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Human Rights Obligations in FDI Operation: A Paradigm Shift in BITs

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Abstract: *Incorporation of human rights obligations into bilateral investment treaties (BITs) is rare. However, with the rise of mega investment-related disputes in developing countries, there are growing concerns about the negative impact of foreign direct investment (FDI) on the human rights of the local population from various aspects, directly and indirectly. Apart from jus cogens norms, the international investment law does not impose any direct obligation on human rights in BITs. Therefore, the scope of 'human rights' within the present BITs is yet to be determined. There is a pressing need to include human rights obligations in BITs from various corners, including civil society and the UN Conference on Trade and Development (UNCTAD). This paper focuses on the changing paradigm of approaches adopted by the UN, UNCTAD, and scholars in advocating for the inclusion of human rights obligations in the context of FDI operations, mainly referring to the Ruggie Report (2011). The paper focuses on which set of human rights instruments should be referred to as the BITs and the appropriate mechanism to enforce those obligations, as well as addresses the challenges to implement. The paper aims to emphasise the fact that human rights will claim greater significance in future, and countries negotiating BITs will eventually be pushed forward to include human rights obligations, at least in response to growing concerns about the rightfulness of the treaty obligations of the current generation of BITs and the growing demand for more balanced BITs.*

Keywords: Human Rights, BITs, FDI operation, UNGPs, Ruggie Report

1. Introduction

The domain of international investment law is one of the most complex areas of international law, with ever-expanding scope and dimension. While thousands of international investment treaties at bilateral and multilateral levels between developed and developing countries cover a wide range of global investment activities and regulation and protection of foreign direct investments (FDIs), no single comprehensive treaty deals with international investment law to date. The ever-expanding body of the law regulating foreign investment operates through

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international investment agreements (IIAs), most of which are bilateral investment treaties (BITs) between developed and developing countries. The BITs cover a wide range of sensitive areas, such as natural resources and public utility services, having direct and indirect relations with host states' and local communities' human rights issues. Human rights concerns are becoming major for FDI-led projects in many developing countries. However, incorporating human rights obligations into BITs is only sometimes found. Apart from *jus cogens* norms, the international investment law does not impose any direct obligation of human rights in the existing BITs.[1] Therefore, the scope of 'human rights' and the possibilities of its enforcement in case of any violations within the present BITs are yet to be determined.

Over the last decade, there has been a pressing need to include human rights obligations in BITs from various corners, including civil society and different initiatives led by different international organizations, particularly the UN and the UN Conference on Trade and Development (UNCTAD). This present paper discusses the changing paradigm of approaches adopted by the UN, UNCTAD, civil society, different international organizations, and scholars in advocating for the inclusion of human rights obligations to BITs, mainly referring to the UN Guiding Principles (UNGPs) on Business and Human Rights endorsed by the UN Human Rights Council, popularly known as the Ruggie Report (2011).[2]It is crucial to note that previously, the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights(2003)[3]were not just rejected, but their rejection was a pivotal moment. This rejection, which occurred in 2004 under the UN Commission on Human Rights, led to the appointment of John Ruggie as the special representative on the issue of human rights and transnational corporations and other business enterprises (SRSG) for a two-year term. This appointment was significant as it mandated the SRSG to identify and clarify standards of corporate responsibility and accountability with regard to human rights, a task that was previously unaddressed.

In 2007, the Human Rights Council renewed the mandate for another year. Under these mandates, the SRSG proposed the "Protect, Respect and Remedy" framework to address business involvement in human rights abuse. In 2008, the Human Rights Council unanimously welcomed and recognised the need to operationalise this framework and renewed the SRSG's mandate for three. In 2007, the Human Rights Council renewed the mandate for another year. Under these

[1] Carlos M. Vázquez "Direct v. Indirect Obligations of Corporations Under International Law" 43 Columbia Journal of Transnational Law 927 (2005) at p. 927.

[2] For the full text of Ruggie Report, located at https://digitallibrary.un.org/record/705860?ln=en

[3] For full text of the Draft Norms located at https://digitallibrary.un.org/record/498842?ln=en

mandates, the SRSG proposed the "Protect, Respect and Remedy" Framework to address business involvement in human rights abuse. In 2008, the Human Rights Council unanimously welcomed and recognised the need to operationalise this framework and renewed the SRSG's mandate for three years. The result of this mandate was the UNGPs, providing – for the first time – a global standard for preventing and addressing the risk of adverse impacts on human rights involving business activity.

With the growing concern for human rights issues in FDI-led projects in developing countries, it becomes pertinent to consider how these concerns can be stipulated in the BITs that cover the operations of these FDI-led projects. With the vast number of international instruments operating in the regime of international human rights, a pertinent question arises: which set of human rights instruments should be referred to in the BITs? And what should be the appropriate mechanism to enforce those human rights obligations? The paper also sheds light on the BITs and other international investment agreements which have directly or indirectly included/referred to human rights obligations by trying to locate the phrase in the BITs and trying to understand the implication of text used in those treaties. This paper also examines whether the treaty drafters are often reluctant to include human rights obligations since such provisions are perceived as counterproductive to FDI or the investment tribunals dealing with such claims of violations of human rights are simply reluctant to go beyond the black letter law interpretation of the text of the BITs. The conclusion paper argues that human rights will claim greater significance in the future, and countries negotiating BITs will eventually be pushed forward to include human rights obligations, at least in response to growing concerns about the rightfulness of the treaty obligations of the current generation of BITs and the growing demand for more balanced investment treaties.

2. Incorporation of human rights in BITs formulation

Incorporation of human rights obligations into BITs is seldom found. However, with the rise of mega investment-related disputes in developing countries, there are growing concerns about the negative impact of FDI on the human rights of the local population from various aspects, directly and indirectly.[4] As the vast majority of BITs stand today, they are protected only by the foreign investors' interest, ensuring some substantive rights without being subject to any specific obligations. On the other hand, the countries only have stringent obligations under the BITs to protect the interests of foreign investors. Still, they are not entitled to claim substantive rights in case of any violations of issues like human rights. Therefore, an investor cannot be accountable for breaching any rights

[4] Steven R. Ratner "Corporations and Human Rights: A Theory of Legal Responsibility" 111 Yale Journal of Law 443(2001) at p. 512.

of the host country under the BITs, as no such rights exist in the current BITs. In this connection, it needs to be emphasised that no obstacle in international law prevents the host countries from putting human rights obligations upon the corporations and foreign investors in the BITs. Therefore, the non-existence of human rights obligations in the vast majority of BITs is not a matter of legal or economic complexity but rather a matter of lack of political will to do so on the part of the state parties.

