
Human Rights Accountability of Transnational Corporations: A Potential Response from Bilateral Investment Treaties

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The Impact of transnational corporations' activities on local communities and populations can result in violations of human rights. There are compelling reasons to hold TNCs liable for human rights violations. The regulation of TNCs has become a global public good, and joint forces are needed to hold TNCs more accountable for their violations of human rights. Bilateral Investment Treaties, as a main component of international investment law regulating international investment activities, require urgent reform in this area. This article examines why and how BITs could be drafted or amended in order to enhance TNCs' human rights accountability. After taking stock of existing legal institutions regulating TNCs, this article analyzes the difficulties and hurdles in subjecting TNCs to human rights liability. Finally, this article probes into potential advisable proposals on how BITs should be reformed, both in substance and procedure, to better respect human rights.

Keywords

Transnational Corporations, Human Rights, Bilateral Investment Treaties

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DOI: <http://dx.doi.org/10.14330/jeail.2015.8.1.03>

I. Introduction

In the modern globalized system, transnational corporations (“TNCs”) have been rising in economic, social, and political importance.¹ Recently, there has been a growing body of evidence that the impact of TNCs’ activities in developing countries can result in violations of human rights or act as a catalyst for violation of human rights.² *E.g.*, TNCs’ doing business in the developing world were not only involved in various conflicts, but were in fact the engine of the conflicts.³ Many TNCs have been accused of violating their workers’ rights to just and favorable working conditions such as suppressing trade unions, denying workers’ right to organize, and causing environmental disasters.⁴

Human rights abuses by foreign corporations are well documented. As Dumberry and Dumas-Aubin succinctly summarized, TNCs have been accused of violating the right to enjoy life, to freedom from torture and cruel, inhuman, or degrading treatment, to freedom from slavery and arbitrary imprisonment, and many other human rights.⁵

As per the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, the Corporations are alleged to have impacted the full range of human rights (Annex

¹ See generally J. Ruggie, Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (“SRSG”), U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last visited on Apr. 13, 2015).

² Deriving from respect for human dignity, human rights of individuals are usually defined as a normative embodiment of the most important universal values of human beings, applicable in every human community. Even though the exact definition of what constitutes fundamental human right is difficult to define and variations occur in the literature, minimum fundamental human rights, which corporations are required to observe, has been catalogued into three groups by certain scholars. These include fundamental human rights preserving the security of persons, labor rights, and non-discrimination. For details, see N. JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY (2002); J. CERNIC, *Corporate Human Rights Obligations at the International Level*, 16 WILLAMETTE J. INT’L L. & DISP. RESOL. 130-4 (2008).

³ See Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, U.N. Doc. S/2001/357 (Apr. 12, 2001), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20S%202001%20357.pdf> (last visited on Apr. 14, 2015).

⁴ R.-C. Drouin, *Promoting Fundamental Labor Rights through International Framework Agreements: Practical Outcomes and Present Challenges*, 31 COMP. LAB. L. & POL’Y J. 591(2010).

⁵ P. Dumberry & G. Dumas-Aubin, *A Few Pragmatic Observations on How BITs Should be Modified to Incorporate Human Rights Obligations*, 11 TRANSNAT. DISP. MGMT 1 (2014), available at <http://ssrn.com/abstract=2531084> (last visited on Apr. 13, 2015).

1).⁶ Persons impacted by the human rights violations can be categorized into the following three groups as workers, communities, and end-users.⁷

Human rights protections traditionally focus and impose duties solely upon States.⁸ This singular focus has led to a breakdown in the protection of international human rights in recent decades. The systemic separation between international economic development, human rights enforcement, and the regulation of private players leaves power to commit human rights abuses in the hands of non-State actors (“NSAs”).⁹ The rapid expansion of transnational economic activity and the corresponding growth in the power of TNCs has prompted international discourse and action to address the human rights violations committed by TNCs.¹⁰

The goal of this research is to explain why and how BITs could be drafted or amended in order to enhance TNCs’ human rights accountability. This paper is composed of six parts including Introduction and Conclusion. Part two will analyze the rationales for holding TNCs liable for human rights violations. Part three will take stock of existing legal institutions regulating TNCs. Part four will examine the difficulties and hurdles in subjecting TNCs to human rights liability. Part five will probe into potential advisable proposals on how BITs should be reformed, both in substance and procedure, to better respect human rights.

II. Why Should TNCs be Held Liable for Human Rights Violations?

Before getting into how to hold TNCs liable for human rights violations, it is imperative to first ascertain why TNCs should be accountable. The rationale

⁶ See Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-related Human Rights Abuse* [hereinafter Survey], U.N. Doc. A/HRC/8/5/Add. 2 (May 23, 2008), at 2, available at <http://www.reports-and-materials.org/Ruggie-2-addendum-23-May-2008.pdf> (last visited on Apr. 14, 2015).

⁷ *Id.* ¶ 11.

⁸ D. Kinley & J. Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 V.A. J. INT’L L. 936 (2004).

⁹ V. Chetail, *The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward*, in *UNITY AND DIVERSITY OF INTERNATIONAL LAW* 123 (P.-M. Dupuy ed. 2014), available at <http://ssrn.com/abstract=2364450> (last visited on Apr. 13, 2015).

¹⁰ D. Weissbrodt, *Human Rights Standards Concerning Transnational Corporations and Other Business Entities*, 23 MINN. J. INT’L L. 135 (2014). See also G. Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 GLOBAL GOVERNANCE 279 (2009).

encompasses the following three dimensions.

A. The Need to Rebalance State Power to Regulate TNCs in the Public Interest

In connection with the increased discussions on whether, and to what extent, TNCs should be required to observe fundamental human rights standards, growing concern in this area may be attributed to a few factors. One is the increased unease at the seemingly unaccountable operations of private capital in a globalizing economy.¹¹ Accordingly, host States' power to regulate TNCs in the public interest has to some extent been obstructed due to jurisdictional limits and lack of investors' responsibilities.¹² Out of the need to rebalance the sovereignty of State to regulate TNCs' economic activities and their interest in investment, it is important to hold TNCs accountable for human rights violation.¹³ Indeed, a continued imbalance may dissuade States from promoting foreign investments.¹⁴

B. Need for Compatibility between TNC Power and Accountability

There should be sufficient reciprocity between the rights one enjoys and the corresponding obligations one holds.¹⁵ There is significant consensus that TNCs wield an extraordinary amount of financial and political power, which should be matched with a corresponding degree of responsibility and accountability.¹⁶

¹¹ P. MUCHLINSKI, *MULTINATIONAL ENTERPRISES & THE LAW* 507 (2d ed. 2007).

¹² *El Paso Energy Int'l Co. v. Arg. Republic*, Decision on Jurisdiction, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 70 (Apr. 27, 2006), available at <http://ita.law.uvic.ca/documents/elpasoEN.pdf> (last visited on Apr. 13, 2015).

¹³ G. Foster, *Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties*, 17 LEWIS & CLARK L. REV. 361 (2013). See also I. Halpern, *Tracing the Contours of Transnational Corporations' Human Rights Obligations in the Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 160 (2008); B. Chooudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements*, 49 COLUM. J. TRANSNAT'L L. 686 (2011).

¹⁴ W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 223 (2008). See also *supra* note 12. Protection of State sovereignty in this context simply ensures that the State has the right and the ability to regulate to protect human rights.

¹⁵ J. Nolan, *With Power Comes Responsibility: Human Rights and Corporate Accountability*, 28 U. NEW S. WALES L. J. 581 (2005). See also P. Macklem, *Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction*, 7 INT'L L. F.D. INT'L 282 (2005).

¹⁶ M. Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights*, 39 DENV. J. INT'L L. & POL'Y 508 (2011).

