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ARTICLE

CORPORATE SOCIAL RESPONSIBILITY AND THE INTERNATIONAL INVESTMENT LAW REGIME: NOT BUSINESS AS USUAL

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INTRODUCTION

The foreign investment promotion and protection regime, developed in the last sixty or so years through an extensive framework of international investment agreements (IIAs), has given foreign investors formidable access to investor-state arbitration. This has allowed them to challenge host government decisions and measures allegedly detrimental to their investment. The regime was almost unchallenged until a few years ago when it came under scrutiny and criticism, inter alia, for allegedly giving disproportionate advantages to foreign investors without any corresponding legal obligations toward the host states and communities. The adoption of the U.N. Sustainable Development Goals[1] in 2015 has created a new policy climate in which foreign investment should be protected if it is harnessed in the service of sustainable development goals.

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1. *See* United Nations, Sustainable Development Goals, https://www.un.org/sustainabledevelopment/sustainable-development-goals (last visited Nov. 26, 2020).

There is little doubt that businesses can make a vital contribution to sustainable development and inclusive growth. The activities and innovations generated by multinational enterprises (MNEs) through international trade and investment can bring valuable benefits and improve people's quality of life. On the other hand, the activities of some MNE investors may have negative impacts resulting in harms. The complexity of global supply chains can lead to an increase in human rights and labor risks, including child labor, forced labor, and unsafe working conditions. Environmental impacts are also significant, such as greenhouse gas emissions; excess water use; air, land, and water pollution; and waste. Corruption is becoming more complex and more difficult to detect and battle at the globalized scale of MNEs' operations.

The negative impacts can be mitigated and even avoided when MNEs adopt socially responsible conduct. In the context of this article, corporate social responsibility (CSR) refers to business conduct consistent with applicable laws and internationally recognized standards in the areas of human rights, international labor and environmental standards, anti-corruption, and, more generally, in any area that promotes sustainable development. It includes both the positive contribution businesses can make to sustainable development as well as the avoidance of adverse impacts and addressing them when they occur. An increasing number of MNEs are now engaged in efforts not only to address CSR by being accountable for their behavior but also to make these efforts measurable by adopting and enhancing "environmental, social and governance" (ESG) standards.

The mounting call to provide for foreign investor responsibility and obligations has resulted in the inclusion of such investor obligations clauses in a number of recent IIAs, although their content and legal effect varies. Section I will discuss the current international framework on CSR, including the way it is addressed through soft law instruments and the second generation of international investment agreements. This section will also analyze new developments in this field. Section II will discuss the dispute settlement means available to address the adverse effects of corporate behavior, absent specific provisions under the first generation IIAs, such as counterclaims and due diligence requirements. Finally, in section III, with investor-state mediation now gaining steam as an alternative method for resolving investor-state disputes, it is useful to examine and reflect on the procedures under the OECD Guidelines for Multinational Enterprises (the Guidelines), the main existing soft-law based consultation and mediation mechanism to address business behavior, in use for decades. Such a mechanism, based on a soft law instrument, may be the most efficient option currently available to manage business behavior and any conflicts between foreign investors and the community in which they operate. Further scrutiny and strengthening of the role of the National Contact Points (NCPs), the government agencies operating under the mandate of the Guidelines, may

be needed to enhance the mechanism as it currently stands. This mechanism, accompanied with a due diligence requirement, as also advocated in the context of U.N. Guiding Principles (UNGPs), at the national or international level, and the parallel observance of this requirement by businesses, can provide at least a partial answer to the question of securing observance of responsible business obligations by investors.

I. The International Framework on CSR: From the Soft Law Approach to the Quest for Binding Obligations for Investors

Before any discussion of introducing provisions in IIAs to create legal obligations for investors, efforts to address these issues at the international level took place in the context of several international non-binding instruments, such as the Guidelines[2] and the 2011 UNGPs.[3] These instruments are often mentioned in new IIAs which include provisions on responsible business behavior and investors' obligations. Binding obligations for MNEs are also being proposed and discussed in the context of a treaty on business and human rights currently being negotiated under the auspices of the U.N. Human Rights Council.[4]

