

THE QUEST FOR CORPORATE ACCOUNTABILITY MEASURES IN BILATERAL INVESTMENT TREATIES

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INTRODUCTION

The problems arising from the fragmentation of international law are increasingly being acknowledged, and solutions are being explored to overcome them. Due to the ‘special nature’ of human rights treaties, which are irreducible to exchanges of undertakings between States, merely to state that these treaties are paramount, will not suffice.¹

Specifically, Multinational Corporations (MNCs) pose challenges to Human and Environmental Rights apart from the host states’ sovereignty limitations to regulate its domestic affairs. The current form and content of the Bilateral Investment Treaties (BITs) legal framework is another burden to human and environmental rights. Currently, both developed and developing countries are paying far greater attention to the scope of their BITs’ obligations and, now more than ever before, are seeking a better balance between investor rights and their right to regulate in the public interest.

The law of international investments, which is mainly developed by state practice, is currently undergoing significant reforms. These developments are due in part to the proliferation of a patchwork of bilateral and multilateral treaties.² Europeans and Americans have often posed to the rest of the world into believing the inviolability and inalienability of the concept of human rights. Yet, their BIT models suggest that they do not revere the protection of human rights after all.

In recent years, the discourse surrounding BITs and issues concerning human rights and the environment have moved from the periphery to the center of the investment law agenda. While human rights standards have historically been applicable against governments and not the private sector, it has become clear that this approach cannot be maintained.³

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1. Olivier De Schutter, *Foreword* to SARAH JOSEPH, *BLAME IT ON THE WTO? A HUMAN RIGHTS CRITIQUE*, at v (Oxford Univ. Press 2011).

2. Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 45, 45–46 (Pierre-Marie Dupuy, et al. eds., 2009).

3. Veronika Haász, *The Role of National Human Rights Institutions in the Implementation of the UN Guiding Principles*, 14 *HUM. RTS. REV.* 165, 165 (2013).

Some legal experts have claimed that “private companies have a responsibility to respect human rights and international legal obligations should be extended to them.”⁴ This alone could be a reason to celebrate, because—as recent as twenty years ago—the terms “human rights” and “business” were rarely used in the same sentence.⁵ “Human rights were of the government’s concern only, while businesses were virtually exempt from abiding by these standards.”⁶ However, this is no longer the narrative.

Thus, it is not only naïve as a matter of fact, but inconceivable in the current investment legal scholarship—more than half a century since the adoption of the International Bill of Rights⁷ and taking into account various public international law developments—to continue perceiving human and environmental rights as incongruent and problematic when incorporated in the BITs legal framework.

BITs can do more to enhance responsible investment.⁸ Foreign investment can facilitate positive conditions and improve peoples’ lives. However, it also carries the risk of negatively impacting the environment, peoples’ health, and the enjoyment of their human rights.⁹ These effects can be exacerbated by domestic regulatory gaps.¹⁰ Therefore, while BITs continue to provide a firm basis for investment protection, it is also important to begin addressing investor responsibilities concerning human and environmental rights.¹¹

For some time now, the discourse surrounding public international law has seemed to establish an international legal shift toward a system centered on human beings and the environment.¹² International relations have ceased to be a part of that decadent framework in which anything is permitted in the name of reasons of state sovereignty.¹³ “A man’s home is

4. *Id.* at 166.

5. UGANDA CONSORTIUM ON CORP. ACCOUNTABILITY, *THE STATE OF CORPORATE ACCOUNTABILITY IN UGANDA: A BASELINE STUDY REPORT FOR THE UGANDA CONSORTIUM ON CORPORATE ACCOUNTABILITY*, at xii (2016).

6. *Id.*

7. *See* JAVAID REHMAN, *INTERNATIONAL HUMAN RIGHTS LAW: A PRACTICAL APPROACH*, 51, 51–132 (Pearson Educ. Ltd. 2003) (providing a full discussion on the International Bill of Rights).

8. *See* U.N. CONF. ON TRADE AND DEV., *WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE*, at 126, U.N. Doc. UNCTAD/WIR/2015, U.N. Sales No. E.15.II.D5 (2015) [hereinafter *WORLD INVESTMENT REPORT 2015*].

9. *Id.*

10. *Id.*

11. *Id.*

12. Apollin Koagne Zouapet, *A binding instrument for multinationals and human rights: Why and how Africa must engage*, FRIENDS OF THE INT’L EARTH, (Nov. 1, 2017), www.foei.org/news/binding-instrument-multinationals-human-rights-africa-must-engage [https://perma.cc/SJ2L-Q5SG].

13. *Id.*

no longer his castle,” and sovereignty does not justify total indifference to human rights and environmental standards anywhere.¹⁴

The human rights movement succeeded in creating focus on a rights-based approach and demonstrating the need to guarantee the rights of all.¹⁵ Unfortunately, this success is tempered by a constant and significant qualification: indigenous peoples.¹⁶ Indigenous people still lie at the bottom of the socio-economic hierarchy in most societies around the world. This fact applies both in terms of their access to such rights and also the benefits from the reverberations of the rights-based approach.¹⁷

In their present form, BITs are asymmetrical.¹⁸ Except for the new generation of BITs—for instance the Morocco-Nigeria BIT of 2016—foreign investors are generally accorded substantive rights under BITs without being subject to any specific obligations.¹⁹ Despite the fact that foreign investment can make positive contributions for development, it can create adverse consequences for human rights, the environment, and other public interests.²⁰ Typically, BITs set out few, if any, responsibilities on the part of investors in return for the protection that they receive.²¹ Accordingly, one objective in reforming international investment agreements is ensuring responsible investor behavior.²² This includes two dimensions: “doing good” and “doing no harm.” Doing good requires maximizing the positive contribution that investors can bring to societies and doing no harm means avoiding negative impacts.²³

This Article is a contribution to the ongoing discussion on the reforms of the BITs. It mainly focuses on the quest for corporate accountability measures for adverse effects on human and environmental rights in Africa. Thus, it suggests ways to mainstream human rights and environmental standards in the BITs legal framework as one of the

14. *Id.*

15. Joshua Castellino, *Indigenous Rights and the Right to Development: Emerging Synergies or Collusion?*, in REFLECTIONS ON THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 367 (Stephen Allen & Alexandra Xanthaki eds., 2011).

16. *Id.*

17. *Id.*

18. Patrick Dumberry & Gabrielle Dumas-Aubin, *How to Incorporate Human Rights Obligations in Bilateral Investment Treaties?*, INV. TREATY NEWS (Mar. 22, 2013), www.iisd.org/itn/2013/03/22/how-to-incorporate-human-rights-obligations-in-bilateral-investment-treaties/ [<https://perma.cc/9FYT-MGRY>].

19. *Id.*

20. WORLD INVESTMENT REPORT 2015, *supra* note 8, at 128.

21. *Id.*

22. *Id.*; see also Frank J. Garcia, et al., *Reforming the International Investment Regime: Lessons from International Trade Law*, 18 J. OF INT’L ECON. L. 861, 861–92 (2015).

23. WORLD INVESTMENT REPORT 2015, *supra* note 8, at 128.

approaches and how tribunals should address the question when faced with it. It also makes a call for a pragmatic approach to strike a balance between the host state's and foreign investor's human rights and environmental standards obligations in BITs.

Significantly, if a sitting Head of State can be held accountable for his or her acts and omissions in this era (at least in theory), why can't MNCs' legacy of impunity be put to an end? In view of that, a discourse about *how* to end that legacy is paramount, as the inquiry of whether or not corporations *should* become accountable is not only moot but overtaken by events. The discussion in this Article addresses the question of whether there is a need for drafting a newer BIT legal framework or if the interpretation of the existing one would suffice to mainstream human and environmental rights in the BITs as a solution to end corporations' impunity. Thus, it lays a foundation for potential corporate accountability measures for the adverse impacts on human rights and the environment often caused by MNCs while in pursuit of their business activities.

I. HUMAN RIGHTS LAW AND INTERNATIONAL INVESTMENT LAW: TWO SIDES OF THE SAME COIN

A number of scholars—albeit a shrinking number—still view international investment law and human rights law as two separate branches of international law, without substantial overlap.²⁴ Other scholars deem the two branches' relationship complex.²⁵ Yet commentators generally agree that international investment law and arbitration have an adverse impact on the promotion and protection of human rights.²⁶

However, the origins of investment protection and human rights share various similarities.²⁷ Regardless of such similarities, historically there has not been a strong connection between human rights law and international economic law, particularly international trade and investment law.²⁸

24. Dupuy, *supra* note 2, at 45.

25. Johannes Hendrik Fahner & Matthew Happold, *The Human Rights Defense in International Investment Arbitration: Exploring the Limits of Systemic Integration*, 68 INT'L & COMPAR. L. Q. 741, 743 (2019); *see also* Abdullah Al Faruque, *Mapping the Relationship between Investment Protection and Human Rights*, 11 THE J. OF WORLD INV. & TRADE 539, 539–60 (2010).