C. TNCs Have Competency and Can be Incentivized to Protect Human Rights

Responsibility positively correlates to competency. There is a growing consensus that subjecting TNCs to the same mandatory standards of international law as those to which States are subjected would benefit both the global community and individual TNCs.¹⁷ As a matter of fact, some evidence suggests that TNCs can have spillover effects on local communities.¹⁸ One way to address these effects is for TNCs to internalize their externalities in the area of human rights violations.¹⁹ By respecting human rights, TNCs can send a signal to the world that they are in compliance with international law²⁰ and can indeed improve human rights conditions.²¹ By observing fundamental human rights, TNCs' reputations benefit, which can help the TNCs avoid negative publicity and the resulting loss of profit and stock value.²²

III. Existing Legal Institutions Regulating TNCs

There are already many legal instruments, including soft laws and hard laws,²³ in

¹⁷ S. Thorsen & A. Meisling, Perspectives on the UN Draft Norms, UN Office of the High Comm'r for Human Rights, available at <http://www2.ohchr.org/english/issues/globalization/business/docs/lawhouse2.doc> (last visited on Apr. 13, 2015).

¹⁸ R. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 DENV. U. L. REV. 184 (2010). See also E. De Brabandere, *Non-state Actors, State Centrism and Human Rights Obligations*, 22 LEIDEN. J. INT'L L. 195 (2009).

¹⁹ Find ways to ensure that the economic actors that create costs has to pay them.

²⁰ Addressing human rights issues can help TNCs to maintain a sound reputation and exercise sound business judgment. See T. Maassarani et al., *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 CORNELL INT'L L. J. 168 (2007).

²¹ Empirical studies demonstrate that TNCs have spillover effects in certain areas (such as improving the labor compensation in certain region). See, e.g., D. Bettwy, *The Human Rights and Wrongs of Foreign Direct Investment: Addressing the Need for An Analytical Framework*, 11 RICH. J. GLOBAL L. & BUS. 239 (2012). It concludes that human rights can be promoted more effectively by developing a separate framework designed to identify and to make operational the positive human rights impacts of FDI. To be accurate and therefore effective, moreover, a separate framework should be designed to measure the influence of FDI on human rights conditions.

²² E. Assadourian, *The State of Corporate Responsibility and the Environment*, 18 GEO. INT'L ENV'T L. REV. 584 (2006).

²³ In international law, soft laws are guidelines, policy declarations, or codes of conduct that set standards of conduct but are not directly enforceable. See BLACK'S LAW DICTIONARY 1397 (B. Garner ed., 9th ed. 2009). In contrast, 'hard' laws are positive enactments requiring enforcement.

regulating TNCs, both at the international²⁴ and domestic levels.²⁵ According to Ostrom, polycentric regulation is useful when considering governance questions in the global commons.²⁶ This is the status quo and would be the future of the governance mechanism for regulating TNCs.

A. Soft Laws

There are already a significant number of soft laws regulating TNCs. Following the economic excesses of the 1980s, the publication of individual corporate codes of conduct became a feature of corporate reporting throughout the 1990s and into the twenty-first century. By the end of the 1990s, Mendes and Clark were able to identify five generations of corporate codes.²⁷ In addition to individual company policies and codes, there are also various industry-wide voluntary codes of conduct, such as the Australian Mineral Industry Framework for Sustainable Development.²⁸

Within the international context, several forums have adopted model legal instruments with a view to regulating of TNC activities, including the ‘Global Compact,’²⁹ the “ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,”³⁰ the “OECD Guidelines for Multinational Enterprises”³¹ and the “Guiding Principles on Business and Human Rights.”³² Moreover, the finance industry’s Equator Principles are possibly the most effective attempt to date at

²⁴ Cernic, *supra* note 2, at 157-67. It cogently argued that fundamental human rights would derive from the international level and examined the (in)direct nature of human rights obligations of corporations under international law.

²⁵ For details on the legal institutions regulating TNCs, see, e.g., J. Nolan, *Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights*, 30 UTRICHT J. INT’L & EUR. L. 7 (2014).

²⁶ E. Ostrom, *Polycentric Systems: Multilevel Governance Involving a Diversity of Organizations*, in GLOBAL ENVIRONMENTAL COMMONS: ANALYTICAL AND POLITICAL CHALLENGES INVOLVING A DIVERSITY OF ORGANIZATIONS 117-8 (E. Brousseau et al. eds., 2012).

²⁷ A. DE JONGE, TRANSNATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY IN THE GLOBAL BUSINESS ENVIRONMENT 22 (2011).

²⁸ Minerals Council of Australia, *Enduring Value - Australian Minerals Industry Framework for Sustainable Development* (July, 2005), available at <http://commdev.org/enduring-value-australian-minerals-industry-framework-sustainable-development-guidance> (last visited on Apr. 13, 2015).

²⁹ The UN Global Compact has adopted a set of ‘Ten Principles’ in the areas of human rights, labor, the environment, and anti-corruption, which it asks companies to “embrace, support and enact, within their sphere of influence” See UN Global Compact, *About US-The Ten Principles* (July 26, 2000), available at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited on Apr. 13, 2015).

³⁰ ILO, *TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY* (4th ed. 2006), available at http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm (last visited on Apr. 15, 2015).

³¹ OECD, *Guidelines for Multinational Enterprises* (2008), available at <http://www.oecd.org> (search ‘Guidelines Multinational’) (last visited on Apr. 13, 2015).

³² *Supra* note 1.

bringing as many enterprises as possible within the terms of a contractually-binding code of conduct.³³ As progressive as these instruments appear, commentators consistently argue that the documents do not impose direct duties or obligations upon the TNC, but instead focus on ‘soft’ obligations.³⁴

In addition, in May 2011, the United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (“SRSG”), John Ruggie, submitted to the UN Human Rights Council the “Guiding Principles on Business and Human Rights,” aimed at implementing the “Protect, Respect and Remedy” policy framework.³⁵ The Council unanimously adopted the Guiding Principles at its June 2011 session. According to Ruggie, the “Protect, Respect and Remedy” framework under the Guiding Principles aims to provide a coherent approach to addressing governance gaps and overcoming the problems of individual action by States and corporate actors.³⁶ The framework also provides a means by which to develop the normative content of corporate responsibility for human rights. The framework focuses on three pillars: (1) further development of the State duty to protect under international human rights law; (2) clarification of the moral responsibility of corporate actors to respect human rights; and (3) development of remedies for victims of corporate human rights violations.³⁷

Additionally, national legal systems have recognized corporate human rights obligations through reporting requirements and divestment initiatives targeting alleged violators.³⁸ A notable example is the Norway’s sovereign wealth fund, which is proactive in weeding out corporate bad actors and even entire industries from its investment portfolio.³⁹

³³ *Id.* ¶ 30.

³⁴ *Supra* note 8.

³⁵ *Supra* note 1. Indeed, the Ruggie report stakes out a weaker position than initially offered up to the UN. In 2003, D. Weissbrodt proposed to hold corporations to higher standards of conduct and liability. But corporations and governments balked. So Kofi Annan tasked Ruggie with deriving more ‘corporate friendly’ norms.

³⁶ *Supra* note 29, ¶ 17.

³⁷ *Id.* ¶ 6.

³⁸ L. Dhooge, *Human rights for Transnational Corporations*, 16 J. TRANSNAT’L L. & POL’Y 197 (2007). See also K. Davis, B. Kingsbury & S. Merry, *Indicators as a Technology of Global Governance*, 46 L. & SOC’Y REV. 71 (2012); G. Sarfaty, *Regulating Through Numbers: A Case Study of Corporate Sustainability Reporting*, 53 VA. J. INT’L L. 575 (2013); Global Reporting Initiative (“GRI”), *Sustainability Reporting Guidelines 3* (2011), available at <https://www.globalreporting.org/resourcelibrary/G3.1-Guidelines-Incl-Technical-Protocol.pdf> (last visited on Apr. 13, 2015).

³⁹ S. Chesterman, *The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations - The Case of Norway’s Sovereign Wealth Fund* 577-615 (New York Univ. Public Law & Legal Theory Working Paper No. 84, 2008), available at http://lsr.nellco.org/nyu_plltwp/84 (last visited on Apr. 13, 2015).

B. Hard Laws

Generally, in addition to explicit and implied recognition of private human rights in various human rights instruments, those duties are recognized by various UN entities including the Human Rights Committee, the European Court of Human Rights, and tribunals in several other countries.⁴⁰

1. *International Treaties and Instruments*

As noted above, most treaties only indirectly regulate corporations, as States are the treaties' primary targets. States are then required to translate such international legal obligations into national legislation.⁴¹

In the international forum, violations of human rights recognized in particular treaties and customary international law often reach private perpetrators expressly or by implication. *E.g.*, the preamble to the Universal Declaration of Human Rights recognizes that the human rights proclaimed therein are "a common standard of achievement of all peoples ... [including] every individual and every organ of society."⁴² Article 29, paragraph 1, affirms that: "Everyone has duties to the community ...,"⁴³ Article 30 recognizes that no right of "any ... group or person ... [exists] to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth" in the Universal Declaration.⁴⁴

The preamble to the International Covenant on Civil and Political Rights ("ICCPR") affirms that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."⁴⁵ Article 5 of ICCPR also recognizes the lack of right of "any ... group or person ... to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth."⁴⁶

⁴⁰ R. MARES ED., THE U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION 38, 96-105 (2012).

⁴¹ Examples include The Organization of Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transaction, The Paris Convention on the Third Party Liability in the Field of Nuclear Energy, The International Convention on Civil Liability for Oil Pollution Damage, and The COE Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. *See Cernic, supra* note 2, at 144.

⁴² G.A. Res. 217(A), U.N. Doc. A/810, at 71 (Dec. 10, 1948).

⁴³ *Id.* art. 29(1).

⁴⁴ *Id.* art. 30.

⁴⁵ ICCPR, pmbl., Dec. 19, 1966, 999 U.N.T.S.171.

⁴⁶ *Id.* art. 5, ¶ 1.

Article 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms contains a “group or person” provision similar to those in the Universal Declaration and ICCPR.⁴⁷

Private duties have also been openly recognized in the preamble to Articles 27 through 29 of the African Charter on Human and Peoples’ Rights.⁴⁸

The preamble to the American Declaration of the Rights and Duties of Man acknowledges that “the fulfillment of duty by each individual is a pre-requisite to the rights of all. Rights and duties are interrelated ...” In addition, Articles XXIX through XXXVIII of the Declaration set forth several express duties of private actors.⁴⁹

The authoritative Human Rights Committee created under ICCPR has also recognized that States should report “the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate Article 7, whether by encouraging, ordering, toleration or perpetuating prohibited acts, must be held responsible.”⁵⁰ The Human Rights Committee added that States have a duty to afford protection against such acts “whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity”⁵¹ and “States must not deprive individuals of right to an effective remedy.”⁵²

2. Home State Laws

As the underwriters of the cornerstone human rights treaties, States assume principal responsibility for the realization of human rights.⁵³ Consequently, human rights law largely relies upon the implementation by domestic legislatures and courts, while the regulations of corporations remain the major province of States.⁵⁴

In the domestic forum, some domestic laws provide a forum for claims against foreign corporations, such as the Alien Tort Claims Act (“ATCA”). ATCA allows

⁴⁷ Convention for the Protection of Human Rights and Fundamental Freedoms art. 17, Nov. 4, 1950, 213 U.N.T.S. 222.

⁴⁸ The African Charter on Human and Peoples’ Rights arts. 27-29, June 27, 1981, 1520 U.N.T.S. 217.

⁴⁹ O.A.S., American Declaration of the Rights and Duties of Man, pmbl. O.A.S. RES. XXX, OEA/SERV.L/V/II.23, DOC. 21 REV. 6 (May 12, 1948), *available at* <http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm> (last visited on Apr. 18, 2015).

⁵⁰ Human Rights Committee, General Comment 20, U.N. Doc. HRI/GEN/1/REV.1 (Mar. 10, 1992), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=HRI/GEN/1/REV.1 (last visited on Apr. 18, 2015).

⁵¹ *Id.* ¶ 2.

⁵² *Id.* ¶ 15.

⁵³ *Supra* note 20, at 141.

⁵⁴ *Id.*

people to sue extra-territorially in the US federal courts.⁵⁵ Under ATCA, national courts' jurisdictional power is being extended to cover events that occurred in foreign countries and actions by those who are not American citizens. It allows aliens to bring civil actions to the US federal courts for a tort committed in violation of the US treaties or international law.

Only non-American plaintiffs can bring a claim under ATCA, however.⁵⁶ In the US District Court case of *Doe v. Unocal*,⁵⁷ e.g., it was held, for the first time, that TNCs could in principle be directly liable for gross violations of human rights under ATCA.

Domestic courts have confirmed on several occasions that human rights law can reach private corporations. More generally, a private corporation as such is simply a juridical person without inherent immunity under the US law or international law.⁵⁸ In the US, private companies can sue and be sued under ATCA and various other statutes. The New Jersey district court in *Iwanowa v. Ford Motor Co.*,⁵⁹ e.g., provided that: "No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violation of international law merely because they were not acting under the color of law."⁶⁰

However, certain cases indicate that it is becoming more difficult for plaintiffs to hold corporations liable for human rights. The strategy of using ATCA as a basis for human rights claims against TNCs will be significantly affected by the US Supreme Court decision in the *Kiobel v. Royal Dutch Petroleum Co.*, where the Supreme Court clearly distinguished domestic liability from international liability of corporations by affirming the lower court's decision that the Alien Tort Statute is not suitable for claims against corporations without current international law of any

⁵⁵ Federal courts ascertaining the content of the law of nations, for the purposes of action brought under Alien Tort Claims Act, must interpret international law not as it was when Act was enacted, but as it has evolved and exists among nations of world today. See 28 U.S.C.A. § 1350, *Kadic v. Karadzic*, 70 F.3d 232, C.A.2 (N.Y.), 1995. See also A New Paradigm for the Alien Tort Statute under Extraterritoriality and the University Principle. Comment, 30 PEPP. L. REV. 671 (2003).

⁵⁶ S. Katuoka & M. Dailidaite, *Responsibility of Transnational Corporations for Human Rights Violations: Deficiencies of International Legal Background and Solutions Offered by National and Regional legal Tools*, 19 JURISPRUDENCE 1301 (2012).

⁵⁷ *John Doe I, et al. v. Unocal Corp., et al.*, 963 F. Supp. 880 (US Dist. Ct., CD Cal. 1997).

⁵⁸ J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 803 (2002).

⁵⁹ *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424 (D.N.J. 1999).

⁶⁰ With respect to non-immunity, the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C § 1330(a), § 1602-5 (1976). It recognizes immunity merely for foreign States and foreign State entities. Even when FSIA reaches foreign State entities, the violation of treaties exception to immunity contained in Sections 1330(a) and 1604 assures that violations of human rights treaties are not entitled to immunity, especially since human rights law requires access to courts and application of the right to an effective remedy. See *supra* note 58, at 807.

corporate responsibility for human rights violations.⁶¹ Indeed, this decision makes it more difficult for plaintiffs to hold corporations liable for human rights violations occurring outside the US unless the claims “touch and concern”⁶² the US with ‘sufficient force.’⁶³

Nevertheless, Katuoka and Dailidaite think that litigation under ATCA is the most effective way to hold TNCs accountable for human rights violations.⁶⁴ They maintain that ATCA has a low jurisdictional threshold based on the minimum contact requirement, an extraterritorial nature, and offers choice of law, namely, the law of the US. Furthermore, claims under ATCA can rest on an international legal norm as long as the norm is specific, universal and obligatory.⁶⁵

3. Host State Laws

Without direct regulation at the international level, save for soft-law provisions which are often industry-made and lack the coercive bite of judicial enforcement, ‘responsibility’ has fallen to host States to provide domestic redress.⁶⁶

Certain laws and regulations in the host State thus directly relate to TNCs’ human rights accountability. Host States’ labor laws, corporate laws, and environmental protection laws may have provisions that can constitute the legal basis for holding TNCs accountable for violating human rights.⁶⁷ There are also cases where courts in host States found corporations liable for negligence or other grounds. Among the host States, however, certain developing countries might not be fully incentivized to enforce human rights protections. Indeed, there can be a “race to the bottom” where host States compete with each other to lower their requirements on human rights compliance in order to attract more foreign investment.⁶⁸ E.g., Ho argues that some dimensions of corporate law in fact extend across the formal internal legal

⁶¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

⁶² *Id.* at 1669.