A. The OECD Guidelines for Multinational Enterprises (MNEs)

The Guidelines, first adopted in 1976 and revised several times since,[5] are the first internationally recognized and most comprehensive standard on CSR. They are recommendations on responsible business conduct backed by forty-eight governments (OECD and non-OECD).[6] The governments

2. The OECD Guidelines for Multinational Enterprises (MNEs) are a part of the 1976 OECD Declaration on International Investment and Multinational Enterprises, a policy commitment by adhering governments to provide an open and transparent environment for international investment and to encourage the positive contribution MNEs can make to economic and social progress. The Guidelines cover all major areas of business ethics. Their recommendations are set out in eleven chapters and cover topics such as information disclosure, human rights, employment and labor, environment, anti-corruption, and consumer interests. The Guidelines also encompass three areas—science and technology, competition, and taxation—not as fully covered by any other international corporate responsibility instrument. *See* Org. for Econ. Coop. and Dev. [OECD], *OECD Guideline for Multinational Enterprises* (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf.

3. Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter *UNGPs*]; *see* Hum. Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4, ¶ 1 (July 6, 2011) (*UNGPs* is endorsed by the Human Rights Council).

4. Open-ended Intergovernmental Working Group [OEIGWG], Revised Draft of a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (July 16, 2019), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf.

5. The last update of the Guidelines was undertaken in 2011. *See* OECD, *supra* note 2.

6. In addition to the thirty-seven OECD member countries, the following non-member governments adhere to the Guidelines: Argentina, Brazil, Costa Rica, Egypt, Jordan, Kazakhstan,

that adhere to the Guidelines aim to encourage the positive contributions MNEs can make to sustainable development and to minimize the difficulties to which their various operations may give rise. They bring together all thematic areas of business responsibility, including human rights and labor rights, as well as information disclosure, environment, bribery, consumer interests, science and technology, competition, and taxation. This comprehensiveness is a unique feature of the Guidelines and makes it the only government-backed instrument covering all major sustainability risks.[7] They incorporate and are aligned with the UNGP standards on business responsibility and core International Labour Organization (ILO) workplace standards. They provide for National Contact Points (NCPs) established by governments to promote the Guidelines and to serve as a non-judicial grievance mechanism to handle cases against companies when the Guidelines are not observed.[8] NCPs are a unique implementation mechanism and have supported access to a remedy on a global scale by providing a platform for mediation and conciliation. This will be further discussed in section III of this article.

Since the latest review in 2011, the Guidelines call for enterprises to carry out due diligence to "identify, prevent and mitigate actual and potential adverse impacts" on matters covered by the Guidelines.[9] In this context, the OECD has produced due-diligence guidance through multi-stakeholder processes involving governments, business representatives, trade unions, and civil society more generally. This guidance is a valuable tool for businesses seeking to understand their responsibilities and act upon them.

B. United Nations Work on Business and Human Rights

In his 2008 report to the United Nations Human Rights Council, Professor John Ruggie, the Special Representative of the U.N. Secretary-General for Business and Human Rights, set out a three-part framework, "Protect, Respect and Remedy," to advance a shared understanding of the complex interactions between companies and human rights.[10] The framework, subsequently endorsed unanimously by the U.N. Human Rights Council, comprises three elements: (i) the state duty to protect human rights from abuse by third parties, including businesses, through appropriate poli-

Morocco, Peru, Romania, Tunisia, and Ukraine. *See* OECD, *supra* note 2. *See also*, OECD, PROGRESS REPORT ON NATIONAL CONTACT POINTS FOR RESPONSIBLE BUSINESS CONDUCT 2 (2019).

7. *Responsible Business Conduct Thematic Areas*, OECD, https://mneguidelines.oecd.org/mneguidelines (last visited Nov. 24, 2020).

8. The National Contact Points were created during the 2000 revision of the OECD Guidelines for Multinational Enterprises as means to further the effectiveness of the Guidelines. OECD, *supra* note 2, at 68.

9. *See* OECD, *supra* note 2, at 20, ¶ 10.

