



ISSN : 1875-4120
 Issue : Vol. 15, issue 2
 Published : February 2018

This paper is part of the TDM Special Issue on "International Commercial and Investment Disputes in and with India" prepared by:



**Professor
 Leïla Choukroune**
[View profile](#)



Rahul Donde
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Corporate Social Responsibility and Foreign Direct Investment - The Indian Investment Treaty Approach and Beyond by L. Choukroune

(addendum April 2018)

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Corporate Social Responsibility and Foreign Direct Investment

The Indian Investment Treaty Approach and Beyond

*Leila Choukroune*¹

"There is one kind of charity common enough among us... It is that patchwork philanthropy, which clothes the ragged, feeds the poor, and heals the sick. I am far from decrying the noble spirit, which seeks to help a poor or suffering fellow being. [However] what advances a nation or a community is not so much to prop up its weakest and most helpless members, but to lift up the best and the most gifted, so as to make them of the greatest service to the country."²

Jamsetji Tata, Founder of the Tata group

" (...) 1. Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee (...) 5. The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy (...)"

Section 135, Indian Company Act 2013 (chosen abstracts)

Abstract

Very few countries have yet adopted a legally binding definition of Corporate Social Responsibility (CSR) and ascribe certain clear obligations to the duty bearer i.e. the Company. That is exactly what India has done with the Section 135 of the 2013 Company Act and, a few years later, the less daring Article 12 of the 2015 new model BIT, which however clearly echoes a unique endeavour to address the societal needs of a 1.3 billion population still massively suffering from poverty. In critically addressing the inclusion of CSR related provisions in International Investment Agreements (I) and the Indian Way to CSR (II), this article reflects upon the pressing need for an alternative and legal approach shifting from mere responsibilities and values to rights. We indeed conclude in supporting the Indian legislative and treaty initiatives, but also in suggesting to go one step further in adopting, in India and globally, a Human Rights-Based (HRBA) approach to international treaty negotiation and dispute settlement for it is the only perspective, which is inclusive and sustainable as it rests upon the shared inalienable and indivisible rights of all and for all.

¹ Professor of International Law and Director of the University's thematic area in Democratic Citizenship, University of Portsmouth (UK). Former Director of the CSH, New Delhi, India. Leila.choukroune@port.ac.uk. I would like to express my sincere gratitude to Dr. Bhaskar Chatterjee for the exclusive interview he has accepted to give me. Alessandra Silva, at the time Master student at the University of Maastricht, should also be thanked for her interest in this topic and participation to some research assistance.

² This approach of philanthropy translated into Tata's support for higher education and research from the London School of Economics (LSE) to the creation of TISS: Tata Institute for Social Sciences and many more initiatives.

Introduction

In the night of the 2nd to 3rd December 1984, “an unpunished horrendous industrial mass disaster” took the lives of 8,000 people³. Later, again, 15,000 to 20,000 persons died of the consequences of the poisonous gas explosion^{4 5 6}. There are many ways of narrating a more than 30-year legal dispute and human disaster, which happened at the Union Carbide India Limited (UCIL) pesticide plant in Bhopal, Madhya Pradesh, India⁷. But the Bhopal tragedy, which resulted from a Foreign Direct Investment (FDI), was rapidly considered as one of the worst industrial catastrophes of all times. It transformed into a judicial epic described by Prof. Upendra Baxi as a “valiant” “violated” and “lethal” litigation, which has until now failed to deliver justice to a massive number of victims of egregious human rights violation who have been repeatedly abused by the impossibility to seek justice and the morally irresponsible and legally unaccountable perpetrators of multiple and repeated crimes: the Corporation and the State⁸.

Just as in our discussions on Corporate Social Responsibility (CSR) in today’s international investment agreements (IIAs) and in the Indian context in particular, *responsibilities, values and rights* intersected and interplayed in a human tragedy which unfolded on the following basis: on the corporate front to start with, UCIL was the Indian subsidiary of Union Carbide Corporation (UCC), with Indian Government controlling a 49.1% stake. In 1994, the Supreme Court of India allowed UCC to sell its 50.9% share. Union Carbide sold UCIL, the Bhopal plant operator, to Eveready Industries India Limited. The plant was later handed over one more time to McLeod Russel (India) Ltd. In addition, Dow Chemical Company purchased Union Carbide in 2001. As to the company’s governance, Warren Anderson was the Chairman of UCC and got arrested for homicide in December 1984 but later freed on bail of 2,000 USD upon the promise of a return to India, which he never fulfilled. On the litigation front then, in February 1985, the Government of India, in an unprecedented move supported by civil society activists, filed a claim for 3.3 billion USD in a US court. Before the many Alien Tort Claim Act (ATCA) litigations of the late 1990s and

³ 3000 according to the Indian government and 7000 to 8000 according to NGOs and Amnesty International.

⁴ The Indian Supreme Court opened its 1989 order for out-of-court settlement as follows: “*The Bhopal Gas Leak tragedy (...) was a horrendous industrial mass disaster, unparalleled in its magnitude and devastation and remains a ghastly monument to the dehumanising influence of inherently dangerous technologies*”. See, <http://www.legalserviceindia.com/issues/topic1401-union-carbide-corporation-vs-union-of-india-transfer-case.html>

⁵ For facts and figures and a large number of Bhopal related press and legal documents, see generally, the Business and Human Resource Centre data base and case summary available at: <http://business-humanrights.org/en/union-carbidedow-lawsuit-re-bhopal>. It is also interesting to take a look at the narration and timeline provided by Union Carbide available at: <http://www.bhopal.com/Chronology>; the company logically insists on this prompt reaction and the many charitable initiatives it funded post-catastrophe and the fact that in February 1989, within 10 days of the order, UCC and UCIL make full payment of the \$470 million to the Government of India.