⁶³ *Id.* at 1670. Cf. A. Colangelo, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 GEO. J. INT’L L. 1329 (2013).

⁶⁴ *Supra* note 56, at 1313.

⁶⁵ *Id.*

⁶⁶ J. Lee, *Establishing Liability for Multinational Corporations: Lessons from Akpan*, 56 INT’L J. L. MGMT. 88-104 (2014).

⁶⁷ R. Mares, *Defining the Limits of Corporate Responsibilities against the Concept of Legal Positive Obligations*, 40 GEO. WASH. INT’L L. REV. 1157 (2009).

⁶⁸ R. Revesz, *Rehabilitating Interstate Competition: Rethinking the “race-to-the-bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992). See also R. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L. J. 1212 (1977); R. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 747 (1977).

boundaries of the multinational corporation.⁶⁹ Furthermore, although corporate law cannot directly remedy human rights violations, this area of law is critical to enforcing human rights obligations on corporations⁷⁰

In addition, certain commentators propose cooperation between home and host countries in order to provide greater access to judicial remedy for victims of TNCs human rights violations. The proposals presented the possibility for this cooperation to materialize through bilateral investment treaties (“BITs”).⁷¹

IV. Difficulties and Hurdles in Subjecting TNCs to Human Rights Liability

Even though there is consensus that TNCs should be accountable for human rights violations, there are both procedural and substantive challenges at different levels to realizing such a goal.

A. Lack of Legal Basis for Holding TNCs Liable at the International Level

Even though States are no longer the exclusive subject of international rights and duties, NSAs are still considered mere objects of international law.⁷² This has become a significant hurdle to achieving effective human rights protection. The traditional view that under human rights law individuals hold the rights while only States bear the obligations has been incrementally criticized for its inability to fully ensure the human right of individuals.⁷³ Most treaties only indirectly regulate corporations because States are the treaties’ primary targets. States are then required to translate

⁶⁹ V. Ho, *Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 COLUM. J. TRANSNAT’L L. 113 (2013).

⁷⁰ *Id.*

⁷¹ I. Prihondono, *Barriers to Transnational Human Rights Litigation against Transnational Corporations (TNCs): The Need for Cooperation between Home and Host Countries*, 3 J. L. & CONFLICT RESOL. 89-103 (2011).

⁷² A. Lakhani, *The Role of Citizens and the Future of International Law: A Paradigm for a Changing World*, 8 CARDOZO J. CONFLICT RESOL. 173-5 (2006). See also De Jonge, *supra* note 27, at 147.

⁷³ E. De Brabandere, *Non-State Actors and Human Rights: Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participants in the International Legal System*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 268-83 (A. d’Aspremont et al. eds., 2011).

such international legal obligations into national legislation.⁷⁴ Consensus has emerged that there is a need to reconstruct the current form of international law so that TNCs can be allocated responsibilities appropriate and proportionate to their nature and activities.⁷⁵ Gradually, TNCs have been recognized in international law as subjects of international law, able to bear duties.⁷⁶

There have been certain ambitious efforts to build voluntary systems⁷⁷ to incentivize TNCs to improve human rights compliance. These efforts, however, had serious shortcomings including lack of monitoring and enforcement mechanisms as well as the voluntary nature of the programs. Nevertheless, voluntary efforts can have both advantages and disadvantages. TNCs are generally more willing to join initiatives that are not forced on them. On the other hand, TNCs can implement these initiatives in the way they see fit so as not to interfere with their profitable operations.⁷⁸ The resistance to compulsory measures has resulted in a variety of vague multilateral initiatives. Even though some of them have certain accountability requirements (such as disclosure, peer benchmarking, etc.), these initiatives have been usually criticized for their weakness.⁷⁹

B. Lack of Incentive or Competency of Host Government and Home Government

Because of the significant economic power of TNCs and certain host States' thirst for and reliance on foreign investment, many developing country's governments are not keen on enforcing human rights laws. They are often concerned that strict enforcement might discourage TNCs investment, critical to local economic development. Moreover, some host governments even become complicit in the human rights violation by TNCs.⁸⁰ In addition, even though some host governments have the determination to enhance human rights protection and punish the TNCs for their human rights violation, the governments would not have sufficient

⁷⁴ Cernic, *supra* note 2, at 144.

⁷⁵ See generally *supra* notes 1, 8, 10 & 56.

⁷⁶ *Supra* note 8, at 946.

⁷⁷ There are at least three means by which voluntary codes may be formulated into legal institutions. For details, see H. WARD, *LEGAL ISSUES IN CORPORATE CITIZENSHIP* 6-7 (IIED ed., Feb. 2003), available at <http://pubs.iied.org/pdfs/16000IIED.pdf> (last visited on Apr. 13, 2015).

⁷⁸ Katuoka & Dailidaite, *supra* note 56, at 1304.

⁷⁹ *Supra* note 20, at 143.

⁸⁰ Amnesty International, The "Enron Project" in Maharashtra: Protests suppressed in the name of Development, July 1997, available at <http://www.amnesty.org/fr/documents/ASA20/031/1997/en> (last visited on Apr. 13, 2015).

resources to effectively realize the goal in a meaningful way.⁸¹

In terms of home State, generally, there is almost no obligation under international law to punish investors for breaching human rights law in a foreign jurisdiction.⁸² As a result, there are not enough regulations in home States to allow them to effectively monitor their investors' human rights compliance and sanction them when there are violations.⁸³

C. Race to the Bottom

Today, consensus is needed on uniform global standards that apply to all TNCs operations irrespective of geographical, cultural or national background. Otherwise, a "race to the bottom" will occur, characterized by the progressive movement of capital and technology from countries with relatively high levels of human rights protections to countries with relatively low levels.⁸⁴ TNCs will be incentivized to transfer their business to those jurisdictions with lower protection of human rights to take advantage of reduced compliance costs. This problem is particularly thorny in a global society where many domestic tools (such as fiscal control)⁸⁵ will not work effectively due to the lack of central authority. Therefore, the global community needs a mechanism to ensure that countries are not forced to compete for investment by lowering human rights standards and tolerating bad TNC behavior.

D. Lack of International Organizations with Sufficient Competency

The regional human rights bodies, and even more so the UN human rights bodies, have regularly been criticized for being ineffective and excessively political.⁸⁶

⁸¹ Foster, *supra* note 13. See also A. Shinsato, *Increasing the Accountability of Transactional Corporations for Environmental Harms: The Petroleum Industry in Nigeria*, 4 NW. J. INT'L HUM. RTS. 186 (2005); N. Pak & J. Nussbaumer, *Beyond Impunity: Strengthening the Legal Accountability of Transnational Corporations for Human Rights Abuses* (Hertie School of Governance Working Paper No. 45, 2009).

⁸² Although there are limited exceptions, international treaties not necessarily aim to regulate TNCs only.

⁸³ P. Simons, *Corporate Voluntarism and Human Rights: The Adequacy and Effectiveness of Voluntary Self-Regulation Regimes*, 59 INDUS. REL. 104 (2004). However, there are still some relating home State regulations. In the U.S., e.g., the Security Act of 1933, the Securities Exchange Act of 1934, and the Foreign Corrupt Practices Act of 1977 all confer (or have been interpreted to confer) extraterritorial jurisdiction over corporate actors. For details, see C. Broecker, "Better the Devil You Know": Home State Approaches to Transnational Corporate Accountability, 41 N.Y.U. J. INT'L L. & POL. 182 (2008).

⁸⁴ D. Spar & D. Yoffie, *Multinational Enterprises and the Prospects for Justice*, 52 J. INT'L AFF. 564 (1999).

⁸⁵ Hongbin Cai & D. Treisman, *Does Competition for Capital Discipline Governments? Decentralization, Globalization, and Public Policy*, 95 AM. ECON. REV. 817-30 (2005).

⁸⁶ The US, as the UN's most influential member and largest financial supporter, was initially one of its most vocal critics, which threatened to cause great problems for the Council. See T. Rushenbergh, *International Human Rights in a Nutshell*

Problems faced by human rights bodies stem from not only an ambiguous attitude towards contentious political issues, but also a lack of adequate financial and human resources.⁸⁷ Moreover, even though suggestions have been made to adopt codes of conduct under the auspices of international organizations, enforcement questions remain.⁸⁸

E. Other Disincentives and Technical Barriers

Developing countries often lack the economic incentives to voluntarily respect citizens' human rights, especially in the areas of labor and environment which require protecting the physical and mental health of individuals.⁸⁹ Even when it becomes clear that TNCs are in derogation of local laws and regulations, an existential imbalance of power generally precludes enforcement.⁹⁰ The ability to successfully prosecute the corporation is problematic in two respects. First, developing countries need the TNC to foster the employment that their economies desperately need. Naturally, developing countries might lack the incentive to prosecute the TNCs.⁹¹ Second, TNCs generally operate through limited liability affiliates or subsidiaries, and moreover the parent company often located in a jurisdiction outside the control of the developing country.⁹² This makes the prosecution of the TNCs more difficult.

by Thomas Buergenthal, Dinah Shelton, and David Stewart (book review), 23 GPSOLO 62 (2006). In contrast, certain NGOs have been quite active in this area. Places like the Center for Constitutional Rights have been active in Alien Tort field.

⁸⁷ *Supra* note 27, at 176.

⁸⁸ U. Kriebaum, *Privatizing Human Rights: The Interface between International Investment Protection and Human Rights*, in *THE LAW OF INTERNATIONAL RELATIONS: LIBER AMICORUM HANSPETER NEUHOLD* 165-89 (A. Reinisch & U. Kriebaum eds., 2007).

⁸⁹ B. Stephens, *The Amoral Economy of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 54 (2002).

⁹⁰ P. Dumberry & G. Dumas-Aubin, *How to Impose Human Rights Obligations on Corporations under Investment Treaties? Pragmatic Guidelines for the Amendment of BITs*, 4 Y.B. INT'L INVESTMENT L. & POL'Y (2011-2012), available at <http://ssrn.com/sol3/abstract=2404054> (last visited on Apr. 13, 2015). See also M. Jacob, *International Investment Agreements and Human Rights* 10 (INEF Research Paper Series, Mar. 2010).

⁹¹ Weissbrodt, *supra* note 10, at 149. See also G. Whelan, J. Moon & M. Orlitzky, *Human Rights, Transnational Corporations, and Embedded Liberalism: What Chance Consensus?*, 87 J. BUS. ETHICS 367 (2009).

⁹² Dhooze, *supra* note 38, at 200.

V. A Potential Response from Bilateral Investment Treaties - A Balanced Approach -

To improve the régime regulating TNCs in the area of human rights, concerted efforts and a diversified governance model are needed. There are already creative ideas that have emerged in the scholarly discussions. *E.g.*, David Kinley, Adam McBeth and others have explored the question of whether or not international law does or should impose human rights obligations on the entities of the World Bank Group.⁹³ Nevertheless, no single body can provide a comprehensive enforcement mechanism. Rather, the collective efforts of all institutions should be made across their constituent fields, with each contributing their particular expertise and resources.⁹⁴

The major form of TNCs' economic activities is 'investment,' and the main body of international investment law is a web of BITs, agreements for promoting foreign investment in a specific country. When the interests of foreign investors can sometimes collide with the human rights of those living in the host State, the host State should be able to justify the measures based on its human rights obligations in order not to avoid liability for breaching its obligations under BITs.⁹⁵

There is significant consensus on the need for a greater degree of balance in BITs between the legitimate interests of investors and host countries.⁹⁶ As certain scholars pointed out, BITs are extremely narrow in their formulation by according substantive rights to investors; they do not correspond duties or obligation on the part of those investors.⁹⁷ Foreign investments have the potential to work as a catalyst for the individual's human rights. However, TNC investors are often not explicitly obliged under investment agreements to observe human rights even though they

⁹³ A. MCBETH, *INTERNATIONAL ECONOMIC ACTORS AND HUMAN RIGHTS* (2010). *See also* D. KINLEY, *CIVILISING GLOBALISATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY* (2009); G. Sarfaty, *Why Cultural Matters in International Institutions: The Marginality of Human Rights at The World Bank*, 103 AM. J. INT'L L. 647 (2009); M. DARROW, *BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE IMF AND INTERNATIONAL HUMAN RIGHTS LAW* (2003).

⁹⁴ *Supra* note 8, at 1020.

⁹⁵ N. Klein, *Human Rights and International Investment Law: Investment Protection as Human Right?*, 4 GOETTINGEN J. INT'L L. 199-215 (2012).

⁹⁶ Huaqun Zeng, *Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice*, 17 J. INT'L. ECON. L. 299 (2014).

⁹⁷ L. PETERSON & K. GRAY, *INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND INVESTMENT TREATY ARBITRATION* 33 (IISD, Apr. 2003), available at http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf (last visited on Apr. 13, 2015).

exert considerable power over individuals and communities.⁹⁸ An innovative idea is to incorporate human rights obligations into BITs,⁹⁹ as this would be an efficient way to impose obligations directly upon corporations via international law. International investment agreements contain a social dimension, as foreign investment directly impacts social, political and environmental issues. Consequently, international investment law should be re-conceptualized in order to realize both the economic and social aspects of foreign investment.¹⁰⁰ Indeed, given the increasing and widespread use of BITs and their effective dispute settlement mechanisms, it may be possible for States to revamp the present BIT regime to better accommodate public interest and human rights. States could accomplish this goal by either amending existing BITs, negotiating new BITs, or interpreting certain BIT provisions with binding force. In addition, human rights obligations, as well as treaty-based compliance mechanisms, could be introduced into BITs and other international investment agreements.¹⁰¹ E.g., SRSG urges States which are in the process of, or considering, reviewing their policy with respect to these agreements “to ensure that the new model BITs combine robust investor protection with adequate allowances for *bona fide* public interest measures, including human rights, applied in a non-discriminatory manner.”¹⁰² Indeed, some of the BITs already encompass certain provisions aiming to address investors’ violation of human rights.¹⁰³ Accordingly, the proposed changes can be categorized as changes either in procedure or in substance.

In this reform, one has to balance the investor’s need to protect financial interests and the host State’s need to regulate. A balancing test could be adopted as shown at Table 1.

⁹⁸ Cernic, *supra* note 2, at 161.

⁹⁹ There are already some discussions on incorporating human rights obligations into bilateral investment treaties. For details, see Chooudhury, *supra* note 13, at 684-6; *supra* note 88; *supra* note 90; *supra* note 97; A. Al Faruque, *Mapping the Relationship Between Investment Protection and Human Rights*, 11 J. WORLD INV. & TRADE 539 (2010); H. MANN, INTERNATIONAL INVESTMENT AGREEMENTS, BUSINESS AND HUMAN RIGHTS: KEY ISSUES AND OPPORTUNITIES, (IISD, Feb. 2008), available at http://www.iisd.org/pdf/2008/iaa_business_human_rights.pdf (last visited on Apr. 13, 2015).

¹⁰⁰ Chooudhury, *supra* note 13.

¹⁰¹ P. Simons, *International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights*, 3 J. HUM. RTS. & ENV’T 43 (2012).

¹⁰² *Supra* note 1.

¹⁰³ U.S. Model BIT.

Table 1: Proposed Balancing Test in the Analysis¹⁰⁴

Investor Harm	Host Governmental Justification
Significance of Affected Interest (Fundamental, Significant, Insignificant) X Magnitude of Intrusion (Total, Significant, Insignificant)	Significance of Host Government Interest in Protecting Human Rights (Compelling, Significant, Insignificant) X Means-End Relationship (Necessary, Significant, Insignificant)

Source: Compiled by the author.

As Table 1 illustrates, no matter in the situation of signing a BIT, or a tribunal is entertaining a case, or a host government is contemplating a potential legislation, each needs to balance two bundles of factors. On one hand, the degree of investor harm should be ascertained, particularly in relation to the significance of affected interests of the investors (whether fundamental, significant, or insignificant on the spectrum) and the magnitude of intrusion (whether total, significant or insignificant on the spectrum).¹⁰⁵ On the other hand, the host government's justification should be ascertained, particularly in relation to the significance of the government interest in protecting human rights (whether it is compelling, significant or insignificant on the spectrum), and how 'necessary' the government action is following a means-ends analysis (whether the governmental action is necessary, significant or insignificant in the spectrum). This balancing test should be taken into consideration in any of the situations mentioned above.¹⁰⁶

Instead of ambitiously exhausting all the changes that international investment law shall make, this part tries to pinpoint the key changes that should be made which are reasonably feasible in reality. In any event, it would be natural for certain States to feel nervous about these provisions in their BITs, either because it would make foreign direct investment less attractive and have a chilling effect on the potential investors, or because it might affect the State's competitive position on international markets. Thus, it is important to reconsider the idea of a multilateral

¹⁰⁴ For details, see G. Simson, *A Method for Analyzing Discriminatory Effects under the Equal Protection Clause*, 29 STAN. L. REV. 673-5 (1977).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

agreement on investment, which would ensure implementation by all the members in the same way.¹⁰⁷

A. How should BITs be Drafted (and Existing Ones be Amended)?

Keeping the aforementioned balancing test in mind, here are a few areas that need to be reformed or amended. Of course, whether these changes can be put into the BITs in practice is another question. It actually depends on the negotiation leverage of the parties.

1. *Scope of Agreement*

One important modification to many formulations commonly encountered at present would be to provide that an investment for the purposes of the agreement is only one concluded in accordance with the host State's domestic law governing the investment and international human rights law.¹⁰⁸ Indeed, tribunals have been recognizing this requirement in certain arbitration awards. In *Phoenix Action Ltd. v. Czech Republic, e.g.*, the tribunal expressed the view that protection "should not be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs."¹⁰⁹

2. *Expropriation Provisions*

A wide variety of government measures might constitute expropriation. Even though a host State has the right to expropriate a foreign investor's investments, such right is limited by the requirements in the expropriation provision of the treaties (such as the expropriation must be for a non-discriminatory public purpose, and the obligation to compensate the investor).¹¹⁰ It is apparent that expropriation provisions might make it more burdensome for States to regulate for human rights reasons.¹¹¹ *E.g.*, it is imaginable that if a host State's new policy that requires enhanced working conditions of employees might constitute indirect expropriation having negative economic impact on the investors, compensation is thus required. Furthermore,

¹⁰⁷ Foster, *supra* note 13, at 361.

¹⁰⁸ *Supra* note 90. See also CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 231 (2006).

¹⁰⁹ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 78 (Apr. 15, 2009), available at <http://www.italaw.com/documents/PhoenixAward.pdf> (last visited on Apr. 13, 2015).

¹¹⁰ R. DOLZER & M. STEVENS, BILATERAL INVESTMENT TREATIES 99-101 (1995).

¹¹¹ Jacob, *supra* note 90, at 14.

BITs could specify exactly when non-discriminatory regulatory actions designed and applied to protect human rights and legitimate public welfare objectives such as public health and safety, do not constitute indirect expropriations.¹¹²

A good prototype is the Common Market for Eastern and Southern Africa (“COMESA”) investment agreement, which contains an express carve out provision, stating:

Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.¹¹³

3. *Fair and Equitable Treatment*

These days, the majority of BITs include the “fair and equitable treatment” standard (“FET”). It is one of the most important principles of international investment law. FET has become the most prominent and controversial standard in this area of law, often leading to divergent approaches by tribunals.¹¹⁴

Various types of governmental actions that inherently deter investments might run afoul of FET. These governmental actions might be motivated by human rights concerns (such as public safety and labor rights).¹¹⁵ A carve out should be made to exempt State regulations aiming to protect human rights, which otherwise would violate FET provisions.

In drafting the BIT, a clause could stipulate something to the effect that differential treatment on the basis of public welfare considerations, such as public health, safety, or the environment, does not contravene this standard. As a matter of fact, there is already a consensus that the investor’s legitimate expectations must be balanced

¹¹² Host State might fail in the attempts to invoke human rights obligations. See, e.g., *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal v. Argentina*, ICSID Case No. ARB/03/19, Decision on Liability (July 30, 2010). For details, see T. Nelson, *Human Rights Law and BIT Protection: Areas of Convergence*, 12 J. WORLD INV. & TRADE 32-7 (2011).

¹¹³ Investment Agreement for the COMESA Common Investment Area, art. 20(8), May 23, 2007, available at http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf (last visited on Apr. 13, 2015).

¹¹⁴ C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357 (2005). See also K. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. INT’L. L. & POL. 47 (2010). (Vandevelde proposed a ‘unified theory’ of fair and equitable treatment that views its elements as expressions of the rule of law).

¹¹⁵ I Knoll-Tudor, *The Fair and Equitable Treatment Standard and Human Rights Norms*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (P.-M. Dupuy et al. eds., 2009).

against the host State's legitimate right to regulate domestic matters in the public interest.¹¹⁶

Moreover, investors should assume certain duties (such as the observance of domestic laws in the host State, the cooperation with the host government, or the due diligence for the investment environment in the host State) in order to enjoy the protection offered by FET.¹¹⁷

4. *Exception provision*

A progressive BIT could lay down a clear exception to a national treatment violation for limited cases of affirmative action, i.e., programs designed to promote equality and advance those segments of society that have been historically disadvantaged or unfairly discriminated against.¹¹⁸

Nonetheless, the issue of public purpose justifications for State regulation looms large, so that once again clear and uniform jurisprudence may have yet to emerge to guide policymakers on this point. The proper balance between investor protection and the State's right to regulate remains similarly elusive with respect to these clauses.¹¹⁹

One could draft a general exception clause that seeks to preserve States' right to regulate in vital areas, thus recognizing that a commitment to human rights and related interests frequently requires more than mere omissions.¹²⁰

5. *Requirement of Pre-Establishment Social Impact Assessment*

Some scholars suggest that a BIT should include an investor obligation for environmental and social impact assessment.¹²¹ As a matter of fact, the IISD Model International Agreement on Investment for Sustainable Development has an entire

¹¹⁶ *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, ¶ 305 (Mar. 17, 2006).

¹¹⁷ *See Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID case No. ARB/97/7, Award (Nov. 13, 2000); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, ¶ 367 (June 25, 2001).

¹¹⁸ *See, e.g., Canadian 2003 Model FIPAs* (Canada refers to its BITs as Foreign Investment Protection Agreements, FIPAs) generally follows the exceptions contained in Art. XX of GATT, and expressly states that human life or health protection, conservation of living or non-living exhaustible natural resources and other conditions are exceptions. *See Ministry of Foreign Affairs, Trade and Development of Canada, Foreign Investment Protection Agreements (FIPA)*, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng> (last visited on Apr.13, 2015).

¹¹⁹ Jacob, *supra* note 90, at 19.

¹²⁰ *Id.* at 34-5. Nevertheless, in interpreting exceptions provisions, tribunals always struggled over several issues. *See Chooudhury, supra* note 13, at 706-7.

¹²¹ *Supra* note 20.

section stipulating the obligations and duties of investors and investments.¹²²

B. Reform of Procedure for Dispute Settlement

Investment law and arbitration law have recently gained much attention due to the perception that large-scale foreign investment occasionally cuts across other essential interests such as human rights protection.¹²³ Eventually, reform of the dispute settlement procedure should be conducted so that it can accommodate claims of investors' violation of human rights and thus hold investors accountable.¹²⁴

1. *Clean-hands doctrine*

There is some consensus that the 'clean hands' doctrine should be introduced into international investment to empower BITs not only to bring justice to investors, but also to bring investors to justice.¹²⁵ Under the doctrine of 'clean hands,' an injured party's wrongdoing may limit his/her claim to reparations.¹²⁶ The doctrine has been applied in various contexts in the domestic laws.¹²⁷ International tribunals generally found inadmissible claims of claimants that had engaged in wrongful conduct in relation to their claims.¹²⁸

An investor's protection under a BIT could be conditioned upon its respect for human rights. Such a 'clean hands' doctrine could be introduced into bilateral investment treaties.¹²⁹ In other words, requiring an investment to be made in accordance with human rights would preclude claims by an investor with unclean hands (in violation of human rights). As Moloo has observed, even though the historical application of the 'clean hands' doctrine has been inconsistent, recent decisions in the investment arbitration context suggest that the doctrine has a

¹²² H. Mann et al., *IISD Model International Agreement on Investment for Sustainable Development* (IISD, Apr. 2005) [hereinafter IISD Model Agreement], available at <http://www.iisd.org> (last visited on Apr. 13, 2015).

¹²³ Jacob, *supra* note 90, at 7.

¹²⁴ See a series of articles, 10 *TRANSNATIONAL DISPUTE MANAGEMENT* (Jan. 2013).

¹²⁵ E. Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?*, 34 *BROOK. J. INT'L L.* 354 (2009).

¹²⁶ *BLACK'S LAW DICTIONARY* 268 (8th ed. 2004). It defines the 'doctrine' as the "principle that a party cannot seek equitable relief or assert an equitable defense if that party has violated an equitable principle."

¹²⁷ See *COUCH* § 232:126. (Clean Hands Doctrine).

¹²⁸ See *Diversion of Water from the River Meuse* (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B), No.70 (June 28); *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 259 (June 27) (dissenting opinion of Judge Schwebel), available at <http://www.icj-cij.org/docket/files/70/6523.pdf> (last visited on Apr. 30, 2015).

¹²⁹ O. Fauchald & J. Stigen, *Transnational Corporate Responsibility for the 21st Century: Corporate Responsibility before International Institutions*, 40 *GEO. WASH. INT'L L. REV.* 1045-6 (2009).

place in international law.¹³⁰ Patrick and Dumas-Aubin maintained that even in the absence of an “in accordance with the law” provision in a BIT, there would exist an implicit obligation for investors to make investments in accordance with the host State’s laws.¹³¹ In practice, the doctrine of ‘clean hands’ should entitle tribunals to find inadmissible any claims involving human rights violations.¹³² Another variation is the “offsetting of damages” option.¹³³ Tribunals could permit an investor’s claim even in the face of human rights violations, but to allow the respondent State to raise any such allegations during the arbitral proceedings.

Nevertheless, the trigger of the ‘clean hands’ doctrine needs to be ascertained in each case so that it will become an area of dispute. In addition to violations of *jus cogens*,¹³⁴ what other human rights violation might trigger ‘clean hands’ need to be clarified.

2. Counterclaim

A claimant investor would be permitted to file a claim even in the face of human rights violations. The host country should be allowed to raise human rights allegations in a counterclaim.¹³⁵ However, there are two significant procedural hurdles in establishing the jurisdiction for counterclaims.

First is the ‘investor’s consent.’¹³⁶ Under Article 46 of the ICSID Convention and Rule 40 of the ICSID Arbitration Rules, an ICSID tribunal can determine a counterclaim if it is “within the scope of the consent of the parties.”¹³⁷ If the investor does not consent to arbitrate counterclaims, the tribunal would not have jurisdiction

¹³⁰ R. Moloo, *A Comment on the Clean Hands Doctrine in International Law*, 7 INTER ALIA 39 (2010).

¹³¹ D. Patrick & G. Dumas-Aubin, *The Doctrine of “Clean Hands” and the Inadmissibility of Claims by Investors Breaching International Human Rights Law*, 10 TRANSNAT’L DISP. MGM’T 1-10 (2013), available at <http://ssrn.com/abstract=2404058> (last visited on Apr. 13, 2015).

¹³² *Id.*

¹³³ IISD Model Agreement art. 18(B) (D).

¹³⁴ The human rights as *jus cogens* include prohibitions against genocide, slave trade, murder/disappearance, torture, prolonged detention, systematic racial discrimination, etc. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1986)§702.

¹³⁵ T. 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).

¹³⁶ J. Crawford, *Treaty and Contract in Investment Arbitration*, 24 ARB. INT’L 364 (2008). It stated that: “The core problem with counterclaims in BIT arbitration is that they treaty commitments of the host states toward the investor are unilateral, and anyway the investor is not a party to the BIT.”

¹³⁷ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 46, Mar. 18, 1965, 575 U.N.T.S. 159. It stated that “Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.”

to hear the counterclaim. In the case of *Roussalis v Romania*, e.g., a ‘host State’ counterclaim was denied on jurisdictional grounds for lack of consent.¹³⁸ Moreover, the ‘umbrella clause’ in the BIT stated that: “Each Contracting Party shall observe any other obligation it may have entered into with regard to investments of investors of the Contracting Party.”¹³⁹ It neither overcame the lack of consent to arbitrate counterclaims, nor permitted the claims to be brought regarding obligations of the investor.¹⁴⁰

Second is the ‘connection’ requirement between the counterclaim and the primary claim to which it is a response. It is another important condition for the tribunal to have jurisdiction over a counterclaim. Each tribunal must decide upon the scope of the interpretation of the term ‘connection’¹⁴¹ in the view of particular circumstances of an individual case, including facts, relevant treaties, and other texts.¹⁴² In conclusion, drafting treaties to permit closely related counterclaims would help to rebalance investment law by enabling the host State to launch a counterclaim.¹⁴³

3. Other Mechanism

Moreover, certain commentators suggest making the dispute settlement more transparent to better address human rights issues related to investment disputes.¹⁴⁴

C. Fall Back on Interpretation Tools

Radi even invites the promoters of human rights to move beyond the semantic activism focusing on the literal absence of human rights in investment treaties and underlying their criticism of the regime as a whole.¹⁴⁵ Rather, these promoters should

¹³⁸ *Spyridon Roussalis v. Romania*, ICSID Case No ARB/06/1, Award, ¶ 874 (Dec. 7, 2011).

¹³⁹ *Id.* ¶ 874.

¹⁴⁰ *Id.*

¹⁴¹ J. Kozikowski, *Counterclaims in Investment Arbitration: Boosting a Host State's Position in Environmental Disputes with Foreign Investors* (draft paper), available at https://www.academia.edu/7914833/Counterclaims_in_Investment_Arbitration_Boosting_a_Host_States_Position_in_Environmental_Disputes_with_Foreign_Investors_Draft_Paper (last visited on Apr. 13, 2015).

¹⁴² *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, ¶ 305 (Mar. 17, 2006). See also *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, (Jan. 29, 2004), 8 ICSID REP. 528 (2005) (host States’ right to counterclaim conceded by claimant).

¹⁴³ A. Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17 LEWIS & CLARK L. REV. 461 (2013).

¹⁴⁴ *Supra* note 97. See also J. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 97(2007).

