A Role for The International Finance Corporation in Integrating Environmental and Human Rights Standards into Core Project Covenants: Case Study of the Baku–Tbilisi–Ceyhan Oil Pipeline Project

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I. INTRODUCTION

The purpose of this chapter is to explore the relationship (or lack thereof) between the legal framework underlying the Baku–Tbilisi–Ceyhan (BTC) oil pipeline project and the International Finance Corporation (the member of the World Bank Group responsible for financing private-sector projects), and to argue that the International Finance Corporation (IFC) would more effectively further its mission of promoting environmentally and socially sustainable development by requiring this legal framework to be compatible with the effective enforcement of evolving international environmental and human rights norms. The BTC pipeline project illustrates both the risk of States being pressured by foreign investors wishing to obtain government guarantees that insulate their investment from risk, and the potential role multilateral lending institutions might play in limiting the detrimental effects of such imbalance in bargaining power.

My purpose is not to look at the myriad critiques regarding implementation in the pipeline project of the IFC’s existing social and environmental safeguard policies,¹ nor to explore the ongoing general

controversy regarding the adequacy of the IFC's safeguard policies, although both these issues will be touched upon. This chapter instead seeks narrowly to examine the controversial legal framework governing the BTC project.

Oil is often called black gold because its discovery and sale can generate such immense wealth. The revenue from oil is particularly seductive for cash-strapped developing countries, which is all the more ironic since those are the countries least well-positioned to invest the substantial resources necessary for oil extraction and export. With the dissolution of the Soviet Union and the disappearance of the Second World into the Third, Azerbaijan, Turkey, and Georgia find themselves lacking cash to fund everything from basic government services to investment in public projects necessary for development, including roads and schools. The object of this case study, the BTC oil pipeline, is predicted to generate between $500 million and $1 billion in government revenue for each of the host States over the life of the project—providing the three governments with enough revenue to make substantial investments in all these areas, if the governments so choose.

In theory, the development of oil for export brings other benefits in addition to the generation of government revenue. The IFC and the BTC


I refer readers to Compliance Advisor/Ombudsman (CAO), A Review of IFC's Safeguard Policies (January 2003) for an exploration of the efficacy of IFC's existing safeguard policies (available at: www.caao-ombudsman.org/pdfs/Review%20of%20IFC%20Safeguard%20Policies%20final%20report%20in%20English%20%2004-03-03.pdf). The CAO’s mandate is to provide policy and process advice on environmental and social performance, to conduct environmental and social compliance audits and reviews as an aid to institutional learning, and to receive complaints and—through an Ombudsman mechanism—seek to resolve issues for people who are directly, or are likely to be directly, affected by IFC and/or MIGA projects.


1 Hart Publishing Ltd. p 402
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Consortium predict that the BTC pipeline project will produce economic spillover effects by providing employment in the region,\textsuperscript{6} supporting the emergence of backward-linked businesses that supply inputs to the pipeline,\textsuperscript{7} creating a ‘multiplier effect’ as initial expenditures circulate and are re-spent in the local economy,\textsuperscript{8} and establishing the host governments as ‘safe bets’ in the eyes of the global investment community, thereby generating further foreign direct investment (FDI) in a virtuous cycle.

This is not to say that the road paved with black gold always—or even usually—leads to development. In fact, many oil-rich developing countries remain corrupt dictatorships renowned for simultaneously perpetrating human rights abuses and blatantly pilfering the public coffers.\textsuperscript{9} Others have been torn apart by civil wars fueled, in part, by the desire of competing factions to control oil revenues.\textsuperscript{10} My point here is not to argue that the development of oil resources is ‘good’ or ‘bad’ for development,\textsuperscript{11} but merely to illustrate the promise oil development theoretically holds, in order to illuminate why the governments of Turkey, Azerbaijan, and Georgia so desperately want the pipeline project to happen.

Unfortunately for developing countries, the construction of a mammoth oil pipeline such as the one that will soon stretch from the Caspian to the Mediterranean requires enormous capital investment\textsuperscript{12} and technical expertise.\textsuperscript{13} It would be extremely difficult for a developing country to

\textsuperscript{6} ibid; see also BTC Co., A Lasting Benefit, available at http://www.caspiandevelopmentexport.com/ASP/BTC_LastinBenefit.asp (last visited 3 December 2004).

\textsuperscript{7} Principal Economic Benefits, above n 3; BTC Co, above n 6.

\textsuperscript{8} Principal Economic Benefits, above n 5.


\textsuperscript{10} See, eg, Amnesty International, Oil in Sudan: Deteriorating Human Rights, 3 May 2000, available at http://web. amnesty.org/library/index.ENGAFRS0012000 (arguing that oil was the final spark for uprisings and the formation of armed opposition groups in Sudan); Nick Shaxson, ‘Fueling the War: Diamonds and Oil’, BBC News, 28 January 1999 (documenting the role diamonds and oil have played in financing Angola’s long civil war).

\textsuperscript{11} This debate has crystallized in the Extractive Industries Review (EIR) and reactions to the EIR by civil society and World Bank Management. The EIR, an independent two-year study commissioned by the World Bank and concluded in 2003, was charged with examining the impact of extractive industries on human rights, poverty alleviation, and the environment in developing countries. The EIR and the Bank Management’s Response are available at http://www2.ific.org/ogmc/; for a broad cross-section of civil society responses, see www.reviewinfo.info.


\textsuperscript{13} The construction of the BTC pipeline poses a vast engineering challenge, spanning 1760 kilometres of widely differing terrain, rising to a height of over 2800 metres in the Caucasus mountains and east Anatolia, and passing beneath hundreds of roads, railway lines and watercourses: BTC Co, Construction, available at http://www.caspiandevelopmentexport.com/ASP/BTC_Construction.asp (last visited 3 December 2004).
sustain such a massive infrastructure project on its own. The only real option, therefore, is for Turkey, Azerbaijan, and Georgia to induce foreign oil companies to raise the capital, supply the technical expertise, and develop the project.

This enables foreign investors such as BP Co, the lead investor in the BTC pipeline, to bargain with potential host governments with the aim of obtaining terms guaranteeing a more favorable investment climate. The bargaining strength of host governments in such a negotiation depends on a wide array of factors, including the existence of alternative economic growth opportunities, the dynamics of internal political pressures, the interest of competing oil investors, and international legal/political constraints. In the case of the BTC project, bargaining positions between BP and the host governments were not so unequal as to allow the BTC Consortium unilaterally to dictate the investment terms—after all, the 11 members of the consortium stood to profit from the pipeline or else they would not have engaged in the project, and therefore they also had much to lose if the project had not gone forward. But the simple fact remains that oil fields exist in other parts of the world. If those had appeared to offer more profitable opportunities than the one presented by the BTC project, the companies that compose the BTC Consortium would certainly have invested elsewhere.

In order to identify how, against such a background, human rights may be better integrated in the policies of the IFC, I begin with a short description of the BTC pipeline project, including a chronology of events leading to development of the project that highlights the potential influence the IFC could exert on the content of project legal frameworks. I then move into an overview of the IFC and its core mission of promoting the progressive realization of human rights in the context of sustainable development. Section IV summarizes the IFC’s safeguard policies and the existing relationship between the BTC project and the IFC, in order to contextualize the potential role of the IFC vis-à-vis the legal frameworks of the projects it sponsors. Section V of the chapter examines the legal underpinnings of the BTC pipeline project as embodied in an Inter-Governmental Agreement (IGA), the Host Government Agreements (HGAs), and a series of subsequent project agreements, concentrating on both the specific mechanisms by which provisions in the agreements could impede the realization of human rights and the efficacy of side-undertakings in addressing those concerns. I conclude by illustrating how

the IFC could better operationalize its commitment to human rights and sustainable development by requiring core project covenants to be compatible with State measures to support the effective enforcement of evolving international legal norms.