26. *See generally* COLUM. CTR. ON SUSTAINABLE INV. & U.N. HUM. RTS. SPECIAL PROC., IMPACTS OF THE INTERNATIONAL INVESTMENT REGIME ON ACCESS TO JUSTICE: ROUNDTABLE OUTCOME DOCUMENT 1–20 (2021).

27. Petrena Notice, *International Investment Law Reform: A Human Rights Perspective*, in REBALANCING INTERNATIONAL INVESTMENT AGREEMENTS IN FAVOUR OF HOST STATES 260, 261 (Wildy, Simmonds, & Hill Publ'g 2018).

28. *See generally* SERGIO PUIG, AT THE MARGINS OF GLOBALIZATION: INDIGENOUS PEOPLES & INTERNATIONAL ECONOMIC LAW (Cambridge Univ. Press 2021).

While International Trade and Foreign Direct Investment (FDI) regulation have developed through the General Agreement on Tariffs and Trade (GATT), the World Trade Organization (WTO), Free Trade Agreements (FTAs), and BITs developing mainly through states' practices, human rights law evolved around the United Nations (UN) and, more recently, regional systems.²⁹ The result is, in Robert Wai's words, that "each field utilize[s] distinct discourses and frameworks for addressing similar problems."³⁰

In particular, human rights frameworks use a discourse of universal values, self-determination, and accountability, whereas international economic law (international investment law included), uses a language of reciprocity and restraint, non-discrimination, self-interest, and joint gains.³¹

In terms of human rights language, the BITs typically lack any references to other international commitments (such as multilateral and regional treaties) made by the contracting parties.³² Historically, BITs containing substantive clauses on human rights were unheard-of. They failed to condition investor rights or access to dispute settlement on investor responsibilities (for example, requiring investors to respect human rights in its operations).³³

Thus, generally, it can be asserted that the BITs legal framework is devoid of language and provisions regarding human rights accountability on the part of the foreign investors. To promote and protect human and environmental rights, a BIT needs to include operative language to that effect or provisions regarding courses of action.

Nonetheless, recent decisions by ad hoc tribunals have noted the importance of the intersection of international investment law with other fields of international law and have recognized the duty of governments to protect against human rights violations.³⁴

These two branches of public international law are presently treated as related fields in the context of business and human rights. Both fields have witnessed significant developments since 2008, when the United Nations (UN) Special Representative on the Issue of Human Rights and Transnational Corporation and Other Business Enterprises proposed a three pillar policy framework for addressing the business and human rights

29. *Id.*

30. *Id.*

31. *Id.*

32. LUKE ERIC PETERSON & KEVIN R. GRAY, INT'L INST. FOR SUSTAINABLE DEV., INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND IN INVESTMENT TREATY ARBITRATION 1, 8 (2005).

33. *Id.*

34. Urbaser S.A. v. The Argentine Republic, Case No. ARB/07/26, Award, ¶ 1200 (Int'l Ctr. for Settlement of Inv. Disp. 2016), http://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf [https://perma.cc/5B77-FMHW].

linkage: Protect, Respect, and Remedy.³⁵ In 2011, the UN Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights: Implementing the UN “Protect, Respect and Remedy” Framework, which showed that the movement toward ensuring corporate respect and accountability for human rights has been gaining momentum.³⁶

A. Rationale for International Human Rights Law in Light of International Investment Law

Human rights primarily focus on individuals and communities.³⁷ However, international human rights instruments do not create causes of action that allow individuals or communities to proceed directly against non-state actors.³⁸ In human rights law, the primary means by which individual rights are protected from human rights violations by non-state actors is through the state.³⁹ The legal options available to an individual or a group of people to proceed directly against a foreign investor (rather than

35. Uche Ewelukwa Ofodile, et al., *Corporate Social Responsibility*, 50 THE YEAR IN REV. 171, 171 (2016) (noting that the BIT being applied in that dispute “has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights”).

36. *Id.*

37. Dupuy, *supra* note 2, at 45.

38. Jorge Daniel Taillant & Jonathan Bonnitcha, *International Investment Law and Human Rights*, in SUSTAINABLE DEV. IN WORLD INV. LAW 73 (Marie-Claire Cordonier Segger, Markus W. Gehring & Andrew Newcomb eds., 2011).

39. *Id.*; see also OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS 17 (2005), www.ohchr.org/Documents/Publications/training12en.pdf [<https://perma.cc/KP9V-SL8F>]; John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, A/HRC/17/31, 3 (Mar. 21, 2011), www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [<https://perma.cc/Y4J4-LSUQ>]. See generally OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS 3 (1996) (The International Covenant on Economic, Social and Cultural Rights of 1966 outlines the basic obligations of States parties in relation to each of the rights found in the Covenant. In the context of this study, the *host State* (a party to the Covenant) has the obligation to protect economic, social and cultural rights which requires the State and its agents to prevent the violation of any individual’s rights by any other individual or non-State actor. Where a third party infringes economic, social and cultural rights, the public authorities should act to preclude further violations and to guarantee access to legal remedies for any victims of the infringement. The Covenant has been ratified by most African States—48 out of 55) (emphasis added).

against the state for breach of its duty to protect) depend entirely on the domestic legal system in question.⁴⁰

Hence, individuals must rely on the domestic legal system for an appropriate cause of action against foreign investors. If a state neglects its duty to provide effective remedies for individuals or groups of people against foreign investors within the domestic legal system, then those people are left without protection from corporate human rights abuse.⁴¹

On the other hand, investment treaties neither focus on natural persons nor address how investment activity might affect the enjoyment of various human rights in the host country, thereby “minimizing the possibility of successfully raising human rights arguments” in BIT arbitrations.⁴² While investors can be individuals, most are private corporations, and international investments law deals primarily with investors envisaged as legal persons, not individuals.⁴³

The initial period of growth of investment treaties was singularly focused on protecting investor rights in foreign states.⁴⁴ The western fears of the expansion of Communism and the oncoming period of decolonization, nationalization, and arbitrary treatment at the hands of governments in the developing world were real. The emerging oil expropriations in the Gulf and Northern Africa compounded that fear.⁴⁵ In simple terms, the investment treaty regime of the 1960s had investor protection as its only function. In this regard, there is no dispute that much has not changed to date.⁴⁶

This explains, in part, why human rights are still rarely invoked in international arbitrations dealing with international investments, be it by the investor or by the host state. Likewise, it explains why MNCs are rarely held accountable for their violations.⁴⁷ Therefore, there is a dire need for the inclusion of corporate accountability measures in the BITs for violations of human rights, measures which would allow individuals to sue MNCs directly, through the host state, or the host state itself for breaching its duty to protect them.

40. Taillant & Bonnitche, *supra* note 38, at 74.

41. *Id.* at 73–74.

42. See generally Angelos Dimopoulos, *EC Free Trade Agreements: An Alternative Model for Addressing Human Rights in Foreign Investment Regulation and Dispute Settlement?*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 566 (Oxford Univ. Press 2009).

43. Dupuy, *supra* note 2, at 45.

44. Howard Mann, *Reconceptualizing International Investment Law: Its Role in Sustainable Development*, 17.2 LEWIS & CLARK L. REV. 521, 524 (2013).

45. *Id.*; PETERSON & GRAY, *supra* note 32, at 7.