However, very few examples of BITs and other international investment agreements have directly or indirectly included/referred to human rights obligations by trying to locate the phrase in the BITs. Two of those such examples are the Morocco-Nigeria BIT (2016) [5]and the International Institute for Sustainable Development (IISD) Model International Investment Agreement on Sustainable Development (2005)[6]. A few BITs deal with or reference either in the preamble or the text to non-investment obligations such as protection of the environment, labor rights, anti-corruption, and human rights. Still, they do not impose any concrete obligations upon foreign investors. Reference to human rights in the preamble could serve as the purpose and object of treaty interpretation. However, that does not create substantive obligations for the investors[7] and thereby appears to be little help for the host country in making a successful claim against the foreign investors. As observed by the NAFTA ADF Tribunal, such general provisions stating the object and purpose of a treaty "may frequently cast light on a specific interpretive issue, but are not to be regarded as overriding and superseding the [text]"[8].

Therefore, specific, well-defined, and mandatory human rights obligations must apply to corporate activities led by an FDI project. Apart from *jus cogens* norms, the international investment law does not impose any direct obligation of human rights in BITs. Therefore, the scope of 'human rights' within the present BITs is uncertain, and its application before an investment tribunal remains vague. Accordingly, this paper argues a pressing need to include human rights obligations in BITs. The same claim has been firmly placed as a global agenda over the last two decades from corners including civil society, the UN, and the UNCTAD.

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[5] See Article 15 and 18 of the BIT, Located at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download

[6] See https://www.iisd.org/system/files/publications/investment_model_int_agreement.pdf

[7] Howard Mann, "International Investment Agreements, Business, Human Rights: Key Issues and Opportunities" IISD (February 2008) at page 10. Located at https://www.iisd.org/system/files/publications/iia_business_human_rights.pdf

[8] ADF Group Inc vs. United States, ICSID Case bi, ARB (AF)/00/1 (NAFTA), Award (9 January 2003) at page 147.

3. A Call for Paradigm Change

Including human rights obligations in BITs is surrounded by controversy over the political and economic interests of the parties rather than any substantive legal arguments. The apparent conflict between the two norms, namely the human rights obligations and foreign investors' protection, can easily be mitigated if there is a political and economic will to view the matter from a holistic perspective. The complexities of today's international investment law regime to protect FDIs and, at the same time, the recent defiance of developing countries raising their voices for more balanced BITs and as well as growing concerns about more responsible behaviour of foreign investors even in developed economies, demands a new kind of BITs that would address the issues of human rights violations in the context of FDIs. Accordingly, there is a call for a paradigm shift to reconsider the state's sovereign attributes and the duty to regulate in favour of the public interest and protection of human rights. This is reflected in global mega-investment cases, often litigated in parallel proceedings at various jurisdictional levels and within a complex network of domestic and international norms. It also reflects how dramatically these investment disputes are resolved.

Civil Society has been fighting to include human rights obligations into BITs for quite a long time. Inclusion of such provisions of human rights obligations must be unambiguous and "create specific, well-defined mandatory human rights obligations applicable to corporate activity"[9]. Phrases like merely 'encouraging' foreign investors to comply with human rights obligations are not good enough. One way of doing it can be specifying certain human rights treaties in the BITs wherein those human rights treaty obligations will prevail in case there are any inconsistencies with the BIT.[10] For example, Article 104 of the North American Free Trade Agreement (NAFTA) (now defunct) provided such clauses dealing with inconsistencies between its text and a list of environmental treaties.[11] The country's obligations to take into account human rights obligations under the BIT need to be specified and clarified.[12] Such clarifications can be subjected to binding notes of interpretation. Such clarification can be helpful for the arbitral tribunals to interpret treaty clauses such as obligations for host countries. However, such

[9] Penelope Simons, "Corporate Voluntarism and Human Rights: The Adequacy and Effectiveness of Voluntary Self-Regulation Regimes" 59(1) Industrial Relations, 101-141 (2004) at p. 130.

[10] See e.g., Barnali Choudhury, "Exceptions Provisions as a Gateway to the Incorporation of Human Rights in International Investment Law" 49 Columbia Journal of Trade Law 670 (2011).

[11] For text of NAFTA see https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2412/download NAFTA has been replaced by Agreement between the United States of America, the United Mexican States and Canada (USMCA) 2018 which came into force on July 2020.

[12] Marc Jacob, "International Investment Agreements and Human Rights" INEF Research paper series (2010) at pp. 33-35 located at https://www.uni-due.de/imperia/md/content/inef/mune_03.2010.pdf

a clause might still suffer from the shortcomings of not imposing any direct, specific, and mandatory human rights obligations upon the foreign investors.

4. Human Rights Norms and their Relevancy in FDI Operation

The notion of 'human rights' in its plain meaning is understood as that by the very fact of being born as a 'human,' every human being is entitled to enjoy certain rights individually and as a part of a community and part of an ecological system irrespective of gender, caste, colour, religion or creed. Some historical events and documents played a significant role in devising and developing the notion of human rights in the modern era. The Magna Carta (1215), the American Declaration of Independence (1776), the French Declaration of Man and the Citizens (1989), and the American Bill of Rights (1791) deserve to be particularly mentioned. After the horrific experience of WWII, the world community realised the need to protect human rights nationally and internationally, thereby adopting the Universal Declaration of Human Rights (UDHR) in 1948. Later in 1966 came the twin documents, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), under the auspices of the UN. The global community has recognised these UN sets of human rights documents, which reflect humankind's moral conscience and the highest common aspirations that these rights are universal, indivisible, inalienable, interdependent, and interrelated. Though there has been significant debate over these two sets of rights, and many scholars consider that the link between civil and political rights, on the one hand, and the economic, social, and cultural rights, on the other hand, are inseparable, complementary, and so interwoven that you cannot fully accomplish one by completely relinquishing the other another. Universal endorsement of these two sets of human rights as a dominant governance concern is a significant accomplishment of the twentieth century.