II. PROJECT BACKGROUND

The 1,760 km BTC oil pipeline originates in Azerbaijan on the shores of the Caspian Sea. Crude oil is received from oil fields under the Caspian at Sangachal, a medium-sized town south of Baku. From here the pipeline is routed west, closely following the existing Western Route Export Pipeline, which is currently used to transport limited amounts of crude oil production. The BTC pipeline then crosses into Georgia, heading north-west towards Tbilisi, Georgia’s capital. It continues west and south, jumping the border into Turkey and traversing the breadth of the country, ending at the Ceyhan terminal on the shores of the Mediterranean. The mammoth BTC pipeline has the capacity to transport up to one million barrels of crude oil per day from the Azerbaijan sector of the Caspian Sea to the Mediterranean coast in Turkey.17

The BTC pipeline is being developed by an international consortium of 11 partners, known as the Baku-Tbilisi-Ceyhan Pipeline Company (BTC Co). BP (UK) is the largest stakeholder in the project, and is leading the design and construction phases. The other oil companies who are partners in this endeavor are: SOCAR (the State oil company of Azerbaijan); TPAO (Turkey); Statoil (Norway); Unocal (USA); Itochu (Japan); Amerada Hess (USA); Eni (Italy); TotalFinaElf, now renamed Total (France); INPEX (Japan), and ConocoPhillips (USA).18

The estimated aggregate cost of the BTC project is US$3.7 billion, the financing of which will include total debt of approximately US$2.6 billion.19 The export credit agencies financing the project are: USExim and OPIC (US), JBC and NEXI (Japan), ECGD (UK), Hermes (Germany), COFACE (France), and SACÉ (Italy).20 The International Finance Corporation has provided loans of US$250 million—and its imprimatur of approval—to finance the project.21

18 BTC Co, above n 14.
19 International Finance Corporation, above n 12.
As the central thrust of this chapter is to argue that the IFC can and should enact safeguard requirements regarding the terms of project agreements for the projects it supports, we must examine to what degree such IFC constraints could influence the content of project agreements. The chronology of events leading to the development of the BTC pipeline is very relevant to understanding the 'micro'-bargaining process which produced the terms of the legal framework governing the project.

In 1997 BP formed a working group composed of its partners in the development of the offshore oil fields under the Caspian Sea (hereinafter 'the Azeri–Chirag–Gunashli project') and the governments of Azerbaijan, Georgia, and Turkey to examine the development of additional export routes for Caspian crude oil.22 The working group concluded that a pipeline would be the most economically viable way of transporting oil from the Azeri–Chirag–Gunashli (ACG) fields to export markets in Europe and the United States. The IGA laying the legal groundwork for the project was signed by Turkey, Georgia, and Azerbaijan in Istanbul on 18 November 1999.23 BTC Company and the three host governments executed the HGAs between November 1999 and October 2000.24 After the legal framework was substantially established, in November 2000, anthropologists, ecologists, and other specialists began conducting extensive environmental and social impact studies (ESIAs), while engineers worked on pipeline design.25 Two years later, with the ESIAs well

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25 BTC Co, above n 22.
under way, the consortium formally approached the IFC for financing. The ESIA were concluded in May 2003 and made public on 11 June, pursuant to the IFC’s requirement of a 120-day formal disclosure period. On 4 November 2003, shortly after the end of the 120-day disclosure period, the IFC approved the project loans.

Civil society opposition to the BTC pipeline project reached a noticeable pitch in the summer of 2002. In August of that year, an international coalition of non-governmental organizations (NGOs) issued a press release slamming the IGA–HGA legal framework for paving the way for human rights abuses and environmental disasters in the pipeline corridor. Given Turkey’s long history of human rights abuses in its ongoing battle with Kurdish secessionists, the NGO community focused initially on the potential impact of the agreements on the Turkish government’s treatment of its Kurdish minority. In the first shot across the bow, the press release claimed that the agreements ‘divided Turkey into three countries … the area where Turkish law applies; the Kurdish areas under official or de facto military rule; and a strip running the entire length of the country from North to South, where BP is the effective government.’ The legal framework was decried as a ‘backdoor MAI [multilateral agreement on investment]’ that would allow BP ‘to waive the rules, destroying the environment and trampling on the rights of local communities with impunity.’ At the same time, the coalition of NGOs released a series of fact-finding reports, based on investigative missions sent to Turkey, Azerbaijan, and Georgia, excoriating the project for the threat that pipeline construction and operation posed to human rights.
and the environment. Public concern continued to mount over the fall and winter of 2002–03, reaching a crescendo when Amnesty International released a comprehensive critique of the HGA–IGA framework in May 2003.

In direct response to the criticisms raised by NGOs and local people affected by the project, Turkey, Azerbaijan, Georgia, and BTC Co issued three new project agreements between May and September 2003, clarifying and modifying the terms of the IGA and the HGAs.

The chronology of events demonstrates that, although excluded from the initial stages of project planning, outside forces such as the IFC and NGOs had significant influence on project design and operation, including the content of the legal framework. Civil society groups did not become active in opposing the project until 2002, after the core project agreements were concluded, but succeeded nonetheless in pressuring project participants to execute three subsequent project agreements addressing social and environmental concerns. The influence of the IFC on project development is even more dramatic—although BTC Co did not


35 See, eg, Baku Ceyhan Campaign, BP’s new oil project a ‘disaster waiting to happen’, say Campaigners: BP Refuses to Discuss Concerns in Public (Press Release), 28 October 2002. The Baku Ceyhan Campaign is a UK based NGO dedicated to raising public awareness of the social problems, human rights abuses and environmental damage that will be caused by the Baku-Tbilisi-Ceyhan oil pipeline: see www.bakuceyhan.org.uk/about.htm. For a list of other press releases from the Baku Ceyhan Campaign and other NGOs, visit: http://www.bakuceyhan.org.uk/news


formally approach IFC for funding until 2002,\textsuperscript{38} and the IFC did not approve financing until 2003.\textsuperscript{39} BTC Co commissioned environmental and social impact assessments as early as 2000,\textsuperscript{40} in anticipation of IFC safeguard guidelines and requirements regarding impact assessments. The conclusion is inevitable: outside players impacted on the terms of the BTC project agreements. If investors are aware of IFC guidelines ex ante, they are likely to anticipate these constraints and abide by them in developing project agreements.

III. THE MISSION OF THE INTERNATIONAL FINANCE CORPORATION

The International Finance Corporation (IFC) is a member of the World Bank Group, which also includes the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for the Settlement of Investment Disputes (ICSID).\textsuperscript{41} The purpose of the IFC is to support private sector projects in developing countries; it operates by providing loans, equity, and technical advice to private sector actors in order to finance sustainable development projects.\textsuperscript{42}

Implicit in the purpose of the IFC is the duty to promote the progressive realization of human rights and environmental sustainability. The central mission of the IFC is to promote sustainable private sector investment in developing countries, helping to reduce poverty and improve people’s lives.\textsuperscript{43} The first ‘shared principle’ underlying this mission is a commitment to ‘promoting sustainable projects ... that are economically beneficial, financially and commercially sound, and environmentally and socially sustainable.’\textsuperscript{44} In 1987 the Brundtland Report solidified the ascendance of ‘sustainable development’ in the social imaginary,\textsuperscript{45} defining sustainable development as ‘development which meets the needs of the

\textsuperscript{38} Oliver Broad, above n 26.
\textsuperscript{44} ibid (emphasis added).
\textsuperscript{45} Simon Dresner, The Principles of Sustainability (Earthscan, 2002), at pp 31–37.
present without compromising the ability of future generations to meet their own needs. The Brundtland Report and subsequent literature clarify that "sustainable development" is concerned with preserving equity between generations (by not depleting the 'natural capital' of the earth's resources), fostering equity within each generation, and promoting growth in order to better provide for people's material well-being. As Roberto Danino, General Counsel for the World Bank, has noted, "Social equity is a rich and complex notion ... Nobel Laureate Amartya Sen has argued [that] we must view development in terms of freedom and the removal of obstacles to it, including poverty, tyranny, poor economic opportunities, systemic social deprivation, the neglect of public facilities as well as intolerance." Danino continued, emphasizing that "social equity thus includes fighting poverty and inequality, giving the poor and marginalized voices, i.e. empowerment; freedom from hunger and fear, as well as access to justice. Social equity has, therefore, an obvious human rights component." The IFC’s mission of promoting sustainable development through private sector investment entails a commitment to social equity, and therefore to environmental sustainability and human rights.