46. Mann, *supra* note 44, at 524.

47. Dupuy, *supra* note 2, at 45.

B. Corporate Social Responsibility: Is it Apposite for the Protection of Human Rights?

There is an ongoing debate concerning the scope of the concept of Corporate Social Responsibility (CSR) and the utility of its inconsistent application around the world, be it as a form of public relation or veritable outreach to the broader society by corporate entities.⁴⁸ The question of whether CSR as it is known and practiced in the western industrialized world is different from its implications and meaning in developing countries is at the core of the debate.⁴⁹ The double standard application of CSR between the north-south is possible because of issues related to regulatory measures as a result of multifaceted factors in the south, such as: misconception of the CSR concept, weak or lack of regulatory frameworks, regulatory compliance problems, corruption, lack of expertise, and other domestic factors in regulating MNCs activities in developing countries.⁵⁰

Additionally, the term Corporate Social Responsibility has not been defined with clear precision.⁵¹ Notably, in 2003, Mary Robinson stated, “it remains the case that virtually all of the corporate social responsibility debates around the world made no reference to international human rights standards.”⁵² In countries like Tanzania, CSR is mainly understood in regards to corporate philanthropy, i.e. providing charitable support to community members with a part of corporate profits.⁵³ This practice is common within African countries both as a camouflage for and concealment of MNCs’ misconduct.⁵⁴

48. JIDE JAMES-ELUYODE, *CORPORATE RESPONSIBILITY AND HUMAN RIGHTS: GLOBAL TRENDS AND ISSUES CONCERNING INDIGENOUS PEOPLES* 60 (Lexington Books 2020).

49. *Id.*; see also Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1431–94 (2006). See generally Amiram Gill, *Corporate Governance as Social Responsibility: A Research Agenda*, 26 BERKELEY J. OF INT’L L. 452, 452–78 (2008).

50. See Birungi Korutaro & Nicholas Biekpe, *Effect of Business Regulation on Investment in Emerging Market Economies*, 3 REV. OF DEV. FIN. 41, 41–50 (2013). See generally ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *REDUCING THE RISK OF POLICY FAILURE: CHALLENGES FOR REGULATORY COMPLIANCE* 1 (2000).

51. JAMES-ELUYODE, *supra* note 48, at 58.

52. Mary Robinson, *Foreword* to GREENLEAF PUBL’G LTD., *BUSINESS AND HUMAN RIGHTS: DILEMMAS AND SOLUTIONS* 9 (Rory Sullivan, ed., 2003).

53. LEGAL AND HUM. RTS. CENTRE, *HUMAN RIGHTS AND BUSINESS REPORT 2018/2019: TANZANIA MAINLAND* 145 (Anna Henga, Felista Mauya & Imelda-Lulu Urrio, eds., 2019).

54. MONICA BARRIOS GONZALES, *INVESTORS VERSUS PEOPLE: THE PUBLIC NATURE OF INTERNATIONAL INVESTMENT LAW* 20 (Nov. 2016), <https://www.business-humanrights.org/sites/default/files/documents/The%20public%20>

In spite of the above, CSR has been defined as a model which “companies use to decide voluntarily to contribute to a better society and a cleaner environment.”⁵⁵ Over time, three tiers of CSR have evolved out of this definition: the first focused on short-term corporate interests and motives; the second on long-term success strategies; and the third aimed at addressing the role of business matters in public policy.⁵⁶

The first two generations of CSR have been viewed by corporations as a form of philanthropy, but the entire application of CSR rests on a voluntary basis (indeed this has been the cornerstone of the concept) and the emergent “soft law.”⁵⁷ The efforts to make CSR part of corporate practice have emanated from public international bodies and non-governmental organizations efforts.⁵⁸

In the contemporary BIT regime, a human rights and environmentally related provision, which has been occurring with more frequency, is one that tasks states with promoting CSR in some way.⁵⁹ For instance, the Brazil-Malawi and Morocco-Nigeria BITs⁶⁰ of 2015 and 2016 respectively, each contain articles on “Corporate Social Responsibility.” However, the CSR language used in each of the two sets of BITs varied.⁶¹

The Brazil-Malawi CSR provision stipulates, *inter alia*, that “investors and their investment *shall strive* to achieve the highest possible level of contribution to the sustainable development of the Host Party and the local community . . . *based on the voluntary principles and standards*

nature%20of%20IIL%20-%20Monica%20Barrios.pdf [https://perma.cc/HK7K-HG MQ].

55. Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 BOSTON UNIV. INT’L L. J. 309, 317 (2004).

56. *Id.*

57. *Id.*

58. *Id.*

59. Madison Condon, *The Integration of Environmental Law into International Investment Treaties and Trade Agreements: Negotiation Process and the Legalization of Commitments*, 33 VA. ENV’T L. J. 102, 126 (2015).

60. Investment Cooperation and Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Malawi, Braz.-Malawi, art. 9, Jan. 25, 2015, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4715/download> [https://perma.cc/2PQW-YN7T]; *see also* Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, Morocco-Nigeria, Dec. 3, 2016, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download> [https://perma.cc/H325-M3EV].

61. Investment Cooperation and Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Malawi, *supra* note 60; *see also* Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, *supra* note 60, at 18.

set out in this Article.” It further provides: “[T]he investors and their investment *shall develop their best efforts* to comply with the following *voluntary principles and standards* for responsible business conduct and consistent with the laws adopted by the Host Party receiving the investment.”⁶²

On the other hand, the Morocco-Nigeria CSR provision stipulates that “investors and their investments *should strive* to make the maximum feasible contributions to the sustainable development of the Host State and local community through *high levels of socially responsible practices*.”⁶³ It further provides: “[W]here standards of corporate social responsibility increase, investors *should strive to apply and achieve the higher-level standards*.”⁶⁴

The BITs themselves are treaties that create legally binding obligations upon their state parties.⁶⁵ The language in the two sets of BITs urges the investors and their investments—when circumstances deem fit—to abide by the CSR. This language may not trigger accountability measures on the part of the investor when adverse impacts on human rights and the environment occur. CSR generally applies to corporate entities, not states, and its mandates are typically voluntary.⁶⁶ At most, states are obligated to persuade MNCs to improve their compliance with voluntary codes or agreed *voluntary principles and standards set out in the BIT*.⁶⁷

It is also absurd to note that the jurisdiction clause in the Morocco-Nigeria BIT remains relatively restrictive, and the BIT does not contain a dispute resolution provision broad enough to allow states to initiate claims for human rights breaches against the investors in the host state.⁶⁸

62. Investment Cooperation and Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Malawi, *supra* note 60; *see also* Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, *supra* note 60, at 18.

63. Investment Cooperation and Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Malawi, *supra* note 60; *see also* Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, *supra* note 60, at 18.

64. Investment Cooperation and Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Malawi, *supra* note 60; *see also* Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, *supra* note 60, at 18.

65. Condon, *supra* note 59, at 127.

66. *Id.*

67. *Id.*

68. Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, *supra* note 60, at art. 27. *See generally* Naomi Briercliffe &

Notwithstanding that, the Morocco-Nigeria BIT's CSR provisions are not articulated to trigger accountability measures in the host state, and yet investors' accountability can be initiated in the home state.⁶⁹

Thus, the current developments in BIT regimes offer a possibility, and thus give credit to the discourse, on *how* to end corporate impunity. The new generations of BITs serve as a green light and a precursor toward corporate accountability. In the words of one legal scholar, "such CSR provisions are an example of the 'blurring' that can occur between 'hard' and 'soft' law."⁷⁰

II. HUMAN RIGHTS AND ENVIRONMENTAL STANDARDS: WHY DO THEY MATTER IN A BITs' LEGAL FRAMEWORK

Over the last half-century, international human rights law and international environmental law developed individually, as distinct domains of international law.⁷¹ However, since the emergence of contemporary international environmental law in the 1960s, legal scholars have perceived a strong relationship between the two areas.⁷² In 1972, the governments participating in the first major multilateral conference on the environment, held in Stockholm, proclaimed in the conclusion of the Stockholm Declaration that "[t]he protection and improvement of the human environment is a major issue which affects the well-being of peoples."⁷³

The international community's drive toward environmental protection has also been linked to constitutional and human rights discourses.⁷⁴ This link is premised on the fact that a safe and healthy environment is required for human health and existence.⁷⁵ As a result, the

Olga Owczarek, *Human-rights-based Claims by States and 'New-Generation' International Investment Agreements*, KLUWER ARB. BLOG, (Aug. 1, 2018), https://arbitrationblog.kluwerarbitration.com/2018/08/01/human-rights-based-claims-by-states-and-new-generation-international-investment-agreements/?doing_wp_cron=1590464650.4290189743041992187500 [https://perma.cc/RC3W-CAJ V]; Niccolò Zugliani, *Human Rights in International Investment Law: The 2016 Morocco-Nigeria Bilateral Investment Treaty*, 68 INT'L & COMPAR. L. Q. 761 (2019).

69. Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, *supra* note 60, at art. 20.

70. Condon, *supra* note 59, at 128.

71. DONALD K. ANTON AND DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 118 (Cambridge Univ. Press 2011).

72. *Id.*

73. *Id.*

74. Hamudi Majamba, *Environmental Rights Jurisprudence in Tanzania: A Review of Judicial Precedents 3* (Dec. 1, 2005) (unpublished thesis, Dar es Salaam University) (on file with University of Dar es Salaam Research Repository).