In the context of human rights and FDIs, both categories of human rights, namely civil and political and economic, social, and cultural rights, come into play directly or indirectly. Though the latter category has more visible relevance in FDI-led projects, as many directly or indirectly impact local communities' economic, social, and cultural rights, civil and political rights like labour condition and their right to development are equally important. While considering whether human rights need to be considered in international investment agreements, BITs, or investment disputes, the obvious question comes: which set of human rights needs to be considered? Human rights obligations are not generally included in the BITs, and even if they are somehow referred to, they appear to be rather timid, indirect, and incoherent. There is a long list of human rights documents in the twentieth century. With the vast number of international instruments operating in the regime of international human rights, a pertinent question arises: which set of

human rights instruments should be referred to in the BITs? And what should be the appropriate mechanism to enforce those human rights obligations?

However, to name a few which are more directly related to foreign direct investments, we can mention the ILO Declaration on Fundamental Principles at Work (1998)[13], the UN Convention Against Anti-Corruption (2003)[14], and the Rio Declaration on Environment and Development (1992)[15]. Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights (2003)[16], later adopted by the UN Sub-commission on Human Rights, impose direct obligations on corporations concerning human rights, labour rights, and environmental protection. The preamble states corporations are "obligated to respect generally recognised responsibilities and norms." However, this was subject to severe criticism. Some soft laws also deserve to be mentioned, such as the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises (2006),[17] OECD Guidelines for Multinational Enterprises (2000)[18] and the UN Global Compact (2010)[19] which prescribed ten principles related to business and human rights. Since the failure to draft a comprehensive code on the responsibilities of multinational corporations, scholars have been vocal in advocating for the inclusion of human rights obligations to BITs.

4.1 Corporate Obligations for Human Rights in FDI Operation

A drastic approach change occurred due to the UN Guiding Principles (UNGPs) on Business and Human Rights endorsed by the UN Human Rights Council, popularly known as the Ruggie Report (2011)[20]. The Ruggie report provided a milestone for a paradigm shift approach to human rights obligations to trade and investment. The report provided a framework that rested on differentiated but complementary responsibilities. These responsibilities include the state's duty to protect against human rights abuses by third parties, including business

[13] Located at https://www.ilo.org/declaration/lang--en/index.htm#:~:text=The%20ILO%20Declaration%20on%20Fundamental,our%20social%20and%20economic%20lives.

[14] Located at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

[15] https://culturalrights.net/en/documentos.php?c=18&p=195#:~:text=The%20Rio%20Declaration%20on%20environment,at%20Stockholm%20on%20June%201972.

[16] Supra note 3

[17] Located at https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm#:~:text=MNE%20Declaration-,Tripartite%20Declaration%20of%20Principles%20concerning%20Multinational%20Enterprises%20and%20Social%20Policy,responsible%20and%20sustainable%20workplace%20practices.

[18] Located at https://www.oecd.org/corporate/mne/1922428.pdf

[19] Located at https://www.unglobalcompact.org/what-is-gc/mission/principles

[20] Supra Note 2

entities, the corporate responsibility to restore human rights, and the need for more effective access to remedies. The UNGPs devised three pillars: legal protection, obligation/responsibility of corporations, and access to treatment. Two principles are particularly noteworthy. Principle 9 of UNGPs states

> "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance, through investment treaties or contracts."

Different states conclude economic agreements with other states or business entities, such as BITs, free trade agreements (FTAs), or investment contracts for joint venture projects. These economic arrangements create opportunities for the host states who receive FDIs. Experiences of the host developing countries show that these economic agreements can also significantly affect the domestic public policy space for the host countries. Sometimes, compliance with the terms of international investment agreements may require states to comply with the human rights legislation fully. Sometimes, they are even subjected to international investment arbitration if they try to do so on the grounds of breach of treaty obligations. Therefore, it is essential that the host states ensure that they retain enough public policy space and regulatory freedom to make them able to protect human rights under the BITs, creating a balance with their obligation to protect the investor's interests.

Furthermore, Principle 12 of UNGPs states

> "the responsibility of the business enterprise to respect human rights refers to internationally recognized human rights, understood at a minimum as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work."

Principle 12 covers a broad scope, as multinational corporations can virtually impact the entire spectrum of internationally recognized human rights. Therefore, their responsibility to respect these human rights applies to all such rights.

With these sets of hard and soft laws on business and human rights, a question remains: what should be the actual content of obligations imposed upon foreign investors? A pragmatic approach can confine the scope of any future investment treaty to a limited number of well-defined obligations of international law on human rights, labour rights, protection of the environment, and anti-corruption, which have direct relevance in the operation of FDIs in the host countries. The UN Global Compact has adopted this approach with its ten principles.

However, the most effective measures can be once the state parties include

human rights obligations in the BITs. This will depend on the state parties at the time of negotiation and which of the many human rights they want to have as a part of the treaty obligation. Whatever obligation is imposed upon foreign investors is subject to negotiation. Though the experience shows that negotiation on imposing human rights obligations upon corporations has yet to see much success in the past, such efforts have raised considerable controversy. These negotiations inevitably resulted in compromises that frustrate the effective implementation of human rights obligations in the FDI context. Such means are made primarily by the host developing countries to attract FDIs in their country, thereby making them reluctant to bargain and negotiate to include human rights obligations into BITs.

Instead, a more straightforward approach can be to refer to the set of human rights documents mentioned above in the provision on investor protection standards. Most countries have already recognised specific standards in well-recognized international treaties. Therefore, BITs can refer to the obligations prescribed under the UDHR, ICCPR, ILO Principles, Rio Declaration, or the Ruggies Report. These human rights instruments have been ratified and endorsed by a vast majority of the countries. Therefore, when a government wishes to negotiate to include these human rights obligations into BITs, it is easier for them to convince the other party to include them as a pledge they have made by adopting and ratifying those instruments. Many principles of the documents mentioned above are also part of customary international law[21] and, therefore, more accessible for the state parties to include in BITs as many of those rights are considered 'non-derogable' rights. In addition, these UNGPs have already been accepted by many corporations as a conduit for their business and as part of their corporate social responsibility agenda. More host countries are ready to impose international legal obligations on corporations, knowing that there is already widespread support for these obligations as a demand for an emerging new trade, business, and investment trend. Since its adoption, UNGPs have also significantly inspired the evolution of law and policy frameworks in various states and internationally.[22]

Incorporation of these human rights obligations that have been prescribed in different international legal instruments as legally binding obligations is essential. Even though there is a broad acceptance of these rights as part of the 'soft law'

[21] Patrick Dumberry& G Dumas-Aubin, "How to Impose Human Rights Obligations on Corporations under Investment Treaties?" 4 Yearbook on International Investment Law and Policy 569-600 (2011-2012) at pp. 584-587.

[22] See generally Surya Deva, "The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface" 6: 2 Business and Human Rights Journal (2021) 336

obligation, the reality is that foreign investors do not have a direct obligation to comply with these principles, and the countries do not have binding responsibilities under international law to ensure corporate compliance with them. Thus, unless these soft rules are transformed into complex rules with binding effects by including them in BITs and investment agreements, these hardly impact the foreign investors' code of conduct towards the host country and the local communities. Unless these obligations are put in complex law as a binding obligation if the host states take any regulatory measures to protect human rights, then in the event of the host country facing a foreign investor in an investment arbitration for breach of treaty obligation, even if different defences are available under international law for regulatory measures taken by host states, it can be a daunting task for the host country to justify those actions based on high threshold imposed by arbitral tribunals. Therefore, the safe option would be to adopt a policy of "negotiate before you litigate.[23]

4.2 The Textual Design of BITs on Human Rights Obligations

The textual design of BITs, at least as they stand today, is asymmetrical. The bulk majority of BITs are excessively pro-investor oriented. Foreign investors are accorded many substantive investment protection standards under the particular BITs without having any substantive specific obligations. The considerable debate among scholars and policymakers of international investment law is how there can be a more excellent balance in the BITs between the legitimate interests of the foreign investors and the host countries.[24] This debate also attracts the issue of the human rights obligations of foreign investors under the BITs. Few international instruments, such as international human rights treaties, hold foreign investors or corporations liable for human rights violations such as UHDR or ICCPR. These instruments impose obligations upon the contracting states and not on the foreign investors or corporations themselves.[25] Today, international law or international investment law does not impose direct obligations on foreign

[23] Choukroune prescribes for "legislate before you litigate" in the context of human rights in international investment disputes. See Choukroune L (2016) Human rights in international investment disputes global litigation as international law re-unifier. In: Choukroune L (ed) Judging the state in international trade and investment law, international law and the global south. Springer, pp 207–215.

[24] M Sornarajah, 'The Unworkability of "Balanced Treaties" and the Importance of Diversity of Approach Among the BRICS' 112 Asian Journal of International Law (2018) 223-227; Boby Banson, "The Case for Well Balanced Bilateral Investment Treaties (BIT): Using the Morocco-Nigeria BIT as a Blue Print for Future Investment Treaties" 3 Transnational Dispute Management (2022) www.transnational-dispute-management.com/article.asp?key=2898

[25] "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts," Report of the Special Representative of the UN Secretary-General, Mr. John Ruggie, on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/4/035 (February 9, 2007), para. 44.

investors or corporations[26]. However, no obstacle in international law bars the countries from including human rights obligations upon the foreign investors in their respective BITs. To establish a business abroad, foreign investors must formalise operations in the host country and comply with legal processes, such as domiciliation or establishment under host state laws. This gives them rights and obligations under domestic law, particularly under the Constitution of the host state. States have a margin of discretion to ensure human rights are respected and guaranteed. They can adopt legislation to hold private entities responsible for human rights violations based on their obligations under international human rights treaties.[27]

The best way to make foreign investors accountable for human rights violations is to impose human rights and other non-investment obligations directly upon corporations in BITs[28]. There are very few BITs that refer now to human rights issues. Even if they do, the language is somewhat unclear and ambiguous. Therefore, these treaties, in effect, do not specifically impose any binding obligations on foreign investors for human rights violations. For example, it would not be sufficient to use wording akin to Section 32 of Norway's (now-defunct) Model BIT. The Parties only "agree to encourage investors" to carry out their investment operations in accordance with non-binding international treaties under that instrument.[29] This narrows the scope of human rights violation issues before an investment tribunal. As a result, human rights concerns can only be raised in a minimal number of circumstances before arbitral tribunals in the context of BIT arbitration proceedings[30].

A reference to human rights obligations in the treaty's preamble might have a positive impact but would not create any substantive obligations for foreign

26One notable exception is the peremptory norms of international law *(jus cogens* norms) for which corporations can be held directly accountable.

27 See e.g., Michael D. Ramsey, 'International Law Limits on Investor Liability in Human Rights Law' 50 (2) Harvard International Law Journal (2009) 271-321; Vassilis Tzevelekos, "In Search of Alternative Solutions: Can the State of Origin Be Held Internationally Responsible for Investors' Human Rights Abuses That Are Not Attributable to It?" 35 (1) Brooklyn Journal of International Law (2010) . J. Int'l L. (2010) 157-231; Carlos Andrés Sevilla Albornoz, "Can Foreign Investors Be Held Liable for Human Rights Violations? International Human Rights Law and Beyond" September 26. 2017 located at https://www.iisd.org/itn/en/2017/09/26/can-foreign-investors-be-held-liable-for-human-rights-violations-international-human-rights-law-and-beyond-carlos-andres-sevilla-albornoz/

28 See Patrick Dumberry& G Dumas-Aubin, Supra Note 21

29 Norway Model BIT (2015) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3350/download

30 Patrick Dumberry and Gabrielle Dumas-Aubin, "When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration," 13(3) Journal of World Investment & Trade (2012), p. 349-372.

investors. Therefore, having an explicit provision on human rights obligations in the BITs is necessary to secure any claim of human rights violations. The tone of the text is also crucial in this context. Therefore, phrasing like merely "encouraging" the investors will not be good enough in case of any breach of human rights violations for any effective remedy that the tribunal can provide. Thus, the treaty language on human rights obligations must be mandatory, creating a legally binding commitment upon foreign investors to adopt specific codes of conduct to comply with the human rights obligations under the relevant BIT. Any deviation from that code of conduct will make the foreign investor responsible for committing a breach of its human rights obligations under the BIT. At the same time, there must be a specific provision to establish an enforcement mechanism where an arbitral tribunal can effectively remedy non-compliance.