It is important to mention briefly an argument that has been advanced at one time or another over the World Bank’s lifetime—that the Bank’s charter prohibits it from considering human rights when selecting projects. Although this ongoing debate has mostly concerned the IBRD and the IDA, and not the IFC, which has its own separate and independent charter, the debate is relevant because the IFC’s Articles of Agreement contain language substantively similar to the controversial clause in the

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46 Ibid at p 67.
49 Ibid.
IBRD’s charter.\textsuperscript{51} I will not explore this argument in detail here; adequate treatment would require a lengthy paper, or possibly a book, and has been addressed quite sufficiently elsewhere.\textsuperscript{52} Suffice it to say that the World Bank’s former General Counsel, Roberto Danino, recently reiterated that he believes that the purported conflict between promoting human rights norms and the IBRD’s charter is illusory, and that the Bank’s Articles of Agreement do not constrain the Bank from adopting a human rights-based approach to development.\textsuperscript{53} The World Bank’s policy on human rights has never been static, and Danino’s interpretation represents a significant evolution from the position of the Bank’s previous General Counsel, Ibrahim Shihata, who liberalized the interpretation of the IBRD Charter somewhat but nevertheless supported the Bank’s traditional distinction between human rights concerns of a preponderantly “economic” and “political” nature.\textsuperscript{54} Although it would perhaps be flippant to assert that no dispute remains regarding the legality of the Bank’s consideration of human rights in assessing the merits of potential development projects, it is to be hoped that further statements by World Bank Counsel can definitely clarify that furthering the progressive realization of human rights is at the core of the World Bank’s mission of sustainable development.

Significantly, the leadership of the IFC has reiterated the IFC’s commitment to promoting the fulfillment of human rights as part of the development agenda. Peter Woicke, IFC Executive Vice-President and Managing Director, in 2004 affirmed “[w]e believe that ... human rights is part of our mission of sustainable development ... [and] I believe that IFC, as one of a handful of organizations that has become a global standard-bearer for environmental and social issues, has a great opportunity and arguably a special responsibility to address these issues.”\textsuperscript{55} The question

\textsuperscript{51} The International Bank for Reconstruction and Development Articles of Agreement state: ‘The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I’ (amended 16 February 1989), Arts 4, 10, available at http://www.worldbank.org. The International Finance Corporation Articles of Agreement state: ‘The Corporation and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in this Agreement’: above n 42, Arts 3, 9.


\textsuperscript{53} Danino, above n 48.

\textsuperscript{54} Ciorciari, above n 50, at 337.

we examine in this chapter is how the IFC could better ensure the promotion of sustainable development and human rights by implementing safeguards regarding the content of the legal covenants that govern large-scale development projects.

IV. THE INTERNATIONAL FINANCE CORPORATION’S SAFEGUARD POLICIES

Projects are assessed primarily for economic viability, but in order for a project sponsor to receive funding it must comply with various IFC social and environmental guidelines. At the time the BTC Pipeline Project was being funded, the IFC operationalized its commitment to human rights and sustainable development through the imposition of safeguard policies, environmental guidelines, and environmental and social review procedures. The safeguard policies, adopted in 1998, were based on those then in place at the International Bank for Reconstruction and Development (IBRD). In February 2006 the IFC Board of Directors updated the IFC’s environmental and social standards. The new Sustainability Policy, Performance Standards, and Disclosure Policy became operational in April 2006.

The purpose of this section is twofold: (1) to illustrate how IFC social and environmental safeguard policies influenced the development of the BTC Pipeline by imposing constraints with which BTC Co was forced to comply, and (2) to overview the IFC’s longstanding social and environmental policy framework in order to illustrate the feasibility of introducing IFC-imposed guidelines regarding Project Agreements into revised safeguard policies. I do not here explore in-depth the benefits and shortcomings of the IFC’s environmental and social policies and procedures, except insofar as one significant shortcoming is the current lack of guidelines regarding the project-specific legal covenants that are the topic of this chapter.

57 Ibid.
At the time the BTC pipeline funding was approved, the IFC had environmental and social polices governing: environmental assessment, natural habitats, pest management, indigenous peoples, safeguarding cultural property, involuntary resettlement, forestry, safety of dams, and projects on international waterway.\textsuperscript{62} The IFC also required projects to conform to the World Bank Group’s Occupational Health and Safety Guidelines.\textsuperscript{63} Subject to a reasonableness test, several types of projects were excluded from IFC financing altogether, including: production or trade in any product or activity illegal under host country laws or international conventions; production or trade in weapons and munitions; production or trade in alcoholic beverages (excluding beer and wine), tobacco, and gambling casinos; production or trade in pesticides/herbicides and pharmaceuticals subject to international phase-outs or bans; and production or trade in radioactive materials, products containing PCBs, and ozone-depleting substances subject to international phase-out.\textsuperscript{64}

Although the new Policy and Procedures on Social and Environmental Sustainability have altered the constraints on environmental and social impacts governing IFC projects,\textsuperscript{65} it is important to detail the pre-existing system because this is the regime under which the BTC pipeline was conceived and financed. Moreover, the new social and environmental policies have only just been introduced, so it remains uncertain how they will function in practice. A brief sketch of the IFC’s long-standing environmental and social safeguards illustrates the constraints placed by the IFC on the BTC project sponsors.

Under the pre-existing safeguard policies, all projects proposed for IFC financing required an environmental assessment (EA) to ensure that they were environmentally and socially sustainable, as mandated by the Environmental Assessment Policy (OP 4.01).\textsuperscript{66} The new Procedures on Social and Environmental Sustainability likewise require a comprehensive assessment of the social and environmental impacts of a proposed project.\textsuperscript{67} The breadth, depth, and methodology of the assessment varies according to the type and complexity of the project, as determined according to the category in which the IFC places the project. A proposed project is classified as ‘Category A’ if it is likely to have significant adverse environmental impacts that are sensitive (an impact is considered ‘sensitive’

\textsuperscript{62} ibid.
\textsuperscript{63} Above n 1, at 2.
\textsuperscript{64} ibid., Annex A, at 19.
\textsuperscript{66} Above n 1, Annex A, at 19.
\textsuperscript{67} International Finance Corporation’s Performance Standards on Social and Environmental Sustainability, above n 5, Performance Standard 1.
if it may be irreversible, affect vulnerable groups of ethnic minorities, involve involuntary displacement and resettlement, or affect significant cultural heritage sites), diverse, or unprecedented. A proposed project is classified as ‘Category B’ if its potential adverse impacts on human populations or environmentally important areas—including wetlands, forests, grasslands, and other natural habitats—are considered site-specific and not irreversible. The scope of assessment for a Category B project may vary from project to project, but it is narrower than that of an assessment for Category A projects. A proposed project is classified as ‘Category C’ if it is likely to have minimal or no adverse environmental impacts. Beyond screening, no further EA action is required for a Category C project. A proposed project is classified as ‘Category F1’ if it involves investment of IFC funds through a financial intermediary in subprojects that may result in adverse environmental impacts. Examples of Category F1 projects are corporate loans to banks, credit lines, and private equity funds. Under the current system, the process of categorizing a project A, B, or C is internal to the Bank and not subject to public participation or review.