10. John Ruggie (Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 9, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

cies, regulation, and adjudication at the national level; (ii) the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse human rights impacts with which they are involved; and (iii) the need for more effective access to remedy.[11] In 2011, the UNGPs were adopted to implement the framework.[12] They do not create binding international obligations for corporate actors to observe human rights. Rather, they rely on corporate human rights risk assessment through the businesses' internal due diligence procedure.[13]

Interest in a binding treaty on business and human rights started in 2014 when the United Nations Human Rights Council established the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG).[14] The mandate of the OEIGWG is "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[15] The OEIGWG has held five sessions so far and, during its last session in October 2019, examined a revised draft of the Legally Binding Instrument.[16] Although its successful conclusion currently seems farfetched given the differences among participating governments, such a treaty could have considerable impact on international investment law and arbitration.

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11. *Id.*

12. H.R.C. Res. 17/4, *supra* note 3, ¶ 3.

13. Paragraph 17 of UNGPs states that:

> In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:
>
> (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
>
> (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
>
> (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

Office of the High Commissioner, *UNGPs*, *supra* note 3, ¶ 17.

14. The resolution was tabled by Ecuador and South Africa and it was co-sponsored by Bolivia, Cuba, and Venezuela. It was strongly supported by a coalition of civil society organizations who formed a "Treaty Alliance" but the participating governments were more divided in their support.

15. Hum. Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9, ¶ 1 (July 14, 2014).

16. *See* OEIGWG, *supra* note 4.

C. *CSR as a New Feature in Investment Treaty Making: A Slow Balancing Act*

By contrast, the reform of existing "first generation" IIAs is now a real process. Those agreements did not address business conduct or adverse impacts caused by business. The view was that these would be addressed under domestic law, that national governments have the primary duty to protect their people from any harm done by business, and that the main obligation of MNEs is to comply with applicable laws in the host countries.[17] However, national legal frameworks may lack laws to address abusive conduct or there may be failure to enforce existing laws. This can be due to lack of capacity, bribery, or other misconduct.

Investment policy makers have started re-examining the degree to which the traditional primary reliance on national law is sufficient to address business conduct, and to consider a possibly stronger contribution of investment treaty policy in this area. The silence of many older generation IIAs on issues like climate change, human rights, gender, the rights of indigenous peoples, or public health is increasingly visible and contested. The call to include principles and provisions referring to the protection of human rights, labor, and the environment in IIAs has been a part of the larger efforts to rebalance the IIAs, in order to both ensure the effective protection of investors and secure the policy space for host states to regulate in the public interest.

Governments have begun to address business in their new trade and investment treaties in recent years. Obligations for investors have been incorporated into, to name a few, the 2016 Morocco-Nigeria BIT,[18] 2016 Argentina-Qatar BIT,[19] 2016 Pan-African Investment Code (PAIC),[20] 2012 South African Development Community (SADC) Model Bilateral Invest-

17. Business groups repeatedly emphasized that it is the duty of governments to establish and enforce laws and to create and maintain a stable and predictable policy environment as well as consistent regulatory and legal frameworks. "To advance progress, all states must be encouraged to address economic, environmental and social, including human rights challenges, in their own jurisdictions by implementing national and international standards both at the national and local levels." Org. for Econ. Coop. and Dev. [OECD], *Business at OECD*, at 3 (Nov. 5, 2019), http://biac.org/wp-content/uploads/2019/11/FIN-2019-11-COM-RBC-PoW1.pdf.

18. Reciprocal Investment Promotion and Protection Agreement, Morocco-Nigeria, Dec. 3, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/otheriia/3711/morocco---nigeria-bit-2016- [hereinafter Morocco-Nigeria BIT].

19. The Reciprocal Investment Promotion and Protection Agreement, Arg.-Qatar, Nov. 6, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3706/argentina [hereinafter Argentina-Qatar BIT].

20. *See* Afr. Union Comm'n, *Draft of Pan-African Investment Code* (Dec. 2016), https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf.

ment Treaty,[21] Canada-EU Trade Agreement (CETA),[22] and 2019 Netherlands BIT.[23]

Some of these clauses are indirect clauses, framing CSR as a self-regulating technique that home and host states should promote. Under the CETA, the parties agree on:

> Encouraging the development and use of voluntary best practices of corporate social responsibility by enterprises, such as those in the OECD Guidelines for Multinational Enterprises, to strengthen coherence between economic, social and environmental objectives.[24]

These provisions do not change the corporate or ethical duties of companies into enforceable legal obligations in the context of dispute settlement proceedings. They merely reaffirm the voluntary nature of CSR, which remains a form of self-responsibility for companies that can, at most, be encouraged by states.