⁶ See, Amnesty’s reports and recent posts available at: <https://www.amnesty.org.in/action/detail/union-carbide-and-dow-must-respect-the-indian-justice-system>

⁷ See Leïla Choukroune, “Human Rights in International Investment Disputes”, in Leïla Choukroune, *Judging the State in International Trade and Investment Law, Sovereignty Modern, the Law and the Economics*, Springer, 2016, pp.179-215. <http://www.springer.com/la/book/9789811023583>

⁸ See Upendra Baxi, Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty plus?, *Business and Human Rights Journal* (2016) 21–40.

2000s, this first Indian extraterritorial attempt to seek redress for corporate wrongful acts appeared as a revolutionary decision proportional to the dramatic character of what Supreme Court Justice Krishna Iyer described, in one of his brilliant formulations, as “Bhoposhima.”⁹ Unfortunately, the United States were not ready to become the world’s human rights court against their own economic interests and decided that the Bhopal case should be litigated in India. Only a few years later, in 1989, and as per typical practice of multinational corporations (MNC), UC and the Indian government managed to strike, on the basis of Supreme Court Order, an out-of-court settlement for a meagre USD 470 million that the company rapidly paid to the State¹⁰. The victims’ reaction to the unfair deal was immediate: writ petitions and reviews were filled, in the public interest, in the Indian Supreme Court, against the Bhopal arrangement. While supreme, the Court is not “infallible” and its 1989 but also 1994 (UC authorized to sell stakes) and 1996 (dilution of charges against Indian UC officials) decisions have proven so.¹¹ Later, in 2004, it failed again to have the victims compensated despite an order to make use of the 470 million USD kept by the Central Bank since 1992! Warren Anderson could never be extradited to India and so prosecuted. While the seven Indian UC executives were eventually convicted in a 2010 Court decision, they were bailed out, the Supreme Court later refusing to re-open the case. In addition, another US-based lawsuit came to a (partial) conclusion when, in June 2012, the US district court dismissed the case against Union Carbide’s company and executives’ responsibility in the disaster. Unfortunately, the epic did not come to an end. Children with disabilities are born from Bhopal survivors every day, legal actions are still going on in Indian courts, and, from political complicity to corruption in non-transparent toxic waste management, one scam is discovered after the other.

Opening this article with the Bhopal tragedy is not a mere coincidence. The recent inclusion of CSR related provisions, if not yet human rights, in international investment agreements illustrates the pressing need to reconcile “public and private interests” and “balance rights and obligations” that is, in a less consensual language, the requirement to protect, respect and remedy individual rights and their possible

⁹ Ibid, at 29; VR Krishna Iyer, Bhoposhima: Crime without Punishment (1991) 26:47 *Economic and Political Weekly* 2705.

¹⁰ On this major Supreme Court of India decision, see, for example, Justice Delayed, the Loss through Law: *Union Carbide Corporation v. Union of India* (1989), in, Zia Mody (ed) *10 Judgements That Changed India* (Penguin Books India, India, 2013) pp. 93–114.

Please see also the Order itself and the reasons listed by the Supreme Court to justify its decision in the name of urgency: “The basic consideration motivating the conclusion of the settlement was the compelling need for urgent relief. The suffering of the victims has been intense and unrelieved. Thousands of persons who pursued their own occupations for an humble and honest living have been rendered destitute by this ghastly disaster. Even after four years of litigation, basic questions of the fundamentals of the law as to liability of the Union Carbide Corporation and the quantum of damages are yet being debated. These, of course, are important issues, which need to be decided. But, when thousands of innocent citizens were in near destitute conditions, without adequate subsistence needs of food and medicine and with every coming morrow haunted by the spectre of death and continued agony, it would be heartless abstention, if the possibilities of immediate sources of relief were not explored. Considerations of excellence and niceties of legal principles were greatly over-shadowed by the pressing problems of very survival for a large number of victims.” Available at: <http://www.legalserviceindia.com/issues/topic1401-union-carbide-corporation-vs-union-of-india-transfer-case.html>.

¹¹ See, BN Kirpal, Ashok H Desai, Gopal Subramaniam, Rajeev Dhavan & Raju Ramachandran (eds) *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (OUP India, India, 2001) 480.

violations. Be it in relation to the *Guiding Principles on Businesses and Human Rights* implementing the UN “Protect, Respect and Remedy” Framework, the UN and UNESCO initiatives in favour of *a culture of lawfulness*, or the latest controversies on Investors States Dispute Settlement (ISDS), the urge for a profound change of mindset is perceptible globally¹². The very definition of CSR has evolved from a philanthropic perspective and the inclusion of voluntary principles into business management to a more embedded approach of “shared values” to achieve “economic success” that is:

“Policies and operating practices that enhance the competitiveness of a company while simultaneously advancing the economic and social conditions in the communities in which it operates. Shared value creation focuses on identifying and expanding the connections between societal and economic progress¹³”.

However, very few countries have yet dared to adopt a legally binding definition of CSR and ascribe certain clear obligations to the duty bearer i.e. the Company. That is exactly what India has done with the Section 135 of the 2013 Company Act and, a few years later, the Article 12 of the 2015 new model BIT, which clearly echoes a unique endeavour to address the societal needs of a 1.3 billion population still massively suffering from poverty. In critically addressing the inclusion of CSR related provisions in International Investment Agreements (I) and the Indian Way to CSR (II), this article will reflect upon the pressing need for an alternative and legal approach shifting from mere responsibilities and values to rights. We indeed conclude in supporting the Indian legislative and treaty initiatives, but also in suggesting to go one step further in adopting, in India and globally, a Human Rights-Based (HRBA) approach to international treaty negotiation and dispute settlement for it is the only perspective, which is inclusive and sustainable as it rests upon the shared inalienable and indivisible rights of all and for all¹⁴.