The BTC pipeline was a Category A project. As a Category A project, the EA examined the project’s potential positive and negative impacts, compared them with those of feasible alternatives (including the ‘without project’ scenario), and recommended any measures needed to prevent, minimize, mitigate, or compensate for adverse impacts and improve performance. A full environmental and social impact assessment (ESIA) was required, which included an environmental audit and a hazard/risk assessment. For Category A projects an Environmental Action Plan (EAP) is an essential part of the EA report and must be included as a part of the draft EA report that is released locally for public consultation, OP 4.01 also set forth requirements for public consultation and public disclosure for projects. In order to comply with OP 4.01, BTC Co engaged in an ESIA and developed a comprehensive EAP, as well as a Public Consultation and Disclosure Plan (PCDP). The process, while laudable, has shortcomings: the NGO community has criticized both the content of

68 Ibid.
69 Ibid.
70 Ibid.
71 Ibid.
73 International Finance Corporation, above n 56.
74 Ibid.
75 Ibid.
76 Ibid.
77 International Finance Corporation, above n 69.
the BTC Consortium’s PCDP, as well as BTC’s failure to abide by its terms.\textsuperscript{78}

The IFC’s initial involvement in a project normally occurs after a feasibility study has been completed (that is, after site selection, preliminary design work, etc.).\textsuperscript{79} In the case of the BTC project, the IFC was approached for funding in 2002, two years after pipeline design began.\textsuperscript{80} After the BTC project sponsor submitted an initial proposal, the IFC conducted an Early Review in order to give the sponsor a quick decision on whether the IFC was interested in engaging in the project. The evaluation process was led by an Investment Officer, who consulted with environmental and social specialists as appropriate. The basis for the early management decision was the Project Data Sheet Early Review (PDS-ER), which contained a project description, highlighted any policy issues and potential deal-breakers, and reviewed development impact.\textsuperscript{81} Based on the information in the PDS-ER, IFC senior management assessed the appropriateness of the project as an investment for IFC and authorized project appraisal. Environmental and social impact concerns could have been deal-breakers, but they are not in themselves grounds for approving a project for appraisal.\textsuperscript{82} In other words, projects are chosen because they are economically viable, unless they threaten unacceptable social and environmental impacts, as opposed to being selected primarily because they promote human rights, public health and safety, or environmental sustainability.

Once the Environment Division was satisfied that the project could comply with appropriate IFC environmental and social requirements, the Division sent an Environmental and Social Clearance Memorandum (ESCM) to the Investment Department. After completion of the appraisal and receipt of the ESCM, the Investment Department decided to process the project, based on considerations of financial viability. The IFC then negotiated with the project sponsor to establish the terms and conditions of IFC participation in the project, including environmental and social aspects, such as conditions of disbursement and covenants, performance and monitoring requirements, and resolution of any outstanding issues.\textsuperscript{83}

IFC projects are finally submitted to the Board for approval after the investment officer considers all outstanding issues to be resolved. After project approval, the investment officer, in consultation with the lawyer


\textsuperscript{79} International Finance Corporation, above n 56.

\textsuperscript{80} Oliver Broad, above n 26.

\textsuperscript{81} International Finance Corporation, above n 56.

\textsuperscript{82} Ibid.

\textsuperscript{83} Ibid.
and environmental and social development specialists, ensures that environmental and social requirements are reflected in the IFC legal documentation for the project. The investment agreement contains covenants which require the project company to comply with IFC and host country requirements, including applicable IFC policies and guidelines. As a Category A project, the investment agreement for the BTC project required the company to comply with the requirements described in the agreed EAP and the PCDP.\(^{84}\)

The Office of the Compliance Advisor/Ombudsman (CAO) conducted a comprehensive review of the impact and implementation of environmental and social safeguard policies in 2003.\(^{85}\) The review concluded that the overall framework of safeguard policies and loan conditionalities was having a positive effect in furthering the Bank's mission of poverty alleviation through sustainable development.\(^{86}\) but that a number of shortcoming remained.\(^{87}\) The report recommended that the IFC should focus on selecting loan recipients with a genuine commitment to implementing environment and social best practices; increase the IFC’s staff capacity of environmental and social specialists; clarify expectations regarding social issues included under the EA policy (OP 4.01), measurable outcomes, and disclosure and consultation requirements; better integrate social and environmental standards into overall project assessment; and hold management and staff accountable for specific environmental and social goals derived from performance at the project and portfolio level.\(^{88}\) It remains to be seen whether the new Policies and Procedures on Social and Environmental Sustainability have effectively incorporated the CAO’s recommendations, or whether the new system will be more or less successful in operationalizing the IFC’s commitment to social and environmental sustainability.

As mentioned at the outset, I have not here attempted to evaluate the sufficiency or effectiveness of the IFC safeguard policies in the context of the BTC pipeline project. This is a critical topic, which has been explored in depth elsewhere.\(^{89}\) The purpose of outlining the pre-existing IFC framework for encouraging social and environmental responsibility is instead to illustrate the feasibility of imposing IFC requirements regarding the legal structure of project agreements (HGAs and IGAs). Such requirements could be incorporated into the structure of IFC safeguard policies and guidelines, as that structure continues to be modified and improved.

\(^{84}\) Ibid.
\(^{85}\) Compliance Advisor/Ombudsman, above n 16.
\(^{86}\) Ibid at 21.
\(^{87}\) Ibid.
\(^{88}\) Ibid.
V. LEGAL FRAMEWORK OF THE BTC PROJECT PIPELINE

The building and operation of the pipeline is governed by two major types of agreements. The IGA between Azerbaijan, Georgia, and Turkey aims ‘to establish more firmly favourable conditions to justify the commitment of capital and resources to the Baku-Tbilisi-Ceyhan MEP Project’ by committing the States to upholding the HGAs, providing security to MEP Project personnel, and protecting the freedom of transit of petroleum in their respective territories. A second set of agreements, known as HGAs, was made between each State separately and BTC Co. The HGA concept is not new, and variations on this model have been used since the beginning of post-Soviet oil exploration in the Caspian region. Together these agreements establish the legal framework that governs the adjudication of any issues relating to the construction and operation of the pipeline for the next 40 years, with the possibility of extension for 20 additional years.

Three additional documents were issued in 2003 seeking to respond to criticisms directed at the HGA-IGA structure by the NGO community. These new project agreements (the Human Rights Undertaking, the Joint Statement, and the Security Protocol) directly address most—but not all—of the primary problems outlined here and in various NGO reports regarding the social and environmental implications of the legal framework. According to the consortium, the three project agreements are an integral part of the prevailing legal regime governing the BTC project, and binding on the parties. Despite these assurances, it is not clear whether a court would interpret the undertakings as integral to the core project covenants, and thus the legal value courts or arbitrators would attach to their terms remains an open question.

Yet the Human Rights Undertaking, along with the Joint Statement and the Security Protocol, are highly significant in another respect—despite their ambiguous legal status. The fact that BTC Co and the three host governments executed the agreements demonstrates that it is indeed politically possible and economically feasible to establish a legal framework that allows States to promote the progressive realization of human rights and environmental sustainability. The clear commitments in the three new

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90 IGA, above n 23, preamble.
91 ibid.
92 HGA of Georgia, above n 24; HGA of Turkey, above n 24; HGA of Azerbaijan, above n 24.
94 HGA of Georgia, above n 24, Art 3.1; HGA of Turkey, above n 24, Art 3.1; HGA of Azerbaijan, above n 24, Art 3.1.
project agreements provide a possible model for provisions that should be incorporated into the core covenants of future investor-government agreements.

Our analysis begins from the premise that there are no rights without remedies. This is both a fundamental legal notion and a commonsense fact. What value is a promise without a mechanism to ensure that the promisor performs? What rights are guaranteed without a way of holding parties accountable if they violate those rights? Our point of departure, therefore, is the legal remedies available under the HGAs and the IGA to BTC Co, the host States, and the private individuals impacted by the pipeline project. We concentrate on how the terms of the HGAs could be interpreted in a manner that would impede the realization of sustainable development and human rights, and conclude with an overview of the subsequently enacted project agreements that aim to address these concerns.

1. Host Governments Obligated to Compensate the BTC Company

The three host governments are bound by the agreements to provide monetary compensation if they fail to satisfy fully all of their obligations under the project agreements.96 If the States violate any of the terms of the agreements ‘whether as a result of action or inaction’97 they must compensate BTC Co for any loss occasioned. The compensation clauses aim to stabilize the investment climate in Turkey, Azerbaijan, and Georgia by removing financial risks and uncertainties for BTC Co. The requirement of compensation in case of contract breach is not uncommon; what is uncommon—and the source of great concern in the NGO community—98 is the extent of the obligations placed upon the host States. The reach of these obligations, coupled with the compensation requirement, infringe the regulatory autonomy of host States and make it difficult for them to promote effectively the progressive realization of human rights and sustainable development.