5. Effective Mechanisms to deal with human rights violations

5.1 Incorporation of Investor-state Dispute Settlements (ISDS) clause in BITs on Human Rights Responsibility

Enforcing human rights obligations against multinational corporations in investment disputes context has been very few. Very few mega investment-related disputes can be mentioned in this discussion. However, three of such disputes deserve to be particularly noted, namely, the *Bhopal dispute*[31] as the first global limitation based on egregious violations of the environment resulting into violations of human rights; the *Texaco/Chevron vs. Ecuador*[32], the cases as the twenty-first-century international investment disputes case addressing all legal interrogations and limitations when faced with human rights protection in the context of powerful multinationals; and the *Phillip Morris*[33] case as the revealing of companies strategies to take advantage of quasi-schizophrenic system decoupling international law from other legal spheres. These cases prove how handicapped the global legal system is when enforcing human rights obligations against foreign investors and powerful multinationals.

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[31] See e.g., Edward Broughton, "The Bhopal disaster and its aftermath: a review" (2005) 4(6) Environmental Health, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1142333/#:~:text=On%20December%203%201984%2C%20more,death%20for%20many%20thousands%20more.

[32] For the historical and political context of Texaco-Chevron's case in Ecuador, see generally Judith Kimberling, "Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevron, Texaco and Aguinda vs Texaco" 38 (2005) New York University Journal of Law and Business 413; Judith Kimberling, "Transnational Operations, Bi-National Injustice: Chevron Texaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador" 31 American Indian Law Review (2006-2007) 445.

[33] See British American Tobacco Australasia Limited and Ors vs. Commonwealth of Australia and JT International SA vs. Commonwealth of Australia, High Court of Australia [2012] Order of 15 August 2012.

Commenting on the judicial epic that followed the *Bhopal* case, Professor Upendra Baxi described the failure to address human rights violations in this case as a "valiant," "violated," and "lethal litigation."[34] Baxi explains how even so many years after the tragic disaster, the judicial system has recurrently failed to deliver justice to a massive number of victims who not only have suffered severe human rights violations at the time of the fatal disaster but their suffering continued many years after the incident repeatedly by the judicial system which failed to give them any remedy for the violations that they suffered. This is judicial abuse described by Choukrouneas "…by the impossibility to seek justice and the morally irresponsible and legally unaccountable perpetrators of multiple and repeated crimes, the corporation and the State".[35]

Therefore, to overcome this struggle to ensure an effective mechanism to enforce human rights, a provision on the ISDS mechanism in the BITs should contain specifically how human rights obligations imposed upon corporations can be enforced before an arbitral tribunal. Most importantly, the provision must clarify that the arbitral tribunal has jurisdiction over the allegations of human rights violations which the UN Global Compact also suggests. The ISDS clause should also expressly provide that the tribunals have the authority to consider human rights obligations in the context of proceedings. An obligation with an enforcement mechanism would render these rights completely effective.

5.2 Conditional investors' protection standards in the BITs:

Many BITs include the phrase "in accordance with law" in providing investment protection standards. It implies that if an investment is not made in compliance with the host state's laws, it will not be subject to the protection offered under the BIT. [36] A tribunal then can decline its jurisdiction over a claim when faced with an investment not in compliance with the particular 'in accordance with law'' provision on a particular investment protection standard.[37] Therefore, it is a question of jurisdiction rather than admissibility. This manifests the 'doctrine of clean hands''[38] under international law, which is also a source of law as per

[34] Upendra Baxi, Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?" 1 Business and Human Rights Journal (2016) 21-40.

[35] See Choukroune Supra note 23 at p. 195.

[36] Salini Construtori S.p.A vs. Morocco, ICSID Case ARB/00/4, Decision on Jurisdiction (23 July 2001) at p. 46. Phoenix Action, Ltd. vs. Czech Republic, ICSID Case No. ARB/06/5, Award (15 April 2009) at p. 101.

[37] See Rahim Moloo, "A Comment on Clean Hands Doctrine in International Law" 1 Transnational Dispute Management (2011) at p. 7.

[38] An essential tenet of international law known as the "clean hands" doctrine is used where there is evidence that a state applicant has not behaved in good faith and has approached the court with unclean hands.

Article 38 (1) (c) of the ICJ Statute.

Unclear BIT clauses will not help the protection of human rights issues. Therefore, the provision for investors' protection under a BIT must be conditioned upon its respect for human rights compliance. The parties to the BIT are free to limit consent to arbitration upon the satisfaction of specific criteria. For example, in *Gustav* arbitration[39], the Tribunal observed that,

> "it is clear that States may specifically and expressly condition access of investors to a chosen dispute settlement mechanism, or the availability of substantive protection [..] one such common condition is an express requirement that the investment comply with the internal legislation of the host State"[40]

Thus, nothing in international law prevents host countries from imposing conditions on the substantive protections for investors' compliance with human rights obligations. Therefore, if the BIT has such a conditional provision on investors' protection, the tribunal can conclude that the foreign investor has breached human rights obligations contrary to its obligations under the BIT described above, and thereby, any claim made by the foreign investor is inadmissible. It would entail that while the tribunal would have jurisdiction over the investor's claim, it would refuse to hear it based on the investor's breach of human rights obligations contained in the BIT. We have examples of investment tribunals refusing admission of claims based on bribery or misrepresentations made by foreign investors. Therefore, why should it not be the same with human rights violations?

5.3 Claiming damages for human rights violations

Suppose the tribunal admits the investors' claims even if there is a human rights violation; in such case, the host state also needs to be allowed to raise the issue of human rights violations before the arbitral proceedings of the respondent.[41] Therefore, when the tribunal is making its determination on the merits of disputes, these allegations of human rights violations need to be considered by the tribunal for assessing the compensation for damages claimed by the foreign investor for breach of investment protection standards in the BIT. Therefore, the compensation claimed by the foreign investor would be reduced in proportion to the investor's violation of human rights obligations. This is, in a way, offsetting the damages

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[39] Gustav FW Hamester GmbH & Co KG vs. Ghana, ICSID Case No. ARB/07/24, Award (18 June 2010)

[40] Gustav Ibid at p. 125

[41] Marc Jacob, "International Investment Agreements and Human Rights" INEF Research paper series (2010) at pp. 36, 45 located at https://www.uni-due.de/imperia/md/content/inef/mune_03.2010.pdf

method of assessing.[42] Arbitral tribunals do have the power to consider investors' behaviour in adjudicating the matter.[43] Many arbitral tribunals have considered the investors' behaviour when calculating the amount of compensation, albeit on issues unrelated to human rights obligations.[44] Also, international law does not prevent investment tribunals from considering international obligations in other areas, such as international human rights law, to determine the quantum of compensation.[45] It is also essential that the ISDS clause explicitly mentions that the investment tribunals have the jurisdiction to consider human rights obligations in the context of the proceedings.

5.4 Making express provisions for counterclaims for human rights violations

Provisions on counterclaims could be included in the BITs, as under the vast majority of BITs, the arbitral tribunals only have jurisdiction to adjudicate claims brought by investors, not those submitted by the host states.[46] This enables the claimant investor to claim even in the face of human rights violation complaints. Still, at the same time, the host country will be allowed to raise the issue of human rights violations as a counterclaim.[47] Therefore, an option in the ISDS clause of the BITs should expressly allow counterclaims made by the host countries in an investment dispute.

In addressing the disputes within the bulk majority of the BITs as they stand today, the arbitral tribunals are only empowered to deal with the claims brought by the foreign investors and not claims submitted by the host states.[48] As these

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[42] Peter Muchlinski, "Caveat Investor? The Relevance of the Conduct of the Investor under Fair and Equitable Treatment Standard" 55(3) ICLQ (2006) at p. 530. Article 18 (B) of the IISD Model International Agreement on Investment for Sustainable Development suggests for such offsetting the damages.

[43] Rudlof Dolzer & Christopher Schreuer, Principles of International Investment Law (New York: Oxford University Press 2008) at p. 273. Also see Peter Muchlinski supra note 42.

[44] MTD EquitySdnBhd& MTD Chile SA vs. Chile, ICSID Case No. ARB/01/7, Award (25 May 2004) 243; IurriBogdano vs. Moldovva, Adhoc- SCC Arbitration Rules, IIC 33 (2005), Award (22 September 2005), 84.

[45] Lahra Liberti, "The Relevance of Non-Investment Treaty Obligations in Assessing Compensation" in Peirre-Marie Dupuy, Ernst-Ulrich Petersmann, & Francesco Francioni, eds "Human Rights in International Investment Law and Arbitration" (New York: Oxford University Press, 2009). Patrick Dumberry and Gabrielle Dumas-Aubin Supra note 28.

[46] Mehmet Toral & Thomas Shultz, "The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations" in Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin, The Backlash against Investment Arbitration: Perceptions and Reality (Kluwer Law International, 2010) at pp. 577-602.

[47] Efrao, Chalamish, "The Future of Bilateral Investment Treaties: A de facto Multilateral Agreement" 34(2) Brooklyn JIL 304 (2009) at p. 348

[48] Mehmet Toral & Thomas Shultz, supra note 46.

many treaties are designed, it does not allow jurisdiction of the tribunal over a counterclaim submitted by the respondent state.[49] This makes the host states incapable of bringing any claim of human rights violations by the investors before the tribunals. Even where the tribunal has jurisdiction over a counterclaim, it will still be challenging to prove the connection between the primary claim and the counterclaim.[50] Article 46 of the ICSID Convention states that a tribunal "shall determine any incidental claims or counterclaims arising directly out of the subject matter of the dispute." Therefore, unless the host state can prove that there is a "connection" between human rights violations counterclaims and the subject matter of the dispute, the tribunal may, in the end, reject the counterclaim, finding it outside the jurisdiction of the tribunal. Thus, to overcome this uncertainty, an express provision in the ISDS clause in the BITs for making counterclaims by the host states must be included.

6. Challenges to Enforce Human Rights Obligations within the Context of FDI

The state parties (host and home states) are often reluctant to include human rights obligations since such provisions are perceived as counterproductive to FDI, or the tribunal dealing with such claims of violations of human rights is unwilling to go beyond the black-letter law interpretation of the text of the BITs. It becomes challenging for the treaty drafters to convince state parties to incorporate human rights obligations in the BITs since the idea that foreign investors can be held liable for human rights obligations is yet to be supported by most states, particularly developed countries. States will also face a recurring problem that they have the right to regulate as an exception to general investment protection standards. The states have both *de jure* and *de facto* duty to protect human rights. Still, under certain circumstances, they might need to resort to controversial principles such as necessity or proportionality to justify if there is any deviation from those human rights obligations. Including human rights obligations invariably involves compromise and controversy. Therefore, countries are likely to be reluctant to include such commitments in the BITs at the negotiation stage. Jurisdictional limitations regarding human rights abuse in arbitral tribunals have been discussed above. With conditional substantive investment rights upon corresponding human rights responsibilities of the investor, it becomes easier for the investment tribunals to adjudicate the issue. The difficulty in proving a causal connection between the

[49] Hege Elisabeth Veenstra-Kjos, "Counterclaims by Host States in Investment Treaty Arbitration" 4 Transnational Disputes Management (2007) at p. 9; Christoph Schreur, The ICSID Convention: A Commentary (Cambridge University Press, 2009) at p. 754.

[50] Helen Burbrowski, "Counterclaims" in: A. de Mestral& C. Lévesque (eds.), Improving International Investment Agreements, Routledge, 2013) at p. 16. Christoph Schreur, The ICSID Convention: A Commentary (Cambridge University Press, 2009) at p. 743.

primary claim and the counterclaim has also been discussed above, which limits the power of the investment tribunals to address human rights violations.

There needs to be more explicit political will amongst countries for such development. Consequently, the present BITs need to be more specific in balancing the rights and obligations of corporations. The inclusion of the idea of corporate social responsibility (CSR) in several BITs is a first step in this direction. But it must be remembered that there is a sharp distinction between CSR obligations and human rights obligations.[51] There are moments when it is unclear how CSR and human rights relate. Their meanings are pretty dissimilar. Businesses are taking a risk when they don't know the difference or believe that using a typical CSR approach is sufficient. A company determines what problems to take on when using a top-down approach to CSR. It may be contributing to the arts, healthcare, or community education, making an overseas disaster relief donation or making efforts to lessen pollution or promote diversity among employees. These selfless efforts certainly deserve appreciation. A human rights approach, however, is distinct. Instead of being top-down, it is bottom-up, with the individual, not the company, at the centre. Human rights will claim greater significance in the future, and countries negotiating BITs will eventually be pushed forward to include human rights obligations, at least in response to growing concerns about the rightfulness of the treaty obligations of the current generation of BITs and the growing demand for more balanced investment treaties.

7. International Efforts for a Comprehensive Legal Framework for Human Rights Obligations in FDI Operations

In recent times, there have been some significant developments to consider, including human rights obligations in the legal regime of international investment law. The UNCITRAL Working Group III is working on reforming the current ISDS mechanism.[52] At the 48th Session of the UNCITRAL, the commission took note of the concerns surrounding human rights violations at the ISDS mechanism. While the proposals do not engage with substantive issues of human rights violations, they envision a more significant role for specific human rights considerations such as access to justice, due process, and the right to trial.

Since 2015, the European Union (EU) has been proposing a Multilateral Investment Court (MIC). The UE has proposed to create a MIC instead of the current ISDS system. This EU proposal caters to reforms based on greater transparency and third-party participation, which would provide more opportunities to consider

[51] Florian Wettstein, "Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles for Business and Human Rights" 6:2 Business and Human Rights Journal (2021) 312

[52] Located at https://www.ohchr.org/sites/default/files/Documents/Issues/Business/WG/Submissions/Others/UNCITRAL.pdf

human rights violations relating to access to justice and accordingly enhance public involvement in these matters. The EU proposal also prescribes limiting frivolous claims made by foreign investors and expanding the regulatory freedom of the host countries, which would reduce the financial burdens of public funds and save the host country from the prospect of regulatory chill.

But the most recent important initiative is taken by the UN Working Group. The UN Working Group on the issue of human rights and transnational corporations and other business enterprises (the working group) presented a report to the UNGA in October 2021 on "Human Rights compatible International Investment Agreement (IIAs)," which includes BITs, investment chapters, in other trade agreements negotiated as bilateral and regional.[53] This UN report focused on how the states should negotiate human rights compatible IIAs to balance the conflicting interests of attracting FDIs properly and protecting the human rights of the local communities. Referring to Principle 9 of UNGP, the report emphasised that this principle has direct implications for States that wish to negotiate new international investment agreements or reform existing contracts. The report further elaborated that it also indirectly impacts foreign investors availing themselves of the protection afforded under such agreements, arbitrators who decide investor-state disputes, and communities affected by investment-related projects. Highlighting the ever-going debate on balancing the interests of the foreign investors and that of the host state's interest to protect its public policies, including that of human rights obligations, the report observed that,

> "Investment is often regarded as being necessary for development as well as for realizing human rights. However, attracting investment is not a sufficient condition for inclusive and sustainable development or for realizing human rights and, in turn, leaving no one behind. A policy framework that promotes responsible business conduct and directs investment promotion efforts toward achieving inclusive and sustainable development is required. States have used international investment agreements as one of the strategies to attract foreign investment. However, there is no conclusive evidence of a positive direct correlation between such agreements and the flow of investment. Irrespective of debates about this linkage, international investment agreements – if not designed properly – can significantly limit the ability of States to regulate investors and their investments. They can also exacerbate the imbalance between rights and obligations of investors and undermine affected communities' quest to hold investors accountable for human rights abuses and environmental pollution."[54] [footnotes in the original text omitted]

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[53] UNGA Report on "Human rights-compatible international investment agreements" located at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/208/09/PDF/N2120809.pdf?OpenElement

[54] Ibid at paragraph 3.

The report addressed all three pillars of the UNGPs in the context of IIAs, and it is built upon the previous works undertaken by the Working Group as well as other organisations such as UNCTAD, OECD who have worked extensively on various dimensions of interface between IIAs and human rights violations. The report accordingly addressed issues of human rights and due diligence, integrated coherent policies, inclusive gender approach, and adequate access to remedy.

The report highlighted the drawbacks of the first generation of IIAs, especially those concluded before 2010, in which the report described "their features as "imbalance, inconsistency, and irresponsibility."[55] The report identified the regulatory restraints that prevailed over the host states ability under the IIAs to pursue legitimate public policy goals.[56] The report emphasises one main concern of the existing IIAs; most of these do not contain any provisions imposing human rights responsibilities or obligations on investors.[57] The report referred to the data based on the UNCTAD database as up to July 2021, which reveals that among the 2575 IIAs, only 40 had provisions on corporate social responsibility in the main text, only 112 contained provisions on labor standards, only 120 had provisions regarding non-lowering of standards, and 317 included provisions about health and environment.[58] The report raised concern over the privileged access to remedy for foreign investors, pointing to the fact that, although the local communities do play a strong role as a stakeholder in FDI-related projects and the disputes that arise out of them, by they are "invisible under the current international investment agreement system."[59] Section III of the report provides for some ongoing initiatives to include human rights obligations under the IIAs, including a comprehensive national action plan on business and human rights by individual states and adopting new generations of IIAs and model BITs. The report also briefly discussed arbitral awards that feature human rights issues. After identifying these main concerns, the report suggests some reforms as a way forward to include greater human rights obligations in IIAs. [60] It suggested a reorientation of the purpose of investment, emphasising that human rights should be the core purpose of attracting FDIs, rather than the issue becoming merely an exception in the IIAs to justify the host country's regulatory actions against the foreign investors. The report also emphasised that host states should ensure that the investment contributes to the inclusive and sustainable development of the host country and that the provisions of the IIAs are accordingly designed to

[55] Ibid at Para 15.

[56] Ibid paras 20-23.

[57] Ibid at paras 24-25

[58] Ibid footnote 29 of the report. Also, see https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping

[59] Ibid paras 26-27.

[60] Ibid paras 53-73.

achieve this goal."[61] The report covers another important aspect: the host state's regulatory freedom. Accordingly, the report further suggested for the preservation of space to exercise the duty to regulate by stating that,

> "Under international human rights law, States have a duty – not merely the right – to regulate investors and their investment so that all internationally recognized human rights are adequately protected. Hence, States must ensure that international investment agreements do not undermine their ability to exercise this duty."[62]

The report categorically suggested including the human rights obligations of the investors in the IIAs and emphasised maintaining parity between the rights and obligations of the foreign investors. The IIAs need to include legally enforceable rights for investors on the issues of human rights and the environment. The agenda of having foreign investors' human rights obligations is not new; instead, it is supported in a historical context both at the normative level and as a matter of emerging practice of the states.[63]

The report prescribed access to remedy pathways for the affected communities. Merely including the human rights obligations of investors in the IIAs will only be sufficient if there is an effective mechanism to enforce these obligations. The local communities who are at times severely affected by the mega FDI projects should be able to seek remedy against the foreign investor directly because the reliance on States to protect their rights may not always come before an arbitral tribunal due to corruption and the corporate capture of the state which is a rampant feature of developing countries who are the primary recipient of large scale FDIs.[64] The report accentuated replacement for an ISDS mechanism, which would be fairer to all and not only for the foreign investors as it stands today, emphasising the fact that arbitral tribunals should pay adequate attention to irresponsible conduct of foreign investors where they are in clear breach of international standards.[65] It also highlighted that the ISDS mechanism does not offer direct access to remedies for the local communities affected by the FDI-related project.[66] Finally, the report provides a list of recommendations[67] as a way forward that the host countries need to do. Among these recommendations, some are significant for the objectives of this research. The report suggested that countries should not consider the IIAs as a panacea for attracting FDI, and these agreements need to include provisions to

[61] Ibid para 53.

[62] Ibid para 57.

[63] Ibid para 63

[64] Ibid para 67

[65] Ibid para 67

[66] Ibid para 72

[67] Ibid para 77

realise human rights and sustainable development goals and promote responsible business conduct.[68] The report also recommended explicitly including in the IIAs detailed public policy exceptions to justify the regulatory freedom of the host countries to protect human rights or the public interest more generally. [69] The report also provided some recommendations for the investors and emphasised more responsible behaviour.[70] It recommended that the investors adopt a mindset of "investment for sustainable development" and accordingly take their human rights responsibilities more seriously throughout the entire cycle of the FDI project and address the claims of local communities if there is any issue of human rights violations.[71] The report also burdens civil society and recommends it actively engage with the States in negotiating IIAs compatible with human rights obligations and continue their advocacy to make the investor accountable for human rights violations.[72] For any future drafting and negotiations of BITs, the recommendations made by this report would be immensely useful to address human rights obligations within the international investment law regime.

8. Conclusion

This paper has discussed that extremely few BITs have directly or indirectly referred to the issue of human rights violations in the context of FDIs either as the express provision or as part of the preamble of the BITs. Even the very few that somehow refer to the phrase 'human rights' do in a relatively soft tone, imposing moral obligations rather than strictly legal ones and thereby without having any binding obligations upon the foreign investors. This makes the scope of human rights violation issues before the arbitral tribunals extraordinarily narrow and only under minimal circumstances.[73] For decades, the developing countries have tried to push their agenda collectively to hold the multinational corporations accountable for their misdeeds through a multilateral agreement on investment and devising a code of conduct for the multinationals. However, all these attempts have failed, and there is a call for a new generation of BITs to balance foreign investors' rights and obligations. However, the new generation of BITs has started relatively slowly, and it seems to have a large number of BITs incorporating human rights obligations looks uncertain. This is also due to the lack of political will among the host developing countries to bargain the issue during the negotiating process of BITs because of the fear that too many obligations upon the foreign investors might discourage the flow of FDIs. However, it is

[68] Ibid para 77

[69] Ibid para 77

[70] Ibid para 78

[71] Ibid para 78

[72] Ibid para 79.

[73] Patrick Dumberry and Gabrielle Dumas-Aubin Supra Note 30.

hard to say whether there is an unwillingness on the part of the state parties to incorporate human rights obligations is genuinely seen as counterproductive for the flow of FDIs or if it is the reluctance of the arbitral tribunals to go beyond the law norms and principles. The issue has been debated among scholars for some time while civil society fought to address these rights directly in the international investment law regime.[74] Having said so, it also needs to be acknowledged that the host developing countries now realise that such balancing BITs are for their benefit, and in the age when more responsible behaviour from the multinationals is demanded, this new generation of BITs will also provide the host developing countries additional tool in their defence against the claims made by foreign investors. As a group and individually, the capital-exporting countries have consistently raised their objections while concluding a BIT with the money-exporting developing countries, which tried to limit the extensive legal protection to the foreign investors. However, there is still a growing concern and movement from civil societies about human rights violations in large investment projects and the impact of corporate activities on the local communities.[75] An explicit provision on human rights obligations in the BITs is the only solution to address the issue before an investment tribunal. A human rights-based approach, which is a logical path to handle all international law issues and global problems holistically, is not just positive but comprehensive in its scope. This approach, which encompasses essential human rights principles, provides an effective tool for international law reunification and coherent application from treaty drafting to dispute resolution.[76]

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[74] See generally Peirre-Marie Dupuy, Ernst-Ulrich Petersmann, & Francesco Francioni, eds "Human Rights in International Investment Law and Arbitration" (New York: Oxford University Press, 2009).

[75] See Adam H. Bradlowt, "Human Rights Impact Litigation in ISDS: A Proposal for Enabling Private Parties to Bring Human Rights Claims Through Investor-State Dispute Settlement Mechanisms" (2018) Vol. 42 (2) The Yale Journal of International Law 355

[76] Choukroune Supra Note 23 at p. 213.