Other, new generation IIAs (or proposed IIAs) include direct human rights obligations on companies. The 2012 South African Development Community (SADC) Model Bilateral Investment Treaty,[25] the 2016 draft Pan-African Investment Code (the draft PAI Code),[26] and the 2016 Morocco-Nigeria BIT[27] are notable examples.

Under the Nigeria-Morocco BIT, for instance, investors are subjected to certain binding obligations. These include the maintenance of an environmental management system to ISO 14001 or equivalent standard while, in relation to labor and human rights standards:

> 1) Investors and investments *shall* uphold human rights in the host state;
>
> 2) Investors and investments *shall* act in accordance with core labor standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998; and
>
> 3) Investors and investments *shall* not manage or operate the investments in a manner that circumvents international environmental, labor and human rights obligations to which the host state and/or home state are Parties.[28]

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21. *See* S. Afr. Dev. Cmty., *SADC Model Bilateral Investment Treaty Template with Commentary* (July 2012), https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf.

22. Comprehensive Economic and Trade Agreement, Can.-Eur. Union, Sept. 21, 2017, https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ [hereinafter CETA].

23. Dutch Ministry of Foreign Affairs, *Netherlands Model Investment Agreement* (Mar. 22, 2019), https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden.

24. CETA, *supra* note 22, at ch. 22, art. 22.3(b).

25. *See* Southern African Development Community, *supra* note 21.

26. *See* Afr. Union Comm'n, *supra* note 20.

27. *See* Morocco-Nigeria BIT, *supra* note 18.

28. *Id.* at 15, art. 18.

In addition, it introduces a novel development in IIA practice stating that:

> Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.[29]

The new 2019 Model Netherlands BIT[30] provides in its Article 7(1) that:

> Investors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws.

Article 7(3) of the BIT imposes a duty on the investor to consider the wider impact of the projected investment:

> The Contracting parties reaffirm the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for environmental and social risks and impacts of its investment.[31]

The Model Netherlands BIT refers to and affirms the G20 Guiding Principles for Global Investment Policymaking (Article 3(3)),[32] the Paris Agreement on Climate Change,[33] the fundamental ILO Conventions,[34] and the Universal Declaration of Human Rights (Article 6(6)),[35] as well as international CSR standards, including the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business, and Human Rights and Recommendation CM/REC(206) (Articles 7(2), (5)). Further, it attempts to put some teeth into the obligation to adhere to these standards. Under Article 23, a tribunal is "*expected to*" take into account non-compliance by the investor with its commitments under the U.N. Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

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29. *Id.* at 16, art. 20.

30. *See* Dutch Ministry of Foreign Affairs, *supra* note 23.

31. *Id.*

32. Org. for Econ. Coop. and Dev. [OECD], *Annex III: The G20 Guiding Principles for Global Investment Policymaking*, https://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf.

33. *See* Paris Agreement, the United Nations Framework Convention on Climate Change (Dec. 12, 2015), https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf.

34. *See* International Labour Organization, Conventions and Recommendations, https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm (last visited Nov. 26, 2020).

35. *See* G.A. Res. 217 (III) A Universal Declaration of Human Rights (Dec. 10, 1948).

II. Arbitration as a Dispute Settlement Tool to Ensure Responsible Business Behavior

Since the first generation of IIAs does not include language on CSR, the number of arbitral decisions raising the responsibility of investors is limited. Investor-state tribunals, for the most part, have been reluctant to accommodate the application of non-investment obligations and other treaties in cases in front of them. Until claims are brought under the new generation of IIAs, the respondent state and the tribunals deciding on such cases have limited resources. Human rights and other business responsibility issues may be the basis of a counterclaim on the part of the respondent state, although the experience so far has been limited. The obligation of investors to exercise due diligence in order to receive protection under the IIAs' substantive investment standards may be the connecting element and has the potential of further development. Furthermore, the investor's conduct in the assessment of the fair and equitable treatment standard (FET) may be another option for consideration under the current limited circumstances. A working group in the arbitration community identified that new rules needed to be formulated, given that the current system of international arbitration was not adequate in accommodating human rights issues through aspects such as the lack of transparency and the lack of human rights arbitrator expertise. The Hague Rules on Business and Human Rights Arbitration are a new development within the field to assist with disputes relating to human rights and their violations.[36]

A. The Enforcement of Investor Obligations through Counterclaims and the Role of Due Diligence

CSR clauses inserted in IIAs could be a useful basis for counterclaims allowing host countries to actively hold investors liable. This is because counterclaims allow host countries to react to the principal claims of foreign investors and directly challenge their wrongful conduct.