A. Obligations

1. Governments Prevented From Taking Any Actions To Protect Public Welfare That Interfere With Project

The HGA explicitly prevents the host governments from taking actions and applying laws and regulations to protect the public welfare when such actions or regulations would

96 HGA of Georgia, above n 24, Art 9; HGA of Turkey, above n 24, Art 10; HGA of Azerbaijan, above n 24 24, Art 9.
97 HGA of Turkey, above n 24, Art 10.1.(iii).
98 See, eg, Human Rights on the Line, above n 36.
interfere with the smooth running of the project. This ban unambiguously extends to regulation for security, health, safety, or environmental reasons. The only exception is when there exists a material, imminent threat to public health or safety. Article 5.2 in each of the Turkish, Georgian, and Azerbaijani HGAs guarantees that the State Authorities shall not act or fail to act in any manner that could hinder or delay any Project Activity or otherwise negatively affect the Project or impair any rights granted under any Project Agreement (including any such action or inaction predicated on security, health, environmental or safety considerations that, directly or indirectly, could interrupt, impede or limit the flow of Petroleum in or through the Facilities, except under circumstances in which continued operation of the Facilities without immediate corrective action creates an imminent, material threat to public security, health, safety or the environment that renders it reasonable to take or fail to take, as the case may be, such action and, then, only to the extent and for the period of time necessary to remove that threat).

If Turkey, Georgia, or Azerbaijan take actions to protect the health and safety of their citizens in the absence of an ‘imminent, material threat’, they will be obliged to compensate BTC Co. The requirement that a threat must be ‘imminent’ and ‘material’ in order for State corrective action to be allowed is incompatible with broadly accepted international human rights standards.

2. Governments Must Maintain 'Economic Equilibrium', Thus Precluding Legal Or Regulatory Changes Through Domestic Legislation, International Treaties, Or Court Decisions

One of the central obligations placed on the States is to maintain the ‘economic equilibrium’ vis-à-vis the investment. ‘Economic equilibrium’ is used to mean the expected economic value of the combination of legal rights and obligations in place when the HGA was signed. If Azerbaijan, Turkey, or Georgia fail to maintain the pre-existing ‘economic equilibrium’, they must compensate the consortium for lower profit expectations. This obligation therefore precludes any legal or regulatory changes that may impact on the pipeline—including improvements to environmental

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99 HGA of Georgia, above n 24, Art 5.2(iii); HGA of Azerbaijan, above n 24, Art 5.2(iii); HGA of Turkey, above n 24, Art 5.2(iii).
100 Ibid.
101 Ibid.
102 Ibid.
104 HGA of Georgia, above n 24, Art 7.2(x); HGA of Turkey, above n 24, Art 7.2(xi); HGA of Azerbaijan, above n 24, Art 7.2(x).
and human rights standards. The Agreements specify that any and all changes in law—whether originating from domestic democratic action, court interpretations of existing law, or through accession to international treaties—constitute a disruption in ‘economic equilibrium’ if such changes negatively affect the project.¹⁰⁶ Article 7.2(xi) of the Turkish HGA states in relevant part: ‘the State Authorities shall take all actions available to them to restore the Economic Equilibrium established under the Project Agreements if and to the extent the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of any change (whether the change is specific to the Project or of general application) in Turkish Law (including any Turkish Laws regarding Taxes, health, safety and the environment)’. Article 7.2(vi) further specifies that the foregoing commitment likewise precludes the application of newly signed international treaties, stating ‘if any domestic or international agreement or treaty ... [or] any other form of commitment, policy or pronouncement or permission, has the effect of impairing, conflicting or interfering with the implementation of the Project, or limiting, abridging or adversely affecting the value of the Project or any of the rights, privileges, exemptions, waivers, indemnifications or protections granted or arising under this Agreement or any other Project Agreement it shall be deemed a Change in Law under Article 7.2(xi).’¹⁰⁷ The freeze imposed also covers any interpretation of existing law that could adversely affect the economic equilibrium of the project. Article 7.2(xi) further specifies that ‘the interpretation or application of Turkish Law (whether by the courts, the executive or legislative authorities, or administrative or regulatory bodies), the decisions, policies or other similar actions of judicial bodies, tribunals and courts, the State Authorities, jurisdictional alterations’ constitutes a change in law and a disruption of economic equilibrium. This prevents the Turkish courts from developing their case-law in a way that has negative implications for the project, thereby compromising an important element in the rule of law.¹⁰⁸ By requiring compensation, the agreements effectively freeze the regulatory regimes of the three host governments for the next 40 years, precluding democratic governance, the evolution of case = law, and the application of evolving international legal norms.

In case the terms of the Agreement left any doubt, the Appendix reiterates that: ‘If any regional or intergovernmental authority having jurisdiction enacts or promulgates social regulations or guidelines applicable to areas where Project Activities occur ... in no event shall the Project be subject to any such standards to the extent they are different from or

¹⁰⁶ Ibid.
¹⁰⁷ HGA of Turkey, above n 24.
¹⁰⁸ Ibid.
more stringent than the standards and practices generally prevailing in
the international Petroleum pipeline industry for comparable projects.\textsuperscript{109}

3. Land Acquisition and Resettlement The three host governments
have also committed to take a number of positive actions under the agree-
ments that could pose a threat to human rights and environmental sustain-
ability.

Turkey, Azerbaijan, and Georgia each promised to secure a range of
land use rights for BTC Co along the pipeline route.\textsuperscript{110} Some 30,000 own-
ers or tenant/sharecroppers will be affected by the land acquisition
process in Turkey alone.\textsuperscript{111} The process of acquiring land for the pipeline
raises a number of human rights concerns. First, because the IGA declared
that the pipeline project is not in the public interest,\textsuperscript{112} in order to ensure
the signatory States could not violate the terms of the HGAs unilater-
ally,\textsuperscript{113} the States lack the legal right to purchase the land or resettle users
compulsorily.\textsuperscript{114} Of course, due to the enormity and strategic importance
of the project it would not be a workable solution to have the consortium
acquire the land it needs through the process that has to be followed by
any private developer—negotiating voluntary sales—so land use rights
are being acquired through compulsory purchase and resettlement.\textsuperscript{115} The
human rights violation this contradiction engenders could be offset by the
provision of independent legal aid to all the people affected, thus allowing
them the opportunity for fair negotiation regarding the price paid by
BTC Co for using the land. According to Amnesty International, The
majority of the people in the pipeline zone are rural and would have prac-
tically no experience in a court of law ... In these circumstances, the
provision of legal aid is fundamental to a fair hearing.\textsuperscript{116} Presently there is
nothing in the IGA, HGA, or any other project documentation guarantee-
ing legal aid to landowners or those displaced (even temporarily) by the
project. Was Turkey to provide the legal aid, and ensure fairness in the
process of land acquisition, then any resulting delay could well interfere
with the economic equilibrium of the project, triggering the compensation
clause in the HGA.\textsuperscript{117}

\textsuperscript{109} HGA of Georgia, above n 24, Appendix 5.2; HGA of Turkey, above n 24, Appendix 4.2;
HGA of Azerbaijan, above n 24, Appendix 4.2.
\textsuperscript{110} \textit{Ibid.} Art 7.
\textsuperscript{112} IGA, above n 23, Art II, 8.
\textsuperscript{113} Human Rights on the Line, above n 36, at 1.
\textsuperscript{114} See, eg European Convention on Human Rights, Protocol 1, Art 1 (20 March 1952); Human Rights on the Line, above n 36, at 17 (citing the Constitution of the Republic of Turkey, Art 35).
\textsuperscript{115} Human Rights on the Line, above n 36, at 17-18.
\textsuperscript{116} \textit{Ibid.}
\textsuperscript{117} \textit{Ibid.}
The land acquisition process also threatens to reinforce discrimination against women. Amnesty International reports:

According to the Land Acquisition Plan, the vast majority of the land is owned by males, or is in the male’s name or under customary rules will be considered to belong to the male head of household ... Additionally, the documents note that women rarely participate in consultation meetings and it is expected that they will not be represented equally in negotiations on land compensation. The result is twofold. Firstly, only the person authorized to engage in dispute resolution for compensation of the land acquisition will be the named owner or user of the land, generally the male in the family. Secondly, the money paid out by BTC will be paid into a bank account in the male’s name or directly to the male in cash, as is [already] happening in Georgia. This excludes women from the process and from enjoying benefit from land on which they have labored and lived. It leaves the women vulnerable in that they cannot promote their own rights (as unnamed landowners and users), and it gives them no means of controlling the assets gained once land has been acquired.\textsuperscript{118}

Historical experience suggests that the threat to women’s rights is not merely hypothetical. For example, the final report of an international fact-finding mission to examine how the planned Yusufeli Dam in north-east Turkey violated international standards and people’s rights stated that: ‘The needs of women and other vulnerable groups have not been taken into account and women have not been involved in the decision-making process even to the limited degree that men have been.’\textsuperscript{119} The HGAs create disincentives for the host governments to modify the process in ways that would better protect the rights of women, because if such modifications slow-down the project in any way, the State would be required to compensate BTC Co.

4. Security. The HGAs each provide that:

\begin{enumerate}
\item the Government, at its sole cost and expense, but in regular consultation with the MEP Participants\textsuperscript{120}, shall use the security forces of the State to provide physical security for the Rights to Land, the Facilities and Persons within the Territory involved in Project Activities ... the Government shall be solely liable for the conduct of all operations of the security forces of the State and neither the MEP Participants nor any other Project Participants shall have any liability or obligation to any Person for any acts or activities of the security forces of the State.\textsuperscript{121}
\end{enumerate}

\textsuperscript{118} Ibid, at 19.


\textsuperscript{120} ‘[O]ne or more, or all, of the Parties to this Agreement ... other than the State Authorities’; HGA of Turkey, above n 24, Appendix 1.

\textsuperscript{121} HGA of Georgia, above n 24, Art 11.3; HGA of Turkey, above n 24, Art 12.3; HGA of Azerbaijan, above n 24, Art 11.3.
This obligation to provide security for the project threatens to encourage human rights abuses by host State governments. Demonstrations against the pipeline are a virtual certainty given the large number of people affected and the possibility of conflicts over resettlement, land compensation, environmental pollution, and fishing and grazing rights. If the pipeline engenders local resistance and protests it is possible that the police and military security forces will maintain order with violent crackdowns, particularly given that failure to protect the pipeline will trigger the compensation obligation.

Both the history of analogous projects in other countries and the human rights track records and political climates in Turkey, Azerbaijan, and Georgia strongly support the prediction that the host governments will perpetrate human rights abuses in maintaining pipeline security. All three governments have long records of illegal detentions, torture, and repressing freedom of speech.\textsuperscript{122} The recent and ongoing response of the Turkish police forces to demonstrations against the Ilisu Dam Project in south-east Turkey and the Ovacık gold mine in western Anatolia are illustrative.\textsuperscript{123} According to Amnesty International, 'The Turkish security forces have a record of violently suppressing all forms of protest, in many cases detaining peaceful demonstrators and further subjecting them to torture or ill-treatment, and charging them with offences not directly related to the demonstration.'\textsuperscript{124} Oil pipelines and other extractive industry projects often precipitate human rights abuses by State governments. According to the World Bank's Extractive Industries Review (EIR), concluded in the fall of 2003, 'In a number of countries, extractive industries have been linked to human rights abuses and civil conflict. Such abuses have been documented, for example, in cases where the army has been called in to guard extractive industries projects.'\textsuperscript{125} In the absence of enforceable, contractual constraints to the contrary, the linkage between pipeline security and human rights abuses will only be exacerbated by the HGAs' compensation requirement.

\begin{thebibliography}{1}
\bibitem{123} Human Rights on the Line, above n 36, at 24–25.
\bibitem{124} \textit{Ibid.} at 23.
\bibitem{125} Extractive Industries Review, above n 11, vol 1, at 6.
\end{thebibliography}
C. Dispute Resolution

The HGAs establish that any dispute regarding the project or arising under the terms of the project agreements shall be subject to international binding arbitration. Amnesty International and other NGOs initially expressed concern that this dispute resolution mechanism prevented local residents affected by the pipeline from seeking remedies if BTC Co violates domestic laws relating to human rights, labor rights, and the environment. Amnesty contended that under the terms of the HGAs, anyone wanting to seek redress against the oil pipeline companies would need to prosecute the case in Geneva, Switzerland, in the English language, pursuant to international laws with which all except sophisticated international investors are utterly unfamiliar. The lack of a reasonably available venue with jurisdiction to adjudicate claims against the BTC Consortium would mean that, de facto, no remedy exists for local populations injured by the construction and operation of the pipeline project.

The legal interpretation advance by Amnesty International is debatable, however: a plain reading of the language of the HGAs indicates that the dispute resolution clauses apply only to the parties to the agreement (the three host governments and the BTC Consortium), and thus do not preclude private parties from seeking remedies in local courts for violations of domestic laws. In other words, local residents would have redress against BTC Co in domestic courts for violations of domestic laws. Yet the issue remains important, as there is no guarantee that future legal frameworks will be similarly worded. Drafters should take precautionary measures to ensure that the rights of private citizens to seek remedies against investors are protected.

A second concern regarding dispute resolution under the HGAs also deserves notice. Let us return to our starting framework—there are no rights with remedies. Private individuals, who are not parties to the agreements, do not have the right to bring suit against the consortium for violating the terms of the agreements. The HGAs do not establish that local people have standing to enforce the project agreements. Therefore the impoverished rural farmers, herders, and workers impacted by the pipeline cannot act on their own to hold the BTC Consortium accountable for human rights commitments made under the agreements, particularly the unilateral commitments discussed below, in section V.3. Instead, enforcement of BTC Co’s human rights commitments depends entirely on host governments. If the host government turns a blind eye to BTC Co’s violations of its commitments—due to domestic or international political

126 See, eg, HGA of Georgia, above n 24, Arts 17.2–17.4.
128 Ibid.
129 Ibid.
pressures—all guarantees made by BTC Co under the HGAs or subsequent project agreements, no matter how exemplary in theory, in practice cannot be enforced by the people who suffer injury stemming from violations of these guarantees.

D. The Joint Statement, the Security Protocol, and the BTC Human Rights Undertaking

The consortium and the host governments reject the concerns detailed above as illusory,130 pointing out that subsequent project agreements issued in 2003 definitely clarify that the IGA–HGA framework cannot be interpreted so as to impede the enforcement of international norms relating to human rights and environmental sustainability.

The Joint Statement, the Security Protocol, and the BTC Human Rights Undertaking were executed in response to intense pressure from local activists and the international NGO community. The first of the three agreements, issued in May 2003, begins: ‘We note concerns expressed by various non-governmental organizations about the BTC Project. We take these concerns seriously. We are determined to make the BTC Project a model project in all respects, and the environmental, social, and human rights aspects of the project are of fundamental importance. We are committed to BTC Co’s objective of, “No accidents, no harm to people, and no damage to the environment.”’131 The BTC Human Rights Undertaking, executed five months later, aimed to address criticisms regarding the ability of host governments and third parties to advance claims against project participants.132 To the extent that these three project agreements do effectively address the primary problems with the HGAs, the NGO community and local human, labor, and environmental justice activists must be given credit for demanding accountability. Their demands led directly to the establishment of a prevailing legal regime far friendlier to the progressive realization of human rights, environmental protection, and sustainable development.

The Joint Statement133 was the first official document to address and attempt to ameliorate the criticisms directed against the IGA–HGA

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130 ‘As part of our dialogue with the NGO community, we are aware of speculation regarding the intent of the parties with respect to provisions of the Project Agreements, and speculation that those provisions might be interpreted or used in a manner that could permit the Project, or the host States, to act in a manner contrary to international human rights, environmental, or social and labor norms. We have considered each of the provisions identified and have concluded that none of the speculation included in recent correspondence reflects the intent or understanding of the parties with respect to their meaning or operation. We are determined to uphold the highest international standards for BTC and we cannot agree with those speculations’: Joint Statement, above n 37, Art 4.