75. *Id.*

right to a clean, healthy, and safe environment has been considered as a prerequisite to ensuring the right to life.⁷⁶

Moreover, the environment is considered in light of the people who inhabit it, particularly indigenous peoples.⁷⁷ Accordingly, the protection and advancement of their rights overlap with the environment.⁷⁸ When it comes to indigenous peoples, the land—a major part of the environment—is corporately owned and normally considered inalienable by them because they have lived there since time immemorial.⁷⁹ Indigenous peoples depend on the land and natural environment for their culture, constituting a crucial aspect to their existence.⁸⁰ They perceive that “land belongs to a vast family of which many are dead, few are living, and countless members are unborn.”⁸¹

So far, foreign investment is not an exclusive private issue related to investors’ economic profit; instead, it involves significant human and environmental rights.⁸² As the adage goes, “when in Rome, do as the Romans do.”⁸³ There is a strong case for the international investment law—BITS’ legal framework in particular—to follow suit, incorporating human rights and environmental standards. Since human rights and environmental standards are integral parts of any business activity, their promotion, respect, and protection must be adhered to in any business-oriented framework by both foreign and local investors.

The “song” human rights are universal, inalienable, indivisible, interrelated, and interdependent, a “song” which has been sung for decades since the adoption of the Universal Declaration of Human Rights in 1948, in academic and non-academic fora, and now needs a pragmatic approach by all stakeholders.⁸⁴ It is high time we give real meaning to the principle of the universality of human rights, which are not only attributed to human

76. *Id.*

77. Lawrence Watters, *Indigenous Peoples and the Environment: Convergence from a Nordic Perspective*, in HUMAN RIGHTS AND THE ENVIRONMENT 3, 15 (Dinah L. Shelton ed., 2009).

78. *Id.*

79. See generally PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 12 (Manchester Univ. Press 2002).

80. Watters, *supra* note 77, at 15.

81. TASLIM OLAWALE ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 162 (Manchester Univ. Press 1956).

82. GONZALES, *supra* note 54, at 20.

83. *Why do we say, When in Rome, Do as the Romans Do?*, SIGHTSEEING TOURS ITALY, <https://www.romecitytour.it/blog/why-do-we-say-when-in-rome-do-as-the-romans-do/> [<https://perma.cc/QA99-ZLLA>] (last visited Aug. 5, 2021).

84. *Human Rights Principles*, UNITED NATIONS POPULATION FUND (2005), <https://www.unfpa.org/resources/human-rights-principles#> [<https://perma.cc/7D32-F5SL>].

beings and the environment in the territory of the state in question, but internationally.⁸⁵

It is therefore imperative that human rights and environmental standards be incorporated in both multilateral and bilateral treaties. For instance, established investments are a property in general terms, and their protection is tantamount to the protection of property rights, a category of human rights.⁸⁶ Thus, human rights law and investment law cannot be divorced, as they are intrinsically linked together.

One issue of increasing debate is whether there is a need for a greater degree of balance in BITs between the legitimate interests of investors and host states.⁸⁷ This leads to a broader discussion on how the negative impacts on human rights and the environment caused by corporations doing business in host states should be addressed.⁸⁸

Some international instruments, such as international human rights treaties, specifically address corporate activities.⁸⁹ Yet international law, as it now stands, does not impose any direct legal obligations on corporations, and it does not prevent countries from signing treaties, such as BITs, that would impose human rights and environmental obligations upon corporations.⁹⁰

Lawyers in general, activists, other stakeholders, and international human rights and environmental lawyers have particularly of late engaged in discussions about BITs' legal framework reforms, especially the Investor-State Dispute Settlement (ISDS) mechanism and have concrete reasons to cajole continuously that course for effective positive changes in the current regime.⁹¹ The interaction between human rights, the environment, and international investment law raises a fundamental question: do these branches of international law merely coexist or do they, at times, intermingle? It is clear that they intermingle.⁹²

85. See generally Frank J. Garcia, et al., *Reforming the International Investment Regime: Lessons from International Trade Law*, 18 J. OF INT'L ECON. L. 861, 861–92 (2015).

86. Jérémie Gilbert, *Land Rights As Human Rights: The Case For a Specific Right to Land*, 18 INT'L J. ON HUM. RTS. 115 (2013).

87. Dumberry & Dumas-Aubin, *supra* note 18.

88. *Id.*

89. *Id.*; see generally JOHN G. RUGGIE ET AL., STATE RESPONSIBILITIES TO REGULATE AND ADJUDICATE CORPORATE ACTIVITIES UNDER THE UNITED NATIONS' CORE HUMAN RIGHTS TREATIES (2007).

90. Dumberry & Dumas-Aubin, *supra* note 18.

91. See generally GONZALES, *supra* note 54.

92. *Id.* at 20.

III. INTERNATIONAL INVESTMENT LAW AND ENVIRONMENTAL LAW: THE INDISPENSABLE NEED FOR CORPORATE ENVIRONMENTAL ACCOUNTABILITY

It is predominantly evident in the field of environmental protection that the International Investment Agreements regime must be rebalanced.⁹³ This is because investment activities can result in significant environmental harm in the host state.⁹⁴ There is no investment treaty signed before 1985 that contained any reference to the environment at all.⁹⁵ However, as of late, the state practice toward the protection of the environment has been promising, as a principle of non-regression from domestic environmental protections to encourage investment has become ubiquitous in the model BITs adopted in the past decade.⁹⁶ This is to say that a large but declining proportion of BITs remain silent on environmental matters, whereas most Free Trade Agreements (FTAs) refer to environmental concerns in an investment context.⁹⁷

The neoclassical view on corporations and their societal role deeply examines their responsibility to achieve objectives, including maximizing profit, as well as their accountability to stakeholders, a category that also encapsulates environmental consideration.⁹⁸ Corporate environmental responsibility defines a progressive new relationship between business and environment.⁹⁹

Furthermore, corporate environmental accountability, as opposed to responsibility, makes reference to the *means for*, rather than the result that should be achieved by, environmentally sound corporate conduct in light of

93. Alessandra Misutra, *Enhancing Environmental Protection in International Investment Law Through the Integration of International Civil Liability Principles*, INV. TREATY NEWS (Apr. 23, 2013), <https://www.iisd.org/itn/2019/04/23/enhancing-environmental-protection-in-international-investment-law-through-the-integration-of-international-civil-liability-principles-alessandra-mistura/> [https://perma.cc/MS3W-Z5ZB].

94. *Id.*

95. Condon, *supra* note 59, at 103.

96. Andrew D. Mitchell & James Munro, *No Retreat: An Emerging Principle of Non-Regression from Environmental Protections in International Investment Law*, 50 GEO. J. OF INT'L L. 625, 628 (2019); *see also* 2012 U.S. Model Bilateral Law Investment Treaty art. 12(2), <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [https://perma.cc/D2J5-TXKC] (last visited Aug. 5, 2021).

97. Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey*, 2011 OECD WORKING PAPERS ON INT'L INV., 7.

98. Christina Gânescu & Laura Dindire, *Corporate Environmental Responsibility—A Key Determinant of Corporate Reputation*, II COMPUTATIONAL METHODS IN SOCIAL SCIENCES 48 (2019).

99. *Id.*

public expectations.¹⁰⁰ By focusing attention on means rather than results, corporate environmental accountability expresses the legitimate expectation that reasonable efforts, including a transparent and participatory framework for decision-making, will be put in place by private companies and foreign investors for the protection of a certain global interest or the attainment of a certain internationally agreed environmental objective.¹⁰¹

In this regard, international practice related to the definition and implementation of the novel concept of corporate environmental accountability is growing fast.¹⁰² International financial institutions have started to review proposed projects and determine the environmental conditions for their financing to the private sector (mostly foreign investors) against standards directly based on international environmental law.¹⁰³ The most interesting example in this respect is the International Finance Corporation (“IFC”) of the World Bank Group, the largest multilateral source of financing for private sector projects in the developing world.¹⁰⁴

The 2006 IFC Performance Standards represent an important precedent regarding setting standards for corporate environmental accountability at the international level.¹⁰⁵ These standards reinforce the growing expectation in the international community that private companies—particularly MNCs—have an obligation to contribute to environmental conservation and sustainable development, as well as partake in preventative measures concerning natural resources.¹⁰⁶

To this end, the trajectory of environmentally friendly BITs is encouraging, but a more pragmatic approach is required. This suggests that

100. Elisa Morgera, *Significant Trends in Corporate Environmental Accountability: The New Performance Standards of the International Finance Corporation*, 18 COLO. J. OF INT’L ENV’T L. & POL’Y. 151, 152 (2006).

101. *Id.*

102. *Id.*; see also *OECD Due Diligence Guidance for Responsible Business Conduct*, OECD (2018), <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> [<https://perma.cc/838W-KLNE>]; *OECD Guidelines for Multinational Enterprises*, OECD (2011), <https://www.oecd.org/daf/inv/mne/48004323.pdf> [<https://perma.cc/55AY-LRC4>]; *The Ten Principles of the UN Global Compact*, U.N. GLOB. COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> [<https://perma.cc/JSH7-8RSN>]; Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); Note by the Secretary-General on U.N. Draft International Code of Conduct on Transnational Corporations, U.N. Doc. E/C.10/1984/S/5 (May 29, 1984); Draft United Nations Code of Conduct on Transnational Corporations, Special Sess. 3/7-18/1983 and 5/9-20/1983, U.N. Doc. E/C.10/1982/6 (1984).

103. Morgera, *supra* note 100, at 154.

104. *Id.*

105. *Id.* at 188.

106. *Id.*

the incorporation of corporate accountability measures in the BITs legal framework will not only fill the *lacunae* in international investment regime but also strengthen it, making it possible for MNCs to be held accountable for causing adverse impacts on the environment in pursuance of their activities.

IV. HUMAN RIGHTS IN THE HIERARCHY OF INTERNATIONAL LAW

It has been argued that human rights norms occupy a superior position in international law due to their specific status.¹⁰⁷ The case of the *Sawhoyamaxa Indigenous Community*¹⁰⁸ presented to the Inter-American Court of Human Rights provides a useful starting point.¹⁰⁹ In this case, the State contended that it could not grant the indigenous community's right to property over their ancestral lands because, among other reasons, these lands now belonged to a German investor, protected by a BIT.¹¹⁰ The Court stated:

[T]he Court has ascertained that the arguments put forth by the State to justify non-enforcement of the indigenous people's property rights have not sufficed to release it from international responsibility. The State has put forth three arguments: "1) that claimed lands have been conveyed from one owner to another 'for a long time' and are duly registered; 2) that said lands are being adequately exploited, and 3) that the owner's right 'is protected under a bilateral agreement between Paraguay and Germany[,] which . . . has become part of the law of the land.'"¹¹¹

With regard to the third argument put forth by the State, the Court had not been furnished with the treaty between Germany and Paraguay, but, according to the State, said convention allows for capital investments made by a contracting party to be condemned or nationalized for a "public purpose or interest."¹¹² This public purpose or interest could justify land

107. OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY 59, 59 (Cambridge Univ. Press 2010).

108. *Id.* at 60; *see also* *Sawhoyamaxa Indigenous Cmty. v. Para., J.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 137–41 (Mar. 29, 2006).

109. SCHUTTER, *supra* note 107, at 59.

110. *Id.* at 60.

111. *Id.* (quoting *Sawhoyamaxa*, Inter-Am. Ct. H.R. (ser. C) No. 146, at ¶ 137).

112. *Id.* (quoting *Sawhoyamaxa*, Inter-Am. Ct. H.R. (ser. C) No. 146, at ¶ 140).

restitution to indigenous people.¹¹³ Moreover, the Court considered that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention.¹¹⁴ In fact, the enforcement of bilateral commercial treaties should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.¹¹⁵ Based on the foregoing, the Court dismissed the arguments of the State described above and finds them insufficient to justify non-enforcement of the right to property of the *Sawhoyamaya* Community.¹¹⁶

The Court's position on the human rights status in light of BITs implies that human rights treaties occupy a superior position in international law. Thus, any treaties conflicting with them should be set aside in situations of conflict due to their nature of having a "normative" character, which distinguishes them from treaties that are merely an exchange of rights and obligations between states.¹¹⁷

V. THE QUEST FOR CORPORATE ACCOUNTABILITY: EXISTING EFFORTS AND PROPOSALS

The notion of protecting human rights solely through obligations on governments seems rather uncontroversial if host states were the only threat to human rights or if states could be accountable for restraining conduct within their borders effectively.¹¹⁸ However, corporate accountability is particularly significant in the context of MNCs' economic activities, particularly when production takes place in countries wherein social and environmental protective standards are low or nonexistent, whether it be a result of insufficient legislation or lack of enforcement.¹¹⁹

Bearing that in mind, it is well known among human rights lawyers and activists that indigenous peoples are disproportionately affected by international investment, due in part to the rich presence of natural resources in indigenous territories and the nature of the relationship

113. *Id.* (quoting *Sawhoyamaya*, Inter-Am. Ct. H.R. (ser. C) No. 146, at ¶ 140).

114. *Id.* (quoting *Sawhoyamaya*, Inter-Am. Ct. H.R. (ser. C) No. 146, at ¶ 140).

115. *Id.* (quoting *Sawhoyamaya*, Inter-Am. Ct. H.R. (ser. C) No. 146, at ¶ 140).

116. *Sawhoyamaya*, Inter-Am. Ct. H.R. (ser. C) No. 146, at ¶¶ 137–41.

117. SCHUTTER, *supra* note 107, at 60.

118. Charles Riziki Majinge, *Can Multinational Corporations Help Secure Human Rights and the Rule of Law? The Case of Sudan*, 44 L. AND POL'Y IN AFR., ASIA, AND LATIN AMERICA 22 (2011).

119. *Id.* at 22–23.

between indigenous peoples and their lands.¹²⁰ Additionally, the instruments that regulate international investment can profoundly affect the human rights of third parties.¹²¹ Among such instruments are BITs and investor-state contracts, both of which are typically negotiated behind closed doors and lack the participation of stakeholders.¹²²

Importantly, corporations have demonstrated the inclination to influence socio-economic and political events worldwide, whether pertaining to developed or developing parts of the world, but they have caused a greater impact in developing countries.¹²³ A concerted effort to explore ways to institute some form of internationally binding normative standards to regulate conduct of corporations began in the early 1970s, when issues concerning the business practices of MNCs in developing countries became a central topic of discussion during the UN Conference on Trade and Development's (UNCTAD) third session, held in Santiago, Chile, between April and May of 1972.¹²⁴ This early initiative by the UN was the embryo of a number of other efforts, which followed after with the aim of holding corporations accountable.¹²⁵

Efforts to approach investment issues from the vantage point of human rights were spearheaded by the UN in the year 2000.¹²⁶ The aim was to find a consensus on norms of MNCs' responsibilities.¹²⁷ The UN appointed a Special Representative for Human Rights and Transnational Corporations and Other Business Entities in 2005, tasked with "identifying and clarifying standards of corporate responsibility and accountability with regard to human rights."¹²⁸ In 2011, the Special Representative prepared a report of "Guiding Principles on Business and Human Rights: Implementing the UN Protect, Respect and Remedy Framework."¹²⁹

In November 2014, the Office of the UN High Commissioner for Human Rights ("OHCHR") launched its Accountability and Remedy Project, which sought solutions for overcoming obstacles undermining the effectiveness of judicial mechanisms in achieving corporate accountability

120. JESSE COLEMAN & KAITLIN Y. CORDES, COLUM. CTR ON SUSTAINABLE INV., INTERNATIONAL INVESTMENT AND THE RIGHTS OF INDIGENOUS PEOPLES: WORKSHOP OUTCOME DOCUMENT 5 (2016).

121. *Id.*

122. *Id.*

123. JAMES-ELUYODE, *supra* note 48, at 95–96.

124. *Id.* at 96.

125. *Id.*

126. RUDOLF DOLZER & CHRISTOPH SCHREUNER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 25 (Oxford Univ. Press 2012).

127. *Id.* at 27.

128. *Id.*

129. *Id.*

and access to remedies in the context of business-related human rights abuses.¹³⁰

Other segments of the international community have also joined hands with the UN in the attempts and efforts to devise means to hold MNCs accountable for adverse impacts on human and environmental rights. Among others, these are: the African Union (AU), the World Bank, and the Organization for Economic Co-operation and Development (OECD). However, most of these attempts and efforts by the international community have only yielded self-regulation or voluntary codes as a means to regulate MNCs' conduct.¹³¹ This is mainly due to the opposition of binding codes by powerful MNCs which have quite often advocated for voluntary codes—in the form of CSR—as an acceptable alternative.¹³²

CSR, as it stands, has adequately addressed human rights concerns caused by MNCs in developed countries. On the contrary, in developing countries, MNCs' have continued to engage in human rights violations without repercussions.¹³³ As admitted by the Special Representative of the Secretary General, the response of business entities to voluntary compliance of human rights initiatives has expanded rapidly, but this response has mainly been concentrated in Western European countries, North America, and Japan.¹³⁴

VI. DEVELOPMENTS IN ARBITRATION OF INTERNATIONAL INVESTMENT DISPUTES IN LIGHT OF HUMAN RIGHTS AND ENVIRONMENTAL MATTERS

As a matter of principle regarding state sovereignty, allegations of human rights violations committed by a corporation should be addressed by the host state where business is conducted. The host state can prosecute foreign corporations for violating human rights obligations before its own domestic courts.¹³⁵ However, it has been asserted that relying on the host

130. *OHCHR Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses*, U.N. OFF. OF THE HIGH COMM'R ON HUM. RTS., <https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRAccountabilityandremedyproject.aspx> [https://perma.cc/B49U-BRT3]; see also COLUM. CTR. ON SUSTAINABLE INV., *IMPACTS OF THE INTERNATIONAL INVESTMENT REGIME ON ACCESS TO JUSTICE: ROUNDTABLE OUTCOME DOCUMENT 7* (2018), https://www.ohchr.org/Documents/Issues/Business/CCSI_UNWGBHR_InternationalInvestmentRegime.pdf [https://perma.cc/SSM8-SHEV].

131. JAMES-ELUYODE, *supra* note 48, at 95–96.

132. *Id.* at 100–01.

133. Majinge, *supra* note 118, at 26.

134. *Id.*

135. See Mariam O. Omotosho, *Reconciling the conflict between International Investment Arbitration and Protection of Human Rights: Way Out* (2019),

state is deemed ineffective.¹³⁶ The reason is that some foreign corporations possess enormous power, which many developing countries cannot match. Such countries are not eager to enforce human rights compliance against such powerful foreign corporations.¹³⁷

On the other hand, from the investor's point of view—in the event of domestic remedies availability in the host state—a systemic perception has developed to the effect that these remedies may not be desirable due to concerns regarding potential impartiality on the part of the host state's judiciary.¹³⁸ Additionally, there could be language-and-cultural-barrier issues.¹³⁹ Thus, resorting to arbitral tribunals for resolution of disputes between the investor and the host state has become an agenda, reinforced by BITs provisions which invariably provide for ISDS.

The role of human rights for the investment dispute and the kind of human rights referred vary depending on the actor who introduces them into the dispute,¹⁴⁰ whether it be investors, home and host states, *amici curiae*, or the arbitrators themselves.¹⁴¹

It is clear that international investment arbitration does not undermine human rights and, in fact, tends to support human rights, as investment arbitral tribunals tend to rely on human rights considerations.¹⁴²

A. Application of Human Rights Standards by Investment Tribunals

In a variety of investment arbitration cases, respondent states have argued *inter alia* that measures impugned by investors were mandated by that state's human rights obligations.¹⁴³ Alternatively, civil society organizations, non-governmental organizations, and public interest lawyers have sought to intervene as *amici* aiming to raise awareness of human rights concerns.¹⁴⁴ In the aforementioned circumstances, tribunals have generally

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484616 [<https://perma.cc/YD8S-N3B6>].

136. *Id.*

137. *Id.*; see also RUGGIE, *supra* note 89.

138. Nicolette Butler & Shavana Musa, *Systemizing Human Rights within Investment Arbitration*, 28 AM. REV. OF INT'L. ARB. 433 (2017).

139. *See id.*

140. Vivian Kube & E. U. Petersmann, *Human Rights Law in International Investment Arbitration*, 11 ASIAN J. OF WTO & INT'L. HEALTH L. & POL'Y. 65, 72 (2016).

141. *Id.*

142. James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. OF COMP. & INT'L L. 77, 82 (2007).

143. Fahner & Happold, *supra* note 25, at 741.

144. Kube & Petersmann, *supra* note 140, at 72.

been reluctant to engage with such arguments and interpret the relationship between investment law and human rights directly.¹⁴⁵

Consequently, it could be contended that there is no settled practice that can be discerned with utmost certainty in investment arbitration awards, which refer to human rights and human rights jurisprudence. Nonetheless, human rights and human rights jurisprudence have been referred to in at least three different ways in investment arbitration awards: (1) in determining substantive rules; (2) in determining procedural rules; and (3) in dealing with supposed conflicts between human rights and international investment law.¹⁴⁶

A few selected cases—emanating from BITs and FTAs with investment chapters—will be considered in this section to determine the role of Investment Tribunals in applying human rights standards and the efficacy of such standards in strengthening the international investment regime. Nevertheless, the discussion advances a case for Investment Tribunals as advocates for compatibility and complementarity of these two branches of public international law.

Human rights law has been applied for interpretive guidance. Foreign investors and/or arbitrators have sometimes referred to human rights law for interpretive guidance in determining the substantive protections owed to foreign investors. In *Mondev International Ltd. v. United States of America*, a Canadian real estate development company, Mondev International Ltd., complained that the disposition of a contract dispute by the United States courts had breached key NAFTA provisions.¹⁴⁷ In the course of examining this claim, the arbitral tribunal acknowledged the potential relevance of certain rulings of the European Court of Human Rights (ECHR) with respect to the statutory immunities of certain state agencies before their own courts.¹⁴⁸ This form of immunity could arguably interfere with the human right to a court hearing. The tribunal conceded that these decisions of the ECHR—while emanating from a different legal order—might provide some guidance by way of analogy.¹⁴⁹ The arbitral tribunal stated that:

These decisions concern the “right to a court;” an aspect of the human rights conferred on all persons by the major human rights conventions and interpreted by the European Court in an evolutionary way. They emanate from a

145. Fahner & Happold, *supra* note 25, at 741.

146. Fry, *supra* note 142, at 82.

147. See *Mondev Int’l v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 144 (Oct. 11. 2002); see also Luke Eric Peterson, Selected Recent Developments in IIA Arbitration and Human Rights, IIA Monitor No. 2 (2009), UNCTAD/WEB/DIAE/IA/2009/7.

148. *Id.* ¶ 138.

149. *Id.* ¶ 144.

different region, and are not concerned, as article 1105(1) of NAFTA is concerned, specifically with investment protection. At most, they provide guidance by analogy as to the possible scope of NAFTA's guarantee of "treatment in accordance with international law, including fair and equitable treatment and full protection and security."¹⁵⁰

Aside from the above, human rights law has also been applied by arbitral tribunals in arbitrations arising out of claims for expropriation. In the *Ronald Lauder v. Czech Republic* arbitration, the tribunal observed that indirect expropriation was not defined in the Czech Republic-United States bilateral investment treaty.¹⁵¹ Accordingly, the arbitrators looked to various secondary studies, as well as the jurisprudence of the ECHR for guidance as to how indirect or de facto expropriations are defined.¹⁵²

Another instance in which a tribunal applied human rights law is in the ICSID dispute of *Urbaser S.A. v. The Argentine Republic*.¹⁵³ The Tribunal noted the importance of the intersection of international investment law with other fields of international law and recognized the duty of governments to protect against human rights violations.¹⁵⁴ The Tribunal stated that the BIT being applied in that particular dispute had "to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights."¹⁵⁵ It accepted its jurisdiction over Argentina's counterclaim based on human rights and confirmed that the "right to water" was a human right under international law.¹⁵⁶ This award became the first to provide an in-depth discussion on a state's counterclaim against an investor for an alleged violation of human rights obligations.¹⁵⁷ The acceptance of the jurisdiction over the counterclaim was based on a broad-jurisdiction clause under the BIT.¹⁵⁸

150. See *Mondev Int'l v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 144 (Oct. 11, 2002); see also Luke Eric Peterson, Selected Recent Developments in IIA Arbitration and Human Rights, IIA Monitor No. 2 (2009); UNCTAD/WEB/DIAE/IA/2009/7.

151. *Lauder v. Czech*, UNCITRAL, Final Award ¶¶ 200–02 (Sept. 3, 2001).

152. *Id.*

153. *Urbaser S.A. v. The Argentine Republic*, Case No. ARB/07/26, Award, ICSID ¶ 1200 (Dec. 8, 2016), <https://www.italaw.com/cases/1144> [<https://perma.cc/9SFA-FTT6>]. See generally Stefanie Schacherer, *Urbaser v. Arg.*, INV. TREATY NEWS, (Oct. 18, 2018), <https://www.iisd.org/itn/en/2018/10/18/urbaser-v-argentina/> [<https://perma.cc/YP2A-A3QX>].

154. *Urbaser S.A.*, ¶ 1200.

155. *Id.*

156. *Id.* ¶ 1143.

157. See Schacherer, *supra* note 153.

158. See *Urbaser S.A.*, ¶ 1143.

Likewise, human rights law has been raised in arbitral tribunals by *amicus curiae* participation in their submissions on a particular issue relevant to its specialty and expertise in a BIT breaches.

In *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*,¹⁵⁹ in support of its decision to admit the *amicus curiae* brief, the Tribunal explained that the petitioners were NGOs “with specialized interests and expertise in human rights, environmental and good governance issues,” and who “approached the issues in the case with interests, expertise and perspectives that have been demonstrated to materially differ from those of the two contending parties, and as such have provided a useful contribution to the proceedings.”¹⁶⁰ The Tribunal further emphasized the importance of the *amici*’s input, making it clear that the *amici*’s “submissions had informed the Tribunal’s analysis of the claims.”¹⁶¹

As Lise Johnson stated while commenting on *Biwater v. Tanzania*, “[t]he Tribunal’s acceptance of and reference to the *amici*’s contributions is significant for a number of reasons: it recognizes and affirms the public interest in investor-state disputes, helps normalize the idea of non-party participation, helps ensure that investor-state disputes take into account broader issues such as sustainable development and human rights where relevant, promotes investor and government accountability, and enhances the perceived legitimacy of the system.”¹⁶²

Nonetheless, the legal justifications offered by the tribunals whenever they apply human rights law could be made simpler and easier—in the context of the BITs legal framework—by incorporating human rights standards as part of its substantive provisions. This will directly confer explicit jurisdiction on the tribunals in determining disputes, but also persuasively utilize a plethora of human rights bodies’ jurisprudence for interpretive or guidance purposes in resolution of investment disputes, as the two branches of the law are mutually dependent.

This could solve the current status of the application of human rights law and even environmental standards by the arbitral tribunals, which is tantamount to throwing a dice thus forcing litigants and arbitrators to choose whether or not to invoke them in a dispute or apply them when resolving it.

Although the application of human rights law in arbitration of investment disputes is not a settled practice, the fact that arbitral tribunals have inconsistently endorsed the application of human rights law as part of arguments and even sometimes apply it in awards is paramount. This is particularly so in the wake of the lack of unanimity of the relevance of

159. See *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, Case No. ARB/05/22, Award, ICSID (July 24, 2008).

160. *Id.* ¶ 359.

161. *Id.* ¶ 392.

162. See generally Lise Johnson, *Biwater v. Tanzania*, INV. TREATY NEWS (Oct. 18, 2013).

human rights law discipline in international investment agreements by arbitrators and legal scholars. This only leads to one vital conclusion: there is a dire need for synchronization of the investment law regime with other branches of public international laws.

B. Application of Environmental Standards by Investment Tribunals

The jurisprudence in international investment arbitration has also interpreted the foremost provisions affording protection to investors in order to balance investors' rights with environmental protection. BITs typically grant foreign investors four main standards of protection: most-favored nation (MFN), national treatment (NT), fair and equitable treatment (FET), and protection against expropriations.¹⁶³

The jurisprudence of arbitral tribunals has revealed that there is an interface between environmental concerns and the "like-circumstances" test of BITs' non-discrimination standards of protection (the same can be said for FTAs with investment chapters). MFN and NT seek to protect foreign investors by granting them a treatment no less favorable than the treatment offered to third parties in comparable situations, whether domestic or foreign investors.¹⁶⁴ In assessing these principles, arbitral tribunals have successfully recognized environmental concerns as a criterion to assess whether "like circumstances" existed and whether, as a consequence, the "investor's right to a treatment no less favorable was violated."¹⁶⁵ For instance, the decision of the arbitral tribunal in *Parkerings-Compagniet v. Republic of Lithuania* illustrates the influence of environmental factors in determining whether two situations are similar under the "like circumstances" test and whether discrimination in violation of the standard of the fair and equitable treatment has occurred.¹⁶⁶

The dispute arose from construction of a parking lot in Vilnius, the capital city of Lithuania, which would have affected a UNESCO protected site in the city's Old Town.¹⁶⁷ According to the records, various administrative Departments and Commissions in Lithuania were opposed to the parking plan.¹⁶⁸ Parkerings made a claim for discrimination under the Lithuania-Norway BIT's MFN and FET clauses alleging that the

163. Camille Martini, *Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting*, 50 INT'L. LAW 529, 534 (2017).

164. *Id.*

165. *Id.*

166. *Parkerings-Compagniet v. Republic of Lith.*, Case No. ARB/05/8, Award, ICSID, ¶ 288 (Sept. 11, 2007); see also Martini, *supra* note 163, at 535.

167. *Parkerings-Compagniet*, ¶ 51–53.

168. *Parkerings-Compagniet*, ¶ 385.2.

municipality had authorized a parking project in favor of another foreign investor.¹⁶⁹ In rejecting the claim, the arbitral tribunal stated:

The fact that the parking project extended significantly more into the Old Town as defined by the UNESCO was decisive. Indeed, the record shows that the opposition raised against the project were (*sic*) important and contributed to the Municipality decision to refuse such a controversial project. The historical and archeological preservation and environmental protection could be and in this case were a justification for the refusal of the project. . . . Consequently, the project in Gedimino was not similar with the parking constructed by Pinus Proprius.¹⁷⁰

The arbitral tribunal's consideration of environmental concerns in this dispute is heartening, but unfortunately it is not a settled practice. Hence, had the BIT in dispute expressly provided for environmental standards as part of the parties' obligations (which could be easily resorted to by the tribunal), the claim by Parkerings could not even be brought before the tribunal as a disputed issue. Besides, it is irrefutable that UNESCO designated and declared sites are *prima facie* worthy of protection by the host state and the international community at large.

VII. A ROADMAP FOR CORPORATE ACCOUNTABILITY MEASURES

The roles and responsibilities of business to protect and promote human rights have been subject to significant discussion as of late.¹⁷¹ While the need for regulation and accountability in business practices has been agreed upon, the form that such regulation should take has been subject to debate.¹⁷² Many advocate that voluntary initiatives are sufficient, while others urge that a binding instrument is needed to adequately address corporate human rights abuses.¹⁷³

A. Incorporate Human Rights and Environmental Obligations into the BITs Legal Framework and Redesign ISDS

Despite the fact that most BITs are currently being reconsidered by an increasing number of states, most investment lawyers continue to be solely preoccupied with reforming the Investor-State-Dispute Settlement

169. *Id.* ¶ 225.

170. *Id.* ¶ 392.

171. Georgia Papalia, *Doing Business Right: The Case for a Business and Human Rights Treaty*, 3 *PERTH INT'L. L. J.* 96 (2018).

172. *Id.*

173. *Id.*

(ISDS) mechanism. However, this study has endeavored to shift the focus of the debates about the reform of international investment law to the substance of BITs in light of corporate accountability for adverse impacts on human rights and the environment particularly on indigenous peoples in Africa.¹⁷⁴

A case has been made on the need to incorporate human rights and environmental standards as well as measures to hold MNCs accountable in the substantive part of the BITs legal framework. However, the ISDS itself needs to be redesigned to accommodate the reforms in order to resolve such disputes brought under respective BITs.

The powerful international investment law adjudication and enforcement regimes of ICSID¹⁷⁵ and the New York Convention¹⁷⁶ could be useful in the settlement and enforcement of human and environmental rights obligations. This could only be possible if the BITs legal framework were to contain not only individual—natural or legal persons—but also indigenous peoples' human rights and environmental standards as investors' obligations that an arbitrator would then have to address if such provisions were alleged to have been violated.¹⁷⁷

Nevertheless, two critical but related issues arise. First, is the promotion and protection of human rights and environmental standards a wise business strategy? Second, what incentive could investors have when states include such rights and standards that would then open them up to potential liability or at least a certain amount of risk?¹⁷⁸

A corporation does not exist and operate its business in a vacuum that neither affects nor depends on the wellbeing of society and the environment. In fact, a growing body of evidence demonstrates that economic success is strongly determined by the way a company addresses social and environmental issues.¹⁷⁹ Further, gone are the days when MNCs had a business strategy which would only serve the interests of their shareholders. At the moment, the primacy of the profit maximization

174. Mohammad Hamdy, *Redesign as Reform: A Critique of the Design of Bilateral Investment Treaties*, 51 GEO. J. OF INT'L L. 255 (2020).

175. See generally *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965*, INT'L CENTRE FOR SETTLEMENT OF INV. DISPS., <https://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/partA.htm> [<https://perma.cc/889B-9MJC>] (last visited Nov. 12, 2020).

176. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, N.Y. Convention, June 10, 1958, 330 U.N.T.S. 38.

177. Fry, *supra* note 142, at 110–11.

178. *Id.* at 111.

179. Mark R. Kramer, *The Backlash to Larry Fink's Letter Shows How Far Business Has to Go on Social Responsibility*, HARV. BUS. REV. (Jan. 31, 2019), <https://hbr.org/2019/01/the-backlash-to-larry-finks-letter-shows-how-far-business-has-to-go-on-social-responsibility> [<https://perma.cc/H54P-DGBZ>].

philosophy of corporations has been compromised by making the “other stakeholders,” which in this context refers to the community where the activities of the corporation take place, become one of the elements of the corporation’s business decisions in order to achieve the society’s legitimate expected objectives as well as those of its shareholders and investors.

Human rights and environmental standards are within the public interest, and the very BITs legal framework in which MNCs operate in the host state does not provide protection for human rights considerations.¹⁸⁰ As Weiler argues, the investment regime ought to change in order to take care of this negative externality.¹⁸¹ In the end, investors will hopefully recognize that prioritizing human rights obligations will improve the investors’ public overall image, and result in increased returns on their investments, as the host state’s labor force becomes healthier, better educated, and possibly even future clients of the investors.¹⁸²

The reality is that the various branches of international law increasingly overlap to the point that serious doubts exist over whether these remain truly self-contained bodies of law. To mention a few, international investment law and arbitration, international human rights law, and international environmental law are inextricably intertwined.¹⁸³ Furthermore, allowing persons who are not signatories to an arrangement that provides for arbitration the right to invoke arbitration rights, is an accepted feature of international arbitration that has given rise to the phrase “arbitration without privity.”¹⁸⁴

B. Incorporate a “Human Rights Veto” as a Special Jurisdictional Power

Modern investment treaties have been accurately described by some commentators as “revolutionary” in the evolution of international investment law.¹⁸⁵ Along with clearer indigenous rights and environmental provisions which have been proposed to be incorporated in the BITs legal framework in addition to corporate peoples’ accountability measures, an explicit “human rights veto jurisdictional power” could be vested to arbitral tribunals. This veto would direct tribunals to summarily dismiss arbitral

180. Fry, *supra* note 142, at 112.

181. See Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. INT’L & COMP. L. REV. 429 (2004).

182. *Id.* at 112–13.

183. *Id.* at 148.

184. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232–57 (1995).

185. Abba Kolo, *Tax Veto as a Special Jurisdictional and Substantive Issue in Investor-State Arbitration: Need for Reassessment?*, 32 SUFFOLK TRANSNAT’L L. REV. 475, 477 (2009).

proceedings from investors implicated in violations of indigenous human rights or environmental standards.¹⁸⁶

If this jurisdictional power is vested in arbitral tribunals, it would assist in creating a level playing field between those corporations that already comply with human rights and environmental standards and those that do not, ensuring that businesses which respect human rights are not disadvantaged by doing so.¹⁸⁷

C. Arbitrate Counterclaims on Violation of Human Rights Filed by a Respondent State

BITs are generally constructed to provide protection to investors; as such, they do not impose direct obligations upon investors.¹⁸⁸ The inclusion of specific treaty provisions imposing incentives upon investors to respect a host state's legislation—including legislation implementing internationally accepted core obligations related to human rights (such as those related to environmental protection)—should be considered by contracting parties to BITs.¹⁸⁹

Rebalancing of this asymmetry might be obtained by allowing states to file counterclaims when possible (provided the ISDS clause so permits), allowing investment tribunals to take a more holistic judicial approach in arbitrating investment disputes.¹⁹⁰ Thus, BITs could compel MNCs to consent to counterclaims for their human rights violations and governments in order to oblige these actors to adjudicate some alleged human rights violations in arbitral proceedings.¹⁹¹

186. *Id.* at 477; see also PUIG, *supra* note 28, at 21 (The idea of “veto” as a special jurisdictional issue will be new to BITs in relation to corporate accountability for adverse impacts on human and environmental rights but it is not entirely new in International Investments Agreements (IIAs). For instance, under Article 1110 of NAFTA, a tax veto applies to fiscal measures in claims of improper expropriation. NAFTA does not suggest that tax matters cannot be arbitrated. Rather, the treaty stipulates that fiscal authorities in host and investor states together may block the arbitral proceedings).

187. Papalia, *supra* note 171, at 98.

188. Anna De Luca, *UNCITRAL Working Group III: Counterclaims in ISDS – Challenges and Prospects in light of the UNCITRAL Reform Process*, KLUWER ARB. BLOG (Mar. 28, 2020), https://arbitrationblog.kluwerarbitration.com/2020/03/28/uncitral-working-group-iii-counterclaims-in-isds-challenges-and-prospects-in-light-of-the-uncitral-reform-process/?doing_wp_cron=1595042731.3091089725494384765625 [<https://perma.cc/H7LR-WGHF>].

189. *Id.*

190. *Id.*

191. PUIG, *supra* note 28, at 151; see also *The Hague Rules on Business and Human Rights Arbitration*, CILC, 19 (Dec. 2019), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf [<https://perma.cc/7HFC-M682>].

CONCLUSION

The significance of any study venturing on the quest for corporate accountability measures for adverse impacts on human rights and the environment cannot be understated. Currently, both developed and developing countries are paying far greater attention to the scope of their bilateral investment treaties obligations and, now more than ever before, are seeking a better balance between investor rights and their right to regulate in the public interest.¹⁹²

Corporate accountability is a challenge that cannot be dealt with effectively through existing approaches.¹⁹³ The incorporation of human rights and environmental standards in the BITs legal framework is inevitable. This is regardless of the perceptions of corporate, commercial, and investment law attorneys and scholars—as both branches of public international law will work to complement and reinforce the investment law regime to end corporate impunity.

In its June 2019 Report, UNCTAD notes that of all the twenty-nine International Investment Agreements (IIAs) concluded in that year—BITs inclusive—only thirteen included CSR provisions, but whose obligations are primarily voluntary on the part of the investor.¹⁹⁴ There is no doubt that this is a positive development toward promotion and protection of human rights and the environment, but it lacks the prerequisite legal weight to hold MNCs accountable for their acts and omissions.

The handful practice of arbitral tribunals and courts is somewhat a mile away in validating the relevancy and interlace between human rights

192. KLU KAVAJIT SINGH & BURGHARD ILLGE, *RETHINKING BILATERAL INVESTMENT TREATIES: CRITICAL ISSUES AND POLICY CHOICES* 4 (2016).

193. “The European Parliament voted, by an overwhelming majority (504 votes to 79, with 112 abstaining), to request that companies by law, conduct environmental and human rights due diligence along their full value chain. . . . EU lawmakers are concerned that the voluntary standards in place (including expectations captured in the UN Guiding Principles on Business and Human Rights) are not working. They are concerned that companies doing the right thing are placed at a competitive disadvantage. And they are concerned that those harmed by business activities overseas do not have access to justice and remedies.” Anna Triponel & Maddie Wolberg, *EU lawmakers have spoken: The responsibility to conduct environmental and human rights due diligence in supply chains will transform into legal duty for companies*, TRIPONEL CONSULTING (Mar. 12, 2021), <https://triponelconsulting.com/2021/03/12/eu-lawmakers-have-spoken-the-responsibility-to-conduct-environmental-and-human-rights-due-diligence-in-supply-chains-will-transform-into-a-legal-duty-for-companies/amp/> [<https://perma.cc/L8VJ-RBPY>].

194. See UNCTAD, *Taking Stock of IIA Reform: Recent Developments*, IIA ISSUES NOTE tbl. 1 (June 2019), https://unctad.org/en/PublicationsLibrary/diaepcbi-nf2019d5_en.pdf [<https://perma.cc/KQY9-ZRPD>].

standards and international investment law.¹⁹⁵ In other words, the hesitancy of the states in incorporating human rights standards in the BITs legal framework is barely justifiable. Under the Corporate Environmental Accountability, local communities should enjoy full access to the information gathered in impact assessments that are conducted by the state agencies or MNCs for transparency purposes.

195. SINGH & ILLGE, *supra* note 192, at 27.