¹² See <https://www.unglobalcompact.org/library/2>.

¹³ In Michael Porter and Mark R. Kramer, “Creating Shared Value: How to Reinvent Capitalism and Unleash a Wave of Innovation and Growth”, *Harvard Business Review*, January-February 2011, p.6, available at: <http://www.nuovavista.com/SharedValuePorterHarvardBusinessReview.PDF>

¹⁴ In this regard, the reconciliation between the so called fragmented domains of international law should be imminent as urgently expected. See Leïla Choukroune, “Human Rights in International Investment Disputes”, in Leïla Choukroune, *Judging the State in International Trade and Investment Law, Sovereignty Modern, the Law and the Economics*, *op.cit* and for a recent approach to this debate in TDM, T. Weiler (2018, forthcoming) "International Investment Law and International Human Rights Law: Reuniting Two Long Lost Siblings (Speaking Notes)" (TDM, ISSN 1875-4120) March 2018, www.transnational-dispute-management.com.

1. CSR and International Investment Agreements

A. Approaching CSR

From the early 2000s onwards, a vast body of literature has been published in international economic law on the merits, limitations and possible linkages of CSR with general international law and trade and investment in particular. Scholars were eager to interrogate the possibly binding nature of these apparently voluntary guidelines if read in conjunction with international law norms and principles hence complementing the existing discourse in economics, management or political sciences¹⁵. International organisations and other influential think tanks came up with policy guidelines and recommendations to integrate CSR in treaty drafting and progressively “legalize” their content. As a matter of fact, and in direct relation with international investment law, the United Nations Conference on Trade and Development (UNCTAD) first published some recommendations, in 2004, on how to integrate CSR in international investment agreements¹⁶. Having learnt the lessons from the dramatic failure of the Multilateral Agreement on Investment (MAI) negotiated under the banner of the Organisation for Economic Cooperation and Development (OECD), the UNCTAD, reflected upon the idea of social responsibility in considering that:

“The challenge is to balance the promotion and protection of liberalized market conditions for investors with the need to pursue development policies; social responsibility obligations are one way to move towards such a balance.”
(...) In this light, the policy options discussed range from an absence of any reference to social responsibility in IIAs to the inclusion of non-binding standards through the reservation of regulatory powers in relation to social responsibility to the use of a no lowering of standard clause, home country promotional measures and, lastly, the inclusion of generally binding social responsibility provisions¹⁷.

The idea of framing and guiding the operation of Multinational Corporations (MNC) was not exactly new. From the mid-1970s, the OECD indeed published a number of versions of its Guidelines for Multinational Enterprises while the UN later drafted a Code of conduct for Transnational Corporations¹⁸. Yet, including CSR provisions in IIAs was rather unprecedented and the three options described above looked the easiest: voluntary principles, no lowering of other standards, binding obligations. Others, like the Dutch think tank SOMO, proposed a more embedded approach to investment law and in particular: a clause limiting direct expropriation, a clause on disinvestment and another one on the limitation of “non-discrimination” in like circumstances to promote local infant industries¹⁹. 10 years later, the practice and

¹⁵ See, for example, Peter Muchlinski “Corporate Social Responsibility” in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* (Oxford, Oxford University Press, 2008); Peter T. Muchlinski *Multinational Enterprises and the Law* (Oxford, Oxford University Press, 2nd ed, 2007) at 100-104 and Part III “The Social Dimension”.

¹⁶ See UNCTAD, *International Investment Agreements - Key issues*, Volume II, 2004, pp. 129-151.

¹⁷ *Ibid.*, p.130.

¹⁸ See <http://mneguidelines.oecd.org/guidelines/> and <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2891>

¹⁹ See <https://www.somo.nl/investment-agreements-and-corporate-social-responsibility/>

interrogations seemed to remain rather similar while a number of IIAs had integrated some forms of CSR provisions.

B. Locating CSR

In April 2016 indeed, the International Labour Organisation (ILO) published a landmark research paper on CSR in international trade and investment agreements and the implications for States, businesses and workers. Following the classic tripartite approach of the Organisation, the ILO interrogated the progressive “legalization” of CRS in government policies yet, at the same time, the vagueness of CSR treaty related provisions, which *de facto* limit the effectiveness of their implementation²⁰. After all, CSR provisions are directly related to labour and the ability of international agreements to participate equitably to the development of countries and regions of the world where the capacity or willingness of governments to protect human rights and so labour rights are often challenged by the imbalances of power between multinational corporations and weaker States with limited if not absent regulatory power. So, the ILO formulated the following hypothesis: “one way to address these concerns and to assure that trade and investment go hand-in-hand with decent work is through the promotion of Corporate Social Responsibility (CSR)”²¹. In line with the United Nations Conference on Trade and Development (UNCTAD) analysis and its recent investment policy reform papers, the ILO is of the opinion that: “CSR would be better placed addressing only investors’ behaviour in Bilateral Investment Treaties (BITs) as a means to rebalance the investors’ rights conferred in these treaties (for example, access to investor-state dispute settlement) with the rights of states to regulate in the public interest, and to ensure the promotion of responsible investments”^{22,23}. However, the evolution of the international trade and investment treaties scene requires a more precise analysis. With the boom in mega-deals or trade agreements including an investment chapter modelled on the basis of the historical North American Free Trade Agreement (NAFTA), a number of labour, sustainability and CSR related provisions have been introduced by treaty drafters apparently also eager to refer, often in the preamble of the same agreements, to existing ILO conventions, UN guiding principles and other major international labour references or statutes. When analysing these provisions, one is immediately struck by their vague character, which appears sometimes in contrast with more stringent and legally binding legal requirements adopted by the same State(s) domestically. The tension between voluntarism and legalization has largely been debated²⁴. While certain CSR related voluntary principles could indeed foster some

²⁰ See ILO, Research Paper N°13, *Corporate Social Responsibility in International Trade and Investment Agreements: Implications for States, Businesses and Workers*, April 2016, available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_476193.pdf.