131 Ibid., Art 1.


133 Joint Statement, above n 37.
framework. Issued by the three host governments in consultation with the BTC Co, it addresses the social and environmental concerns outlined above in two ways. First, it asserts and clarifies the intent of the parties that "the Project be developed and operated as a model for good environmental, labor and social practices."134 This clarification would make it difficult for BTC Co to prosecute a claim for compensation springing from the enforcement of evolving international legal norms. Second, and more concretely, the Statement affirms that the project will be bound by international environmental and labor standards. With regard to environmental risk management, "the IGA commits each State to the application of environmental standards and practices that are "no less stringent" than those generally applied within member states of the European Union from time to time."135 The clause continues, clarifying that "the HGAs and other BTC Project Agreements give effect to this commitment, and provide a dynamic benchmark that will evolve as EU standards evolve, and as international standards and practices within the petroleum pipeline industry also evolve."136 With regard to labor rights, the Statement confirms "that International Labor Organization conventions on Forced Labor, Freedom of Association and Right to Organize, Collective Bargaining, Discrimination, Equal Remuneration and Minimum Age, all as in effect from time to time, will 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 any host State is a party from time to time."137

The Security Protocol, issued by Georgia, Turkey, and Azerbaijan in July 2003, primarily addresses a number of issues regarding coordination of security operations between the three countries.138 Chapter Two of the Protocol, however, addresses human rights, affirming that all security measures will be implemented in accordance with the UN Declaration of Human Rights, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of Racial Discrimination, the UN Code of Conduct for Law Enforcement Officials, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol 11, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the Voluntary Principles on Security and Human Rights.139

134 Ibid., Art 1.
135 Ibid., Art 7.
136 Ibid.
137 Ibid., Art 8.
138 Security Protocol, above n 37, ch 1, Arts 1–11.
139 Ibid., Arts 12, 13.
In the BTC Human Rights Undertaking, dated 22 September 2003, the BTC Co promises it will: (1) not assert any claims that would prevent Host Governments from applying domestic laws to regulate human rights or health, safety, or environmental issues; (2) not assert or advance any claim that would prevent host governments from applying dynamic and evolving norms of international law as related to human rights or health, safety, and environmental standards; (3) not prevent claims by private parties from proceeding against Project Participants in State Courts; and (4) that 'economic equilibrium' will not be used to seek compensation for actions required under international treaties relating to human and labor rights or health, safety, or environmental protections.\(^\text{140}\)

To return to our initial frame of analysis grounded in rights and remedies, the Undertaking is potentially more legally significant than either the Joint Statement or the Security Protocol because it directly addresses the core issue of remedies. The Undertaking promises that BTC Co will not seek compensation for the economic impact of government actions that reasonably protect public health and safety or promote adherence to international human and environmental norms. The Undertaking also promises that people affected by the project can hold BTC Co legally accountable in domestic courts, declaring that the international arbitration clauses of the HGAs are not to be interpreted so as to preclude private parties from seeking remedies against project participants in local courts for violations of domestic law.\(^\text{141}\) Significantly, the Undertaking does not establish the right of locally affected populations to hold the BTC Co accountable for injuries resulting from breach by BTC Co of project agreement standards relating to human rights, health, safety, or the environment.\(^\text{142}\) In other words, the Undertaking by BTC does not establish a 'private attorney general right of action', meaning that it remains solely up to the host governments to demand redress from BTC Co for any breach of its human rights commitments.

Although, as mentioned earlier, the importance of the project agreements should not be overlooked, their legal significance under international law remains somewhat ambiguous. On the one hand, the Undertaking states that it cannot be revoked without the consent of the Governments of Turkey, Azerbaijan, and Georgia\(^\text{143}\) and warrants that the commitments it contains 'constitute a legal, valid, and binding obligation'.\(^\text{144}\) The Joint Statement likewise declares that it 'constitutes a Project Agreement as defined under the BTC IGA and HGAs',\(^\text{145}\) while the Security Protocol

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\(^{140}\) BTC Human Rights Undertaking, above n 37, at 3–4.

\(^{141}\) HGA of Georgia, above n 24, Arts 17.2–17.4.

\(^{142}\) BTC Company, above n 94, at 14.

\(^{143}\) Ibid.

\(^{144}\) Ibid.

establishes that it 'shall remain in force throughout the commercial operation of the projects.' On the other hand, the Undertaking was issued unilaterally by the BTC Co, without consideration from the host governments, and may be unenforceable for that reason. To the extent that the terms of these instruments directly conflict with provisions in the core project covenants, a court might decide that the terms of the HGAs and IGA control. Despite assurances to the contrary, the legal value courts or arbitrators would attach to the three documents remains an open question. It is also worth noting that none of the three project agreements (the Joint Statement, the Security Protocol, and the BTC Human Rights Undertaking) address concerns regarding involuntary resettlement procedures or the way the land acquisition process discriminates against women.

E. Contrasting the BTC Agreements with Standard Bilateral Investment Treaties

The purpose of the stabilization clauses in the HGAs is to protect BTC Co from financial risks associated with operating in a foreign country with an unfamiliar legal system and an unpredictable political climate. Bilateral investment treaties (BITs) between States also aim to protect foreign investors from the same risks. It is important to recognize the key differences between the terms of the BTC pipeline project HGAs and the BITs that govern foreign investments worldwide, of which there are currently more than 2,265.

The key provisions of BITs are generally: (1) national treatment, guaranteeing that foreign investments will be treated no less favorably than domestic investments; (2) most-favored-nation treatment, guaranteeing that foreign investments will be treated no less favorably than investments of investors of any third country; (3) establishment that expropriations

147 Under the doctrine of consideration—applicable under common law but not civil law—a contract and/or a subsequent modification to an existing contract is unenforceable unless there has been a bargain for exchange. Subject to specific exceptions, if a promise is made by one party, unilaterally, without receipt of consideration from the other party, there is no contract: see Restatement (Second) of Contracts §§17, §71 (1981). On the other hand, promissory estoppel might prevent BTC Co from invalidating its unilateral statement, if the host States have relied on the assertions it contains: see Restatement (Second) of Contracts §139 (1981). Since the HGAs are governed by the law of England (see HGA of Azerbaijan, Art 17.12; HGA of Georgia, Art 17.13; HGA of Turkey, Art 18.12), the doctrine of consideration applies.
must be done for a public purpose, in accordance with the law, and on payment of compensation; (4) prohibitions on performance requirements, including local purchasing and balance of payments requirements; and (5) the specification of a dispute settlement mechanism, usually under the rules of the International Centre for the Settlement of Investment Disputes (ICSID) and/or the United Nations Commission on International Trade Law (UNCITRAL).  

The most important distinction between the BTC Project HGAs and BITs is that the HGAs are contracts between a private investor and the host States, while BITs are treaties between sovereign governments. The national treatment, most-favored-nation, and performance requirement provisions are irrelevant to the BTC project contract because the HGAs concern a specific investment (the pipeline project), not possible future investments. Moreover, BTC Co can act in its own interest to hold host governments accountable for violations of the HGAs, without relying on the home State government to intercede on its behalf, as is necessary under BITs.

Another area in which a distinction must be drawn between the BTC legal framework and BITs is the compensation requirement of the HGAs, and the expropriation/compensation constraint imposed by BITs. At first glance, the compensation requirement of the BTC HGAs appears to mirror the ‘no expropriation without compensation’ requirement generally established by BITs, but this semblance is illusory—the compensation requirement in HGAs establishes a somewhat more expansive obligation than do corresponding BIT expropriation/compensation clauses. As detailed above in Section V, the HGAs between Turkey, Azerbaijan, Georgia, and BTC Co require the host governments to compensate for regulations that upset the ‘economic equilibrium’ of the pipeline project, even slightly. In contrast, the value of a property must be substantially diminished in order for an expropriation to have occurred. Determinations regarding regulatory takings involve complex, fact-based analysis of many factors, including the extent of a purported diminution in value, the nature of the ‘property right’ infringed upon, and whether a regulation represents a legitimate exercise of police powers. The HGAs short-circuit this nuanced analysis, requiring the host governments to compensate BTC Co for legal and regulatory actions that would not be


151 Ibid.
likely to constitute an expropriation under international law—and would therefore not trigger the corresponding compensation requirement established by BITs. The HGAs thus establish a greater financial liability owed by governments to the pipeline project investors than would be imposed under BITs, constraining the regulatory autonomy of Turkey, Azerbaijan, and Georgia to a correspondingly greater extent.

The agreements conflate property and contract law, replacing the rationality that generally governs expropriations jurisprudence with the doctrine underlying contracts. By requiring the host governments to 'restore the Economic Equilibrium established under the Project Agreements' or pay compensation, the HGAs protect BTC Co’s right to expected future profits. This idea of expectation damages is common to contract law—courts generally award expectation damages in order to give parties incentives to breach only when breach would be socially efficient—but is not an established principle of international takings jurisprudence.

When protecting private property from uncompensated government expropriation, a court must first ascertain the property interests in question (the rights of a claimant in relation to a resource). Only if a property right exists can it have been abrogated by the government. Even in the United States, arguably one of the most pro-private property regimes in the world, the inclusion of expected profits as a protected property right is highly contested. Enshrining an absolute private property right

152 HGA of Georgia, above n 24, Art 7.2(x); HGA of Turkey, above n 24, Art 7.2(xi); HGA of Azerbaijan, above n 24, Art 7.2(x).
153 The purpose of expectation damages in case of contract breach is to put the promisee in the position he or she would have been in had the promisor performed the contract.
154 Default measure of damages is expectancy: Restatement (Second) of Contracts §347 (1981).
155 A socially efficient breach occurs when a promisor stands to gain more by breaching than the promisee stands to gain if the promisor fulfills the contract terms—thus the promisor is willing to breach even if he or she must compensate the promisee for the full amount.
156 A history of international jurisprudence regarding regulatory takings and compensation in the context of NAFTA, see Bein and Beavais, above n 149, at 40–59.
157 The greater the number of rights recognized as legally protected property interests, the more likely it becomes that a government regulation will infringe on these rights and therefore require compensation: Howard Mann and Julie Soloway, Untangling the Expropriation and Regulation Relationship: Is there a way forward?, Report to the Ad Hoc Expert Group on Investment Rules and the [Canadian] Department of Foreign Affairs and International Trade, 31 March 2002, s 4(D).
159 Although the US Supreme Court has ruled that the abridgement of ‘distinct investment-backed expectations’ may constitute a ‘taking’ that requires government compensation, in Lucas v SC Coastal Council, 505 US 1003, at 1027–1029 (1992), the court has also ruled that many regulations that diminish but do not extinguish property value are not ‘takings’: see, eg Penn Central Transport, Co v New York City, 438 US 104, at 124 (1978).
to expected profits would make the normal functioning of government virtually impossible—most laws and regulations alter the ‘economic equilibrium’ surrounding businesses to some extent; clearly the vast majority of standard regulations are not considered compensable expropriations. In conflating the contract remedy of expectation damages with a property right in expected profits, the expropriation/regulation/compensation regime established under the HGAs greatly increases the private property protections afforded to the BTC Consortium, and sharply circumscribes the ability of Azerbaijan, Turkey, and Georgia to enact laws and regulations in the public interest.

VI. THE INTERNATIONAL FINANCE CORPORATION SHOULD REQUIRE CORE PROJECT AGREEMENTS TO SUPPORT THE EFFECTIVE ENFORCEMENT OF EVOLVING HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT NORMS

What is to be done, and who is to do it? How can the international community better ensure that human rights and principles of sustainable development are not undermined by the legal frameworks governing large-scale private development projects, such as the BTC pipeline project?

This chapter has so far examined the background of the BTC pipeline, the IFC’s commitment to sustainable development, current safeguard policies the IFC has implemented to further that mission, the problematic aspects of the BTC Project HGAs and IGA, and the positive steps Turkey, Azerbaijan, Georgia, and BTC Co have taken to address social and environmental critiques leveled against the HGAs and IGA.

The legal framework of the BTC project is a case study of both the risks and opportunities presented by project covenants. As detailed in Section V, the initial IGA–HGA legal framework agreement threatened to thwart the protection of health, safety, human rights, and the environment. Yet the execution of subsequent project agreements addressing many of these concerns demonstrated that it is both legally possible and economically feasible to create a legal framework that instead enables the progressive realization of human rights and environmental sustainability.

In order better to further its mission of promoting environmentally and socially sustainable private sector projects, the IFC should implement standards regarding the legal frameworks that govern the projects the Bank finances. The current review and revision of the safeguard policies presents an opportunity to incorporate such standards into core IFC social and environmental project guidelines. Large-scale investment receiving IFC loans or assistance, particularly in the extractive industries, should be required to ensure than any covenants executed with host governments enable the protection and promotion of environmental sustainability and human rights.
Any HGAs should: (1) require project investors to uphold international environmental and human rights norms; (2) provide host governments the right to seek redress in international courts if such norms are violated; (3) bar investors from asserting any claims for compensation if or when host governments apply evolving international laws to regulate human rights or health, safety, or environmental issues; (4) establish the ‘private attorney general right’ of private parties to bring suit against project investors in local courts if investors violate either the terms of the project agreement or international or domestic laws; and (5) implement contractual mechanisms to prevent providers of security services from perpetrating human rights abuses against dissidents. Central to all these recommendations is the principle—put forth in recommendation (3)—that host States may protect and promote human rights by imposing obligations on transnational corporations, and that transnational corporations may not seek compensation for economic loss. Allowing host States the latitude to enforce human rights norms is all the more important because international human rights obligations are primarily directed towards States, and substantial legal ambiguity exists as to the content of human rights norms when addressed to private parties. Therefore the host States have a pivotal role to play in transforming idealized human rights into concrete, legal obligations.

The IFC is well positioned to influence the content of legal agreements used to structure future projects such as the BTC pipeline. This influence is both direct and indirect.

First, project sponsors seeking IFC financing can be required to comply with guidelines regarding project agreements in the same way that they are required to abide by existing IFC safeguard policies. IFC safeguard policies and project assessment procedures already impose a web of conditions on large-scale projects such as the BTC pipeline. Guidelines regarding stabilization instruments could be incorporated into this already existing web. To the extent that sponsors are aware of the guidelines, they can take them into account ex ante; to the extent that they become aware only through the IFC loan appraisal process, sponsors can work with IFC lawyers to incorporate IFC mandated terms into the legal framework ex post, as occurred in the BTC project case study.

Second, IFC policies exert influence beyond the immediate realm of the project the Bank finances. According to the CAO, case studies show that the safeguard policies have a demonstration effect by introducing government regulators, sponsors, and industry sectors to best practices. In one case, a project sponsor’s use of the safeguard policy encouraged suppliers and producers to adopt the best practice throughout the supply

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chain.\textsuperscript{161} By establishing a ‘best practice’ benchmark vis-à-vis stabilization clauses, the IFC will encourage companies to adopt a similar framework in subsequent agreements.

Critics may object to the imposition of additional constraints on private sector investors, arguing that constraints will discourage investors from seeking IFC funding and thus prevent the IFC from having positive impact on the sponsor’s project in other ways. This specious assertion has two powerful rejoinders. First, World Bank financing adds not only investment to the project, but a stamp of multilateral respectability as well. As one observer puts it, BP and its partners could have raised the money on their own, what they needed was ‘the political blessing of the two agencies to avoid claims that the project fails to meet international standards.’\textsuperscript{162} Second, as the recent review of IFC safeguards policies attests, the largest determinant of the effectiveness of safeguard policies is the attitude of project sponsors.\textsuperscript{163} If sponsors are not interested in upholding basic standards regarding health, safety, the environment, and human rights, their commitment to any of the social and environmental policies is likely to be questionable. In other words, if a project sponsor is deterred by applying for IFC funding because of the IFC’s safeguard policies, then all the better—the sponsor would likely make a poor and underperforming IFC partner anyway.

The self-proclaimed mission of the IFC is to promote economic development that is socially responsible and environmentally sustainable.\textsuperscript{164} This mission requires that the IFC refuse to finance projects when their legal structure impedes the effective enforcement of international and domestic laws regarding health, safety, human rights, and the environment. The BTC pipeline project illustrates the immediate relevance of this issue, as well as a case study of some possible best practices. The IFC should seize the opportunity presented by the ongoing safeguard policy overhaul to include standards regarding legal framework agreements in the Policy on Social and Environmental Sustainability, thus enabling the effective enforcement of evolving international norms regarding human rights, environmental sustainability, labor, health, and safety.

\textsuperscript{161} Ibid.
\textsuperscript{162} Christopher PM Waters, above n 92, at 23 (citing Carl Mortished, ‘BP Awaits Pipeline Ruling’ (2003) The Times, 27 October.

\textsuperscript{163} Compliance Advisor/Ombudsman, above n 16, at 40.

\textsuperscript{164} International Finance Corporation, above n 43.