Under the current circumstances, though, counterclaims have not been very successful.[37] A majority of IIAs do not contain provisions allowing counterclaims to be invoked. Also, the counterclaim has to be within the jurisdiction of the tribunal and arise directly from the subject matter of the dispute and directly out of the investment. Further, there is uncertainty as to

36. The Hague & Ctr. for Int'l Legal Coop., *The Hague Rules on Business and Human Rights Arbitration* (Dec. 19, 2019), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf (funding for the project was provided by the City of The Hague and supported by the Ministry of Foreign Affairs of the Netherlands).

37. *See generally* Mark A. Clodfelter & Diana Tsutieva, *Counterclaims in Investment Treaty Arbitration, in* Arbitration in International Investment Agreements: A Guide to the Key Issues (Katia Yannaca-Small ed., 2d ed. 2018).

whether host country obligations under international law can be enforced against foreign investors.

This was demonstrated in *Urbaser v. Argentina*.[38] In this case, Argentina filed a counterclaim regarding the investor's breach of the human right to water.[39] The tribunal rejected the investor's assertion that the examination of its human rights obligations was outside the tribunal's jurisdiction.[40] It deemed the BIT to be worded broadly enough to afford jurisdiction over the counterclaim, and deemed the factual connection between the claim and the counterclaim to be "manifest" since they were based on the same investment and involved claimants' compliance with the concession commitments at issue.[41]

In examining the BIT's relation to international law and human rights, the *Urbaser* tribunal referred to instruments such as the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic Social and Cultural Rights to recognize human rights to water and sanitation.[42] It stated that, even as these instruments recognize that people have certain rights, they do not impose affirmative obligations on private parties to promote or implement those rights. At most, these instruments impose a prohibition "not to engage in activity aimed at destroying such rights."[43]

The tribunal concluded that Argentina's claim could not be accepted on the merits, as the human right to water created obligations for States only.[44] However, the tribunal considered that: "The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights[,] would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties."[45] This negative obligation recalls one of the well-

38. *See* Urbaser S.A., Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award (Dec. 6, 2016), https://www.italaw.com/sites/default/files/case-documents/ita0887.pdf.

39. *See, e.g.*, Urbaser S.A. v. The Argentine Republic, ICSID Case No. ARB/07/26, Counter-Memorial and Counter-Claim of the Argentine Republic (May 29, 2013) (not public).

40. Urbaser S.A., Award, *supra* note 38, ¶ 1155.

41. *Id.* In another case, *Aven v. Costa Rica*, after the tribunal accepted that counterclaims were contemplated by the DR-CAFTA treaty and were therefore within the parties' consent, it found that language protecting the state's right to regulate and enforce measures in the interest of the environment imposed treaty obligations on investors. It concluded that, while the DR-CAFTA did not impose any express affirmative obligation on investors to protect the ecology of the host state, it could elevate breach of domestic environmental regulations to a treaty breach, forming the cause of action for a counterclaim. Ultimately though, the tribunal rejected Costa Rica's counterclaim for environmental damage for procedural reasons. *See* David Aven et al. v. the Republic of Costa Rica, ICSID Case No. UNCT/15/3, Final Award (Sept. 18, 2018).

42. Urbaser S.A., Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, *supra* note 38, ¶¶ 1196–98.

43. *Id.* ¶ 1199.

44. *Id.* ¶ 1210.