²¹ *Ibid*, p.1.

²² See UNCTAD, *Investment Policy Framework for Sustainable Development*, 2015, available at: http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

²³ *Ibid*, p.2.

²⁴ See for example, Gond, J.; Kang, N.; Moon, J. “The government of self-regulation: On the comparative dynamics of corporate social responsibility”, in *Economy and Society*, Vol. 40, No. 4, 2011, pp. 640–671 and Blackett, A. “Codes of corporate conduct and the labour regulatory state in developing countries” in J.J. Kirton and M.J. Trebilcock (eds.), *Hard choices, soft Law. Voluntary standards in global trade, environment and social governance*, Ashgate, 2004, pp. 121–133. And at the other end of the same spectrum, Surya Deva and David Bilchitz (ed.), *Human Rights Obligations of*

innovative companies policies, it is highly likely that other basic requirements in terms of working hours, child labour or even the right to go on strike or collectively bargain are better enforced if clearly “legalized²⁵”. The concept of legalization has equally been largely discussed in legal and political literature over the past decade and could indeed be explained as follow:

“Legalization” refers to a particular set of characteristics that institutions may (or may not) possess. These characteristics are defined along three dimensions: obligation, precision, and delegation. *Obligation* means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are *legally* bound by a rule or commitment in the sense that their behaviour thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. *Precision* means that rules unambiguously define the conduct they require, authorize, or proscribe. *Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules. Each of these dimensions is a matter of degree and gradation, not a rigid dichotomy, and each can vary independently. Consequently, the concept of legalization encompasses a multidimensional continuum, ranging from the “ideal type” of legalization where all three properties are maximized; to “hard” legalization, where all three (or at least obligation and delegation) are high; through multiple forms of partial or “soft” legalization involving different combinations of attributes; and finally to the complete absence of legalization, another ideal type. None of these dimensions far less the full spectrum of legalization—can be fully operationalize.”

Are IIAs CSR provisions “legalized” that is indeed drafted in the form of legally binding obligation defined with precision and able to be implemented and interpreted by way of delegation to third parties? Well, not quite so if the letter of the law is taken into consideration here. The following examples are revealing of the type of CSR related provisions one can find since the mid-2000 in IIAs. The 2007 Norwegian model BIT could serve as an illustration of the first “generation” of international agreements including some sort of CSR provisions, which were actually quite daring in their combined references to international law, labour and human rights from the Preamble: ²⁶

“Emphasising the importance of corporate social responsibility;

Recognising that the development of economic and business ties can promote respect for internationally recognised labour rights;

Businesses: Beyond the Responsibility to Respect?, Cambridge University Press, 2013.

²⁵ On the concept of legalization, see Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, “The Concept of Legalisation”, *International Organization* 54, 3, Summer 2000, pp. 401–419, available at: <https://www.princeton.edu/~amoravcs/library/concept.pdf>.

²⁶ See <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2873>

Reaffirming their commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights;

Recognising that the promotion of sustainable investments is critical for the further development of national and global economies as well as for the pursuit of national and global objectives for sustainable development, and understanding that the promotion of such investments requires cooperative efforts of investors, host governments and home governments;”

This preamble needs to be read in conjunction with the Article 32 (Corporate Social Responsibility):

“The Parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact.”

While a commendable initiative referring to the existing non-binding instruments of that time, the OECD Guidelines for Multinational Enterprises and the UN Global Compact, the language remains rather vague and no particular obligation is set for Parties.

Canadian treaties of the late 2000 offered a good overview of a sort of second generation of CSR provisions in IIAs or Foreign Trade Agreements (FTAs). In this regard, they are quite remarkable as progressively moving towards a form of legalization often combining references to voluntary CSR principles with more binding labour provisions sometimes included in a dedicated Chapter. A pioneer of sustainable investment treaty drafting, Canada has been later emulated internationally in a number of other treaties. As a matter of fact, the 2009 Canada-Peru Free Trade Agreement and its Chapter 16 on Labour (Article 1601 and 1603) is of particular interest as it goes much further than simple CSR incantation²⁷:

“The Parties affirm their obligations as members of the International Labour Organization (ILO) and their commitments to the *ILO Declaration on Fundamental Principles and Rights at Work* (1998) and its Follow-Up as well as their continuing respect for each other’s Constitution and laws.”

(...)

In order to further the foregoing objectives, the Parties’ mutual obligations are set out in the *Labour Cooperation Agreement between Canada and the Republic of Peru* (LCA) that addresses, *inter alia*:

(a) general obligations concerning the internationally recognized labour principles and rights that are to be embodied in each Party’s labour laws;

²⁷ See <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/16.aspx?lang=eng>
See <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5589>

- (b) derogation from domestic labour laws in order to encourage trade or investment;
- (c) effective enforcement of labour laws through appropriate government action, private rights of action, procedural guarantees, public information and awareness;
- (d) institutional mechanisms to oversee the implementation of the LCA, such as a Ministerial Council and National Administration Offices to receive and review public communications on specified labour law matters and to enable cooperative activities to further the objectives of the LCA;
- (e) general and ministerial consultations regarding the implementation of the LCA and its obligations; and
- (f) independent review panels to hold hearings and make determinations regarding alleged non-compliance with the terms of the LCA and, if requested, monetary assessments.”

A number of recent Canadian Bilateral Investment Treaties go one step further in terms of CSR in abandoning the language of voluntarism for an apparently more binding formula as in the 2014 Canada-Mali BIT or 2015 Canada Burkina-Faso BIT Article 16 (Corporate Social Responsibility)²⁸:

“Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.”

This being said, the action required “incorporation in practices and internal policies” is only encouraged and one remains quite far from a “legalization” in the possible absence of binding requirements in domestic law. However, a notable characteristic needs to be highlighted here as it is an exception in most trade and investment treaties. Indeed, the Article 21 of the Canada Burkina-Faso BIT (Claim by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise) does not exclude CSR of the list of possible claims. One could then imagine – a quite unlike situation from a pure cynical business perspective – that the investor could claim against the State (Burkina Faso) for having not “encouraged” the incorporation of CSR in its internal practices and policies.

Another interesting recent example of incorporation of CSR provision in IIAs is offered by the practice of Brazil, famously known for its opposition to BITs, with the drafting of quite original Agreements on Cooperation and Facilitation of Investments (ACFIs). In the 2015 Brazil-Malawi ACFI, for example, the Article 9 (Corporate Social Responsibility) provides a long list of voluntary principles and

²⁸ See <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3460>

standards for “responsible business conduct” consistent with the host State law and introduced by the following paragraph:

“Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host Party and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article.²⁹”

While the lists are always very detailed and combining the most recent standards and businesses practices, the language remains soft, often vague and stresses the voluntary nature of CSR obligation.

A more detailed study of CSR provisions in recent IIAs would naturally require a dedicated contribution on the basis of a systematic global analysis, but to conclude on this brief overview, the following elements are perceptible today in a large variety of treaties: very few Parties have chosen to legalise CSR provisions and still prefer to relate to its voluntary character; the language adopted hence remains soft and rather vague despite certain “non lowering of domestic law provisions” clauses; CSR claims are generally excluded and there are limited mechanisms of implementation such as, for example, Committees or Contact Points. A better proposal is however put forward in FTAs comprising a labour Chapter which de facto renders a number of CSR labour related obligations binding in conjunction with existing domestic legalizations themselves integrating international norms. This traditional dialogue, but also the tension between international and national law, is indeed key and has been well illustrated in the Indian way to CSR. A relatively vague treaty provision might indeed suffice if a more stringent and binding domestic legal framework is provided together with existing judicial mechanism guaranteeing its implementation.

II. From “Patchwork Philanthropy” to Legal Obligation: CSR the Indian Way

A. Legalization

In 2013, India globally pioneered a novel social experiment: the legalization of precise CSR targets in domestic law. Although not immediately welcomed nor supported by the private sector (see below Dr. Chatterjee’s interview below), this reform did not come as a complete surprise for the astute observer of Indian business life. India is deeply influenced by ethical and societal values, which find their roots in a long history of syncretism. Be it the Muslim *Zakaat* (donation to the poor), the Hindu principle of *Dhramada* (benefaction) or *Daashant* (the tenth part or contributing one tenth of resources) found in Sikhism, the idea of “giving back to the community” as one would express in a modern CSR manner was present throughout Indian business history. India had clearly illustrated itself from the early days of modern capitalism by some fascinating and unique philanthropic practices lead by major industrialists families such as the Tatas or Birlas^{30,31,32}. In addition, another

²⁹ See <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4715>

³⁰ See KPMG India and Assocham, *Corporate Social Responsibility, Towards a Sustainable Future : A White Paper, 2008*, http://www.in.kpmg.com/pdf/csr_whitepaper.pdf

reform had preceded the 2013 Company Act amendments: in 2010 indeed, the Indian Government had made CSR mandatory for more than 200 Public Sector Undertakings (PSU), asking them to spend 0.5% to 5% (on an average, 2%) of their net profit on Corporate social responsibility. These “ Guidelines on Corporate Social Responsibility for Central Public Sector Enterprises” were seen as a continuation of the earlier CSR voluntary guidelines, making CSR expenditure mandatory³³. The concept was simple: “Public corporations have legal responsibility to maximize shareholders profits; but a shift in corporate mindset led by social expectations and pressure is causing business leaders to rethink their responsibilities with corporate performance measured in terms of economic impact, social impact and environmental impact, commonly called the Triple Bottom Line³⁴”. It revealed efficient too as public sector companies had spent 66.7% of what they were required to spend (against 82% for private companies) in the first year of mandatory CSR³⁵. In about a century, the Indian way to CSR had so gone from Tata’s Patchwork philanthropy to a legal obligation supported by the State and public and private enterprises equally. But what were the 2013 Company Act amendments requiring precisely? The Article 135 of the 2013 Company Act read as follow:

“135. Corporate Social Responsibility

- (1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.
- (2) The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.
- (3) The Corporate Social Responsibility Committee shall,—
 - (a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;
 - (b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and

³¹ See for *Tata* : <http://www.tata.com/sustainability/articlesinside/corporate-social-responsibility> and *Birla*: <http://www.adityabirla.com/csr/overview>; and again for a much more recent yet very successful and quite revealing company of the new digital economy *Paytm*: <https://paytm.com/about-us/csr-3/>

³² On Indian CSR History, see Nayan Mitra and René Schmidpeter, *Corporate Social Responsibility in India*, Springer, 2017: <https://link.springer.com/book/10.1007%2F978-3-319-41781-3>;

³³ See <http://megplanning.gov.in/circular/Guidelines%20on%20Corporate%20Social%20Responsibility%20for%20CPSEs.PDF>

³⁴ Ibid.

³⁵ According to *LiveMint* reproducing think Tank data, see: <https://www.livemint.com/Specials/PiwvOfqACWArNyQX45THwJ/CSR-spend-How-public-and-private-sectors-fared.html>

(c) monitor the Corporate Social Responsibility Policy of the company from time to time.

(4) The Board of every company referred to in sub-section (1) shall,—

(a) after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and

(b) ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.

(5) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy:

Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:

Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount.

Explanation.—For the purposes of this section “average net profit” shall be calculated in accordance with the provisions of section 198.”

A three steps process was then put in place: 1. The constitution of a CSR Committee, which advises and monitors the Company’s Board on CSR related policies and activities; 2. The actual spending “in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy”; 3. The production of a report explaining and justifying the company’s failure to spend if any. Finally, these spending should target local communities and a number of priority areas which had been identified by the government.

Interview with Dr. Bhaskar Chatterjee, the “Father of India CSR”

1. *What was the general political and economic context of the inclusion of the Section 135 in the Indian companies Act of 2013?*

This was the end of the United Progressive Alliance (UPA) and about 4 months before the Bharatiya Janata Party (BJP) came to power. India was doing extremely well economically with a 7.9% GDP growth. The general corporate context was very positive. So the feeling was that Companies could then give back to society.

2. *What were the government’s expectations? What were the private sectors expectations?*

As far as the government expectations were concerned, it was felt that companies, which had made an adequate amount of profit (from INR 5 Crore (50 million)) could afford to give a share of this profit to the poorest sections of society. For the private sector however, the feeling was that CSR has been done for a long time in any case and since companies were paying taxes they were doing enough already. The 2% requirement was then first seen as a mere additional tax.

3. *What served your (legal) reasoning in drafting the provision?*

For the public sector, the 2010 Guidelines for giving a part of the profit to CSR had already been issued. The new section 135 inserted into the Companies Act at that time was in tune with what was issued to the public sector in the 2010 Guidelines. So section 135 is the essence of what was already applicable to the Public Sector in India. As I served as Secretary to the Government of India, in the Department of Public Enterprises, I had already drafted the text of the Guidelines and so it was then easy to draft section 135.

4. *Any comparative or international inspiration?*

Michael E. Porter’s approach and landmark article with Mark A. Kramer on how to create shared value as well as the seemingly simple idea to giving back to society certainly inspired me³⁶. Porter’s approach was nevertheless not resting upon legislation but only shared value: corporate should do business with and for the poorest sector to the benefit of all. I changed this around to a large extent: to me, the poor must not be the target of corporate business. Corporate must legally make their profit and after making this profit, they must contribute 2% of it to the poorest of the poor through civil society organizations. So, two ideas were quite novel as concepts here: 1. There must be legislation. 2. Corporates must make profit and only after they do, should give 2% from it to the poor.

³⁶ See Michael Porter and Mark R. Kramer, “Creating Shared Value: How to Reinvent Capitalism and Unleash a Wave of Innovation and Growth”, *Harvard Business Review*, January-February 2011, available at: <http://www.nuovavista.com/SharedValuePorterHarvardBusinessReview.PDF>

5. *How is this provision inscribed more largely in Indian corporate and regulatory history?*

Historically, there was nothing in regulatory history. There was no regulation of any kind in the domain of CSR at all. This was completely unique to India and to global corporate law.

6. *4 years later, how do you reflect upon the application of the provision by Indian and foreign corporations?*

By large it has gone pretty well. Expenditure and compliance have largely improved. Corporates now also have stopped being defensive. They do see this as an opportunity and not a challenge anymore. If they do it well and systematically, it helps build their brand image and their value to society. Overall, the whole perception improved considerably. For example, we had presumed that about 10,000 companies would need to comply, but for 2016-17, our expectations were exceeded as about 17,000 companies have complied with the 2% rule. As to the expenditures: 6,000 crore (approx.) were spent for the first year, 9,000 crore (approx.) in the second year and for 2016-17: the estimated expenditure is 16,000 crore! This shows a substantial jump both in the number of compliant companies and in the money actually spent for CSR by them.

7. *What remains to be done for a better implementation by foreign investors?*

Most of these foreign investors are MNCs. They have had a good history of CSR. They do understand that for the Indian branch of their operations, they have to spend 2% of their profits and so comply with the Indian legal requirements. They are doing this systematically. We have good examples of compliance by companies such as BASF, Samsung, LG, and BOSCH who all have demonstrated quite exceptional work in CSR in India.

8. *Do you see a possible interaction between the Section 135 and the Article 12 of the BIT model?*

Yes of course. The new BIT model Article 12 reflects the impact of Section 135. India as a country is expecting more of foreign investors in development initiatives reaching out to the poor. There are strong interactions.

9. *From your personal professional experience in dealing with major FDI, do you see the article 12 and domestic CSR related provisions and the Section 135 in particular playing a positive role in balancing investors and State's rights and obligations? Or, on the contrary do you see these as deterring FDI?*

Yes very much so they do play a positive role. They are not contrary to each other at all and they do not deter FDI. Many companies investing in India are doing CSR in their own countries of origin. Virtually, every company is doing something in relation to CSR. So these provisions do not at all deter FDI. Sometimes, it even comes at as attraction. It sends a message: in the course of doing business in India we look

forward to you participating to the development of the country. It sends a positive message and to the home and host countries at the same time.

Dr. Bhaskar Chatterjee, popularly known in India as the "father of CSR," is former Director General and CEO Indian Institute for corporate affairs, Ministry of Corporate Affairs, India.

This interview has been conducted by Prof. Leïla Choukroune with Dr Bhaskar Chatterjee in March 2018.

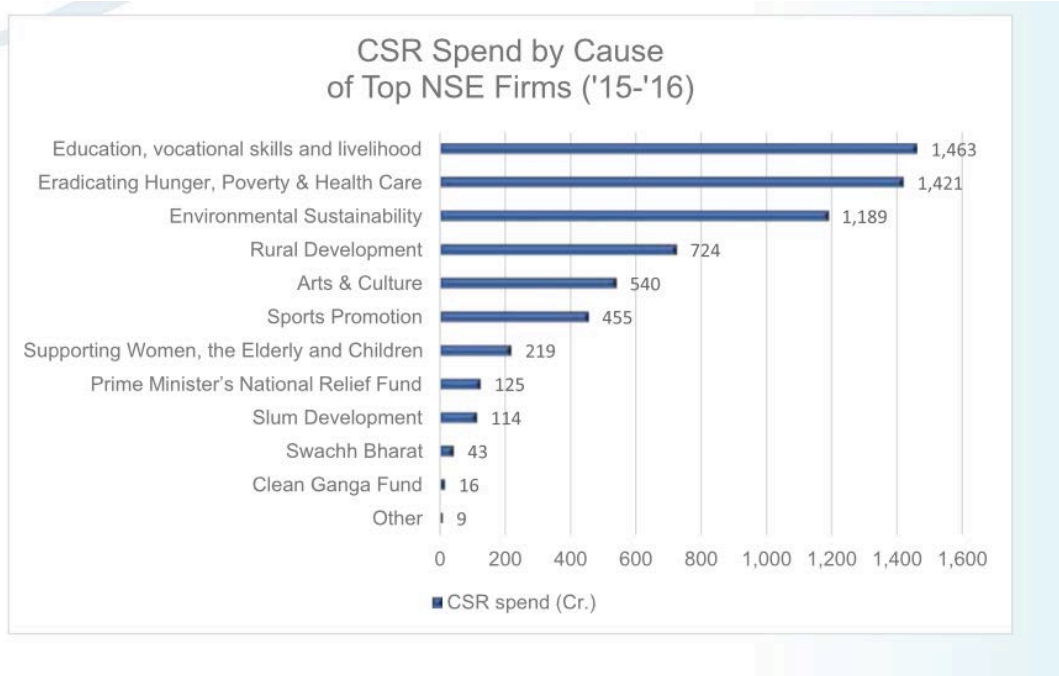
B. Implementation

Four years after the adoption of the Section 135 of the 2013 Company Act what are the results of this dramatic policy decision including in relation to the inclusion on the article 12 (CSR) of the 2015 Indian BIT model?

According to a recently published Working Paper of the Universities of Chicago and Michigan Law Schools, there could be a “negative and substantial” effect on the value of the studied firms, yet at the same time “a significant increase in CSR activities”³⁷. Interestingly, according to the same study it may well be that firms, which spent less than 2% of their profit on CSR have increased their spending, while, on the contrary, firms which spent more have reduced their CSR expenditure after Section 135 came into effect. These findings have to be taken into account with certain prudence while other studies seem to show, on the basis of qualitative interviews with CSR leaders, a real adherence to the new requirements and some keen investment in CSR activities³⁸. Spending is of course not an end to a mean. It remains to be seen how, where, what for and by who are these CSR activities carried upon, an interrogation, which also questions the role of the civil society and NGOs as well as that of Companies CSR departments and executives.

³⁷ See Dhammika Dharmapala and Vikramaditya S. Khanna, *The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862714.

³⁸ See the Consultancy firm Equal Innovation's Report, *India's CSR - Taking Singles Instead of Hitting Sixes* available at: <http://www.equalinnovation.com/india-csr-report.html>. The top 16 Tata companies spent INR 1,198 crore on CSR in the last two fiscal years, according to data from *Think through Consulting*. TCS, the second-largest listed company in India based on market capitalisation, alone spent Rs 380 crore on CSR projects last financial year. See: <https://economictimes.indiatimes.com/news/company/corporate-trends/tcs-to-contribute-a-sizeable-portion-of-its-csr-fund-to-tata-trusts/articleshow/60215344.cms>



Source: Equal Innovation's Report, *India's CSR - Taking Singles Instead of Hitting Sixes*

However, it is even more relevant for us to further investigate the link between the Section 135 of the 2013 Company and the Article 12 (Corporate Social Responsibility) of the 2015 Indian BIT Model, which reads as follow:

“Investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption.”

The non-binding language of the BIT model provision provides an interesting correspondence but also an apparent departure from the legalization of CSR that is now found in Indian domestic law. From a legalization perspective indeed, the Article 12 of the new BIT model is rather disappointing for it does not define any obligation, is imprecise and of course cannot be clearly implemented. The only element of relative satisfaction could be found in the reference to human rights, a positive move, which could be read in conjunction with other “non-investment concerns” related provisions one can identify in the model and in recent Indian IIAs practice more generally³⁹. That the 2015 Model BIT is disappointing, incoherent and often departs from previous legislative and regulatory progresses made internally in India is not a surprise and had been highlighted by the Indian Law Commission prior to its adoption. It is also largely discussed in this Special Issue of TDM⁴⁰. One could

³⁹ See Leïla Choukroune, «Indian International Investment Agreements and “Non Investment Concerns”: time for a right(s) approach” *Jindal Global Law Review* (2016) 7: 157, available at: <https://link.springer.com/article/10.1007/s41020-016-0030-y>

⁴⁰ For well argued and constructive criticism, see the Indian Law Commission Report: *Report 260 of the Law Commission of India* at: <http://lawcommissionofindia.nic.in/reports/Report260.pdf>

however hope, as alluded to above, that the natural interactions between treaty law and a domestic Indian law, now more demanding than its international obligations, could plead in favour of a better integration of CSR related provisions to further the country's social ambitions internally and externally.

Conclusion: Responsibilities, Values and Rights

While CSR has evolved from corporate responsibilities to “shared values”, which are sometimes formulated in a legalized manner, it is now ample time to move towards a discourse and practice of rights. A Human Rights-Based (HRBA) approach to international treaty negotiation and dispute settlement has to be definitively adopted for it is the only perspective, which is inclusive and sustainable as it rests upon the shared inalienable and indivisible rights of all and for all.

According to the United Nations, the following criteria have to be met to define a HRBA⁴¹:

- **Universality and inalienability:** Human rights are universal and inalienable: As stated in the article 1 of the Universal Declaration of Human Rights, “All human beings are born free and equal in dignity and rights.”
- **Indivisibility:** Human rights are indivisible. Whether civil, cultural, economic, political or social, they are all inherent to the dignity of every person. There is no hierarchy of rights.
- **Interdependence and interrelatedness:** The realization of one right often depends on the realization of others. Rights are not separable.
- **Equality and non-discrimination:** All human beings are equal. Discrimination on the basis of sex, religion, ethnicity (etc.) cannot be tolerated.
- **Participation and inclusion:** Human beings are entitled individually and collectively to active, free and meaningful participation in, contribution to and enjoyment of civil, economic, social, cultural and political development.
- **Empowerment:** Human beings are empowered to claim their rights.
- **Accountability and respect for the rule of law:** There is a need to identify ‘rights holders’ and corresponding ‘duty bearers’. These include both positive obligations to protect, promote and fulfil human rights, as well as negative obligations to abstain from rights violations. A HRBA requires the development of laws, administrative procedures, and practices and mechanisms to ensure the fulfilment of entitlements, as well as opportunities to address denials and violations. It is local and global and yet again glocal in that international norms and standards are integrated at the local level.

In doing so, novel treaty drafting would echo recent arbitral decisions, which seem to timidly move towards the direction of a greater appreciation of CSR, if not entirely human rights as international law obligations, as illustrated in the Urbaser case (as concessionaire, Urbaser supplied water and sewerage services in the Province of Buenos Aires replacing in the context of water privatisation):

⁴¹ See UNESCO Strategy on Human Rights, *The Human Rights-Based Approach to the United Nations System*, 2006, and UNICEF, *a Human Rights Based Approach to Education for All*, 2007.

“1195. The Tribunal may mention in this respect that international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities’ operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law. On the other hand, even though several initiatives undertaken at the international scene are seriously targeting corporations human rights conduct, they are not, on their own, sufficient to oblige corporations to put their policies in line with human rights law. The focus must be, therefore, on contextualizing a corporation’s specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual”⁴².

The artificial fragmentation of international law is actually at stake here. Be it for non-State actors (the Company) but also for *Lex Specialis* (IIAs), the need for a profound change of paradigm is evident and appears as the only solution able to participate in the reunification of international law on the basis of a (human) rights-based approach. A HRBA not only encompass essential human rights principles, but it also proves an effective tool to international law reunification and coherent application from treaty drafting to dispute resolution. As applied to investment (and trade), an HRBA puts the discussion in another perspective, that of legal entitlements, rights holders can claim against the State and other non-State actors. Hence, for example, the provision of water and sanitation services to the most vulnerable and marginalized communities as in the Urbaser case and many more to come including in India is no longer a charitable act but a State’s obligation to be fulfilled. Of course, one of the dangers of an HRBA could be the multiplication of rights deprived of concrete substance (the right to development as an example) and so possible application as hardly justiciable. This normative hyper activity would prove counterproductive and so leads to the dilution of rights rather than to their fostering. However, an HRBA is not necessarily equivalent to rights inflation and eventually dilution. While HRBA re-politicizes international issues in calling for justice and equity, it can also be extremely concrete as based on a clear set of identified norms. A practical solution is then to concentrate on the normative nature of key human rights and human rights principle to define more narrowly HRBA. In this regard, The UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming (the Common Understanding) adopted by the United Nations Development Group (UNDG) in 2003 provides an interesting first definition (having in mind that the objective of the UN was that of harmonization between its many agencies).⁴³ The perspective is pragmatic to allow simple

⁴² See *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, para. 1195.

⁴³ See, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies*, available at: <http://hrbportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>
The Common Understanding is described as follows:

“All programmes of development co-operation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.”

integration of these HR principles into concrete UN agencies work and based on fundamental concepts: universality and inalienability; indivisibility; inter-dependence and inter-relatedness; non-discrimination and equality; participation and inclusion; accountability and the rule of law. Why would the State favour one right over another as the realization of one right depends on the realization of other rights? Why then give precedence over private property and not equality and inclusion, security at the cost of transparency and participation? This HRBA will not necessarily resolve difficult economic or social equations for developing States in particular, but in expressly linking economic situations to rights, it provides a basic conceptual framework for negotiations with domestic and foreign private actors, enables the public to participate to decision making and fosters States accountability. In doing so it also departs from as much as it renews the traditional international trade and investment approach often confined to risk prevention and remediation and exception justification. Lastly it supports CSR approaches and foster their implementation if providing some normative substance, a super legalization, which makes companies (and States) truly responsible and accountable not only on the basis of shared values but of rights common to all.

Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process. Development cooperation contributes to the development of the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights”.