¹⁴⁵ Y. Radi, *Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International*

adopt a more constructive approach by looking within the regime itself to see how their tools can be used to promote human rights, regardless of the semantics used. He demonstrates that by relying on guiding principles (the legitimate expectations and distinct-investment-backed expectations), a nondiscriminatory State measure pursuing a human rights objective will rarely be viewed as violating the FET treatment provision or as constituting indirect expropriation.¹⁴⁶

Moreover, Choudhury proposes certain interpretation approaches in ascertaining the exception provisions that allow States to derogate from their international investment agreement obligations under specified condition.¹⁴⁷ These exception provisions are broad enough to encapsulate human rights obligations in their ambit.¹⁴⁸

D. Incentivize the States and Tribunals

Some capital-exporting countries might be reluctant to make the aforementioned changes as their primary goal is to secure protection for investors from their jurisdiction. However, they should take three factors into consideration in contemplating the proposed changes. First, there has been significant pressure from various interest groups to strengthen the host State's power to regulate and punish international investors' (usually TNCs') violation of human rights.¹⁴⁹ Making the proposed changes in BITs might help the government confront pressure from interest groups. Second, recently, more States which were once capital-exporting countries have started to import capital, as well. The US is a typical example which has amended her model BIT several times to make it more balanced. Third, if the BITs continue to be unbalanced, it might cause certain States to withdraw from the ICSID system,¹⁵⁰

Investment Law Toolbox, 37 N.C. J. INT'L L. & COM. REG. 1107 (2012).

¹⁴⁶ *Id.*

¹⁴⁷ Choudhury, *supra* note 13.

¹⁴⁸ *Id.*

¹⁴⁹ Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development [Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises], U.N. Doc. A/HRC/8/5/Add.1 (Apr. 23, 2008), ¶ 88, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/8/5/Add.1 (last visited on Apr. 15, 2015).

¹⁵⁰ Bolivia and Venezuela denounced ICSID in the late 2000s, and Ecuador reduced the scope of its consent to arbitrate disputes under the convention. See ICSID, Bolivia Submits a Notice under Article 71 of the ICSID Convention, Press Release, May 16, 2007, available at <http://www.worldbank.org/icsid/highlights/05-16-07.htm>; ICSID, Ecuador's Notification under Article 25(4) of the ICSID Convention, Press Release, Dec. 5, 2007, available at https://icsid.worldbank.org/apps/ICSIDWEB/Pages/News.aspx?CID=107&ListID=74f1e8b5-96d0-4f0a-8f0c-2f3a92d84773&variation=en_us; [https://icsid.worldbank.org/apps/ICSIDWEB/Documents/Ecuador's Notification under Article 25\(4\) of the ICSID Convention.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/Documents/Ecuador's%20Notification%20under%20Article%2025(4)%20of%20the%20ICSID%20Convention.pdf); ICSID, Venezuela Submits a Notice under Article 71 of the ICSID

which might challenge the legitimacy of the system and even cause its collapse.

Moreover, certain research indicates that structural biases exist in investor-State arbitrations. As a matter of fact, international arbitration is now regularly accused of lacking legitimacy, as well as being inherently biased in favor of investors and huge conglomerates.¹⁵¹ Apparently, significant efforts are needed to reduce structural bias, so that the tribunal may be incentivized to give appropriate and sufficient consideration to host governments' human rights concerns.¹⁵²

VI. Conclusion

BITs, as a main component of international investment law regulating international investment activities, need a reform. While the new BITs should be drafted (and existing ones be amended), the dispute settlement procedure should be also reformed to make TNCs more accountable for human rights violations.

Regulation of TNCs is becoming a global public good, to which each player in the global society should contribute in accordance with its ability, join forces and pool resources to hold TNCs more accountable for their human rights violations. Concerted efforts are required. Moreover, various proposals have been made in regard to reforming international institutions to better address TNCs' violation of human rights. Among these proposed reforms, integrating changes in the substantive and procedural aspects of BITs might constitute an effective and meaningful response.¹⁵³

Convention, Press Release, Jan. 26, 2012, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/Pages/News.aspx?CID=57&ListID=74f1e8b5-96d0-4f0a-8f0c-2f3a92d84773&variation=en_us (all last visited on Apr. 13, 2015).

¹⁵¹ *Supra* note 16, at 487. See also B. Choudhury, *Recapturing Public Power: is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775 (2008); C. Brower II & J. Sharpe, *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT'L 415 (2003); S. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 152 (2005).

¹⁵² W. Park, *Arbitrator Integrity: the Transitory and the Permanent*, 46 SAN DIEGO L. REV. 658 (2009). See also C. Tietje et al., *Once and Forever? The Legal Effects of a Denunciation of ICSID*, 6 TRANSNAT'L DISP. MGMT. 5 (2008).

¹⁵³ China is in the process of negotiating a BIT with the US. If a Sino-US BIT is signed and finalized, it should contain strong provisions that place affirmative duties on signatory-nations and TNC investors to staunchly protect workers' rights, as well as provide the state and investors with an avenue through which to enforce these obligations. See S. Hang, *Investing in Human Rights: Using Bilateral Investment Treaties to Hold Multinational Corporations Liable for Labor Rights Violations*, 37 FORDHAM INT'L L. J. 1215 (2014).

Annexes

1. Labor Rights Impacted¹⁵⁴

Freedom of association	Right to equal pay for equal work
Right to organize and participate in collective bargaining	Right to equality at work
Right to non-discrimination	Right to just and favorable remuneration
Abolition of slavery and forced labor	Right to a safe work environment
Abolition of child labor	Right to rest and leisure
Right to work	Right to family life

2. Non-Labor Rights Impacted¹⁵⁵

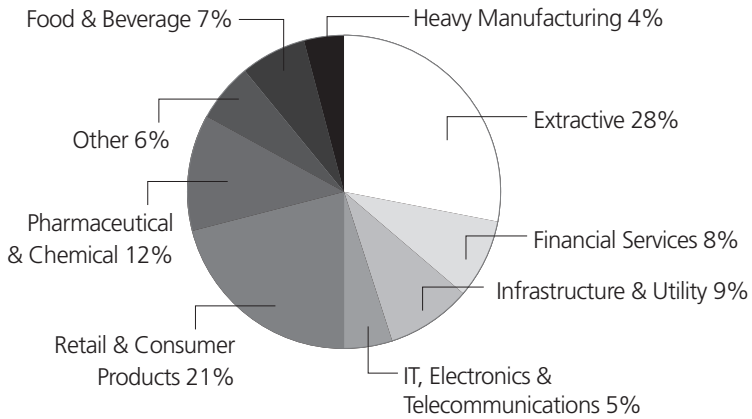
Right to life, liberty and security of the person	Right of peaceful assembly	Right to an adequate standard of living (including food, clothing, and housing)
Freedom from torture or cruel, inhuman or degrading treatment	Right to marry and form a family	Right to physical and mental health; access to medical services
Equal recognition and protection under the law	Freedom of thought, conscience and religion	Right to education
Right to a fair trial	Right to hold opinions, freedom of information and expression	Right to participate in cultural life, the benefits of scientific progress, and protection of authorial interests
Right to self-determination	Right to political life	Right to social security
Freedom of movement	Right to privacy	

¹⁵⁴ *Supra* note 1, at 2.

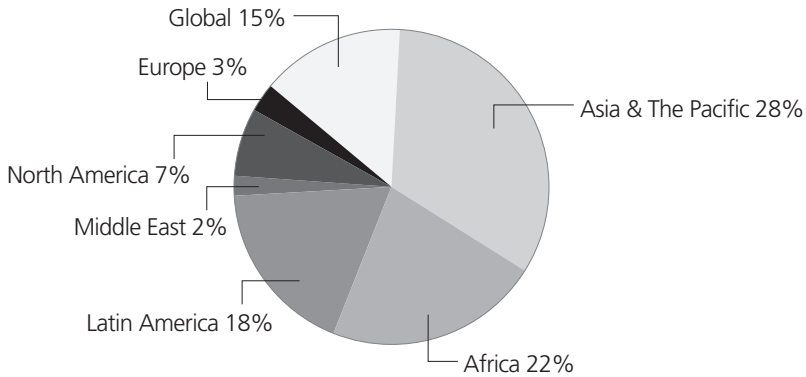
¹⁵⁵ *Id.* at 3.

3. Allegations by Sector & Regions of Alleged Incidents¹⁵⁶

Allegations by Sector



Regions of Alleged Incidents



¹⁵⁶ *Id.* at 9-10.