45. *Id.*

known CSR standards, the due diligence obligation requiring MNEs to "endeavor" not to violate human rights or pollute the environment. The human rights due diligence conducted by companies as a part of the CSR, and most recently the ESG discourse, has been, as mentioned above, primarily conceptualized through the work of John Ruggie, the U.N. Special Representative on Business and Human Rights. According to the UNGPs, companies have a responsibility to respect human rights. Within this responsibility, companies have to undertake due diligence in order to identify, prevent, mitigate, and account for how they address their adverse human rights impacts. Human-rights due diligence should be understood as part of the company's CSR/ESG framework incorporated into broader enterprise management risk systems.[46] This means that human-rights due diligence is one of the integral elements of CSR and ESG performance whose aim is to ensure responsible business conduct and to prevent possible human rights violations, especially for companies operating abroad. Under international investment law, foreign investors operating in host states are required, at least to some extent, to assess the socio-political and economic risks that might also include the human rights situation and the environmental issues affecting the investment.

It could be imagined that, faced with a CSR clause in a future investment treaty requiring investors to comply with this due diligence obligation, an arbitral tribunal could have a useful tool to consolidate an enforceable obligation on investors with a basis for admitting counterclaims.

If investors are aware of the risk of host countries successfully bringing counterclaims invoking their lack of due diligence, they might be dissuaded from initiating an arbitration proceeding in which they would have to justify their own conduct. Therefore, the link between the duty of due diligence (as described in a CSR clause) and investment law (through counterclaims) could help "significantly moralize the use of treaty-based arbitration."[47] Investors could even be held liable for breaching a due-diligence obligation that is directly enforceable and that could ultimately impose on them an obligation to compensate the host country.

Another way to have a basis for such counterclaims would be for a state to expressly add CSR standards to a license—a mining license, for instance. Or, investors themselves may voluntarily include CSR standards in documents they submit to a state to gain approval for exploration or production. The incorporation of these standards by either party could give rise to a counterclaim. If these CSR standards are affirmed in a license or an internal regulation, then a state may choose to bring a counterclaim if the

46. *See* Hum. Rts. Council Res. 17/4, *supra* note 3.

47. *See* L. Dubin, RSE et droit des investissements, les prémisses d'une rencontre, *Revue Générale de Droit International Public*, 2018, vol. 4. referring to E. Gaillard L'avenir des traités de protection des investissements. C. Leben (Ed.), *Droit international des investissements et de l'arbitrage international,* Paris, Pedone, 2015, p. 1040.

investor fails to comply with the standards.[48] On the flip-side, we may envisage situations where investors who conduct effective CSR due diligence could be harbored from certain potential liabilities.

B. Investor Conduct in the Assessment of the Fair and Equitable Treatment (FET) Standard

The requirement for an investor to conduct due diligence has been applied by investment tribunals in deciding on the protection of an investor under substantive investment protection clauses. One of these substantive protection provisions is the FET standard, which is one of the most commonly invoked provisions in investment cases.[49] Almost all treaties provide that the investor should be treated fairly and equitably by a host state. One of the pivotal elements of the FET standard is the protection of the legitimate expectations of an investor. A breach of the legitimate expectations of an investor may lead to a violation of the FET standard. The investor's legitimate expectations are usually based on implicit or explicit assurances or representations made by the host state to the investor. These can be provided to investors in different forms, for example in the state's legislation or through contractual commitments. In the absence of any explicit or implicit representations by the host state towards the investor, the latter may still have legitimate expectations, based on the expectation of the stability of the general legal framework.

In assessing the legitimacy of expectations, a number of tribunals have underlined the importance of the investor's own diligent conduct for the purpose of protecting its legitimate expectations. This is primarily related to the risk assessment and due diligence checks that are expected to be performed by an investor in order to justify its expectations. In several decisions, tribunals have emphasized that an investor, before claiming the protection of its legitimate expectations, has to assess the possible risks and to perform a due-diligence check before investing in a host state. For example, the investment tribunal in *Biwater v. Tanzania* stressed that "countervailing factors such as the responsibility of foreign investors, both in terms of prior due diligence as well as subsequent conduct" should be considered in establishing the violation.[50] On the part of an investor, the performance of a due-diligence test and risk assessment may include the collection of information on the rules and regulations concerning the investor's investment. Also, in a number of FET decisions, tribunals have emphasized that

48. *See* Yasmine Lahlou et al., *The Rise of Environmental Counterclaims in Mining Arbitration*, *in* THE GUIDE TO MINING ARBITRATIONS 51–68 (Jason Fry & Louis-Alexis Bret eds., 2019).

49. *See generally* Katia Yannaca-Small, *Fair and Equitable Treatment: Have Its Contours Fully Evolved?*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES (Katia Yannaca-Small ed., Oxford Univ. Press, 2d ed. 2018).

50. Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Final Award, ¶ 601 (July 24, 2008).

an investor should take into account the economic and sociopolitical background in the host state.[51] The level of preparation by the investor is expressed in the extent of the due diligence and risk assessment conducted by the investor.

C. The Hague Arbitration Rules on Business and Human Rights

The Hague Arbitration Rules on Business and Human Rights (The Hague Arbitration Rules)[52] were initiated by the Business and Human Rights Arbitration Working Group, a private group of international practicing lawyers and academics. They aim to create an international private judicial dispute resolution avenue available to parties involved in business and human rights issues.

The Hague Arbitration Rules are based on the UNCITRAL Arbitration Rules. In contrast to investment treaty arbitration, they are not:

> [L]imited by the type of claimant(s) or respondent(s) or the subject-matter of the dispute and extend to any disputes that the parties to an arbitration agreement have agreed to resolve by arbitration under the Hague Rules. Parties could thus include business entities, individuals, labor unions and organizations, States, State entities, international organizations and civil society organizations, as well as any other parties of any kind.[53]

There is an emphasis on public interest considerations and access to justice. The Hague Arbitration Rules seek to contribute in "filling the judicial remedy gap in the UN Guiding Principles on Business and Human Rights."[54] "Human rights disputes" in this context mean:

1. The Victim-Business scenario: the typical scenario in which "victims" bring claims against a company alleging that their human rights have been impacted by the activities of that company
2. The Business-Business scenario: with the growth of obligations to monitor and conduct due diligence down a business' supply chain, for example where a manufacturer imposes obligations on a contractor or supplier to comply with certain human rights standards in the performance of its obligations and that contractor or supplier breaches those obligations[55]

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51. *See*, *e.g.*, MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01.7, Award, ¶ 178 (May 25, 2004); Parkering-Companiet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, ¶¶ 332–33 (Sept. 11, 2007).

52. *See* The Hague Rules on Business and Human Rights Arbitration, *supra* note 36.

53. *Id.* at 3.

54. Julianne Hughes-Jennett, *Energy Disputes in a Disruptive World – A Take on Business and Human Rights Arbitration*, KLUWER ARBITRATION BLOG (July 14, 2019), http://arbitrationblog.kluwerarbitration.com/2019/07/14/energy-disputes-in-a-disruptive-world-a-take-on-business-and-human-rights-arbitration.

55. *Id.*

It remains to be seen whether the Hague Arbitration Rules will help address the "investor obligation deficit" in current IIAs and whether the ethos of the Rules may indirectly pave the way towards a new generation of IIAs, by having elaborated on the standing of human rights considerations in this context.

III. CSR through Due Diligence, Mediation and Consultation: The Mechanism of the OECD Guidelines for Multinational Enterprises

State-based mechanisms are emphasized as an essential part of the state duty to protect human rights. Company-level mechanisms are seen as crucial to the ability of companies to fulfill their responsibility to respect rights. Due diligence mechanisms are developed by businesses to achieve and demonstrate compliance.

With regard to the third pillar of the framework on access to remedy, Ruggie reflected in both his 2008 and 2009 reports on the respective roles of judicial and non-judicial grievance mechanisms. Ruggie posits that non-judiciary mechanisms—including those based on the mediation of disputes—have an important role to play alongside judicial processes in providing remedy for human rights abuses by companies.[56] Soft law mechanisms, such as those in the context of the OECD Guidelines, have been used for a long time with, until recently, mixed results. However, this mechanism, which is already in place and has been tried, can provide for notification, mediation, and consultation. With improvements, it could be an answer to remedy for human rights-related and other abuses by companies.

A. Due Diligence: The Role of Business Compliance

Ruggie, through the UNGPs, insisted on the importance of methods to help companies comply with their responsibilities, and to evaluate and demonstrate compliance. The basic principle is that companies should develop and implement systems so that they can both "know and show" that they respect human rights and CSR. This led to the development of human rights due diligence.

The OECD has taken a leading role in developing and operationalizing CSR and human rights due diligence in multi-stakeholder processes.[57] It has produced, consolidated, and detailed due diligence guidance through multi-stakeholder processes involving governments, business, trade unions, civil society, and experