluded a bilateral investment treaty, which provides: “The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive these measures as an encouragement for the establishment of an investment. If a Party considers that the other Party has offered such an encouragement, it may request consultations with a view to avoiding this type of encouragement.”¹

UN Guiding Principles on Business and Human Rights. The Project Agreement adopts the UN Guiding Principles on Business and Human Rights,² including the policies that enterprises should contribute to economic, social and environmental progress with a view to achieving sustainable development and respect the human rights consistent with the host government’s international obligations and commitments.³

¹ See, e.g., Article 11 of Canada-Jordan Agreement on Promotion and Protection of Investments, entered into force on 14.s12.2009. <http://www.treaty-accord.gc.ca/text-texte.aspx?id=105176>

² <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

<http://www.business-humanrights.org/media/documents/un-human-rights-council-resolution-re-human-rights-transnational-corps-eng-6-jul-2011.pdf>

³ The Project Agreement also include the following commitments:

A. *Project Security and Human Rights.* Oilmanistan confirms its commitment to compliance with human rights, including the Universal Declaration of Human Rights, the United Nations Basic Principles on the use of Force and Firearms by Law

Further, an annex to the Project Agreement includes a **Human Rights Undertaking**, which is governed by English law and cannot be withdrawn without the consent of Oilmanistan. It restates the obligations of the Parties to comply with the UN Guiding Principles on Business and Human Rights.

The **Human Rights Undertaking** also confirms the right of affected persons such as local villagers to bring actions in any court of competent jurisdiction, including that of Oilmanistan, to seek remedies with respect to the human rights impacts, as well as recognizing as effective and binding the **human rights undertaking** in any arbitration under the Project Agreement in relation to such disputes between Oilmanistan and Western Crab.

Enforcement Officials, United Nations Code of Conduct for Law Enforcement Officials, the European Convention on Human Rights and, in a manner consistent with its national laws, the Voluntary Principles on Security and Human Rights (the “International Norms”).

B. Environment. The Parties are committed to the application of environmental standards and practices that are “no less stringent” than those generally applied within member states of the European Union. The [Project Agreement] shall give effect to this commitment. The ESIA (Environmental and Social Impact Analyses) approved by Oilmanistan and social policies and guidelines of the World Bank Group are incorporated into the Project Agreement. The World Bank Group’s policies require the development of a Resettlement Action Plan and the acquisition of land and resettlement of affected persons in accordance with that plan, and [requires Western Crab to conduct land acquisition and compensation activities in accordance with a Resettlement Action Plan developed in accordance with World Bank Group policies for the Project.

C. Labor. [The Parties] confirm their understanding that International Labor Organization conventions on Forced Labor, Freedom of Association and Right to Organize, Collective Bargaining, Discrimination, Equal Remuneration and Minimum Age apply to the development and operation of the Project, and that the Project is and will remain subject to the standards set forth in any and all other international labor and human rights treaties to which Oilmanistan is a party from time to time.”

There is now a hearing before the Arbitral Tribunal, organized under ICSID, to decide various points. In this mock arbitration, you, the audience, must consider these points and vote at the end of the adversary process to help the judge make a ruling.

V. POINTS AT ISSUES

- A. Is the claim of Western Crab for damages before the Arbitral Tribunal admissible, i.e., does the Arbitral Tribunal have jurisdiction over the claim of Western Crab against Oilmanistan?
- B. Do the Obayah Township villagers have standing as non-disputing parties in the case to appear before the Arbitral Tribunal? Namely, do they have a significant interest in the proceeding between Oilmanistan and Western Crab and does their participation assist the Arbitral Tribunal in the determination of issues by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties, i.e., Western Crab and Oilmanistan?
- C. Can the failures and liabilities of Oilmanistan be established independently from the actions or omissions of Western Crab, if the government has presented no credible defense of its own conduct or any evidence of failures by Western Crab that might exonerate Oilmanistan?
- D. If it finds for Western Crab, can the Arbitral Tribunal devise an appropriate remedy by which the Project can be revived with observance of the human rights of Obayah villagers; settlement of the villagers' claims and compensation payment of Western Crab's losses from the proceeds of the long-term Project; and security for Oilmanistan's share of the proceeds rather than an award of

monetary compensation for Western Crab with no prospect of payment?

- E. Can the Obayah villagers obtain any compensation or remedies from the Arbitral Tribunal, directly or indirectly?

VI.AWARD

Following a five-minute opening statement by counsel for each party and debate of questions from members of the audience, Judge Ameli will put to the vote of the audience the points at issue, declare the winner, and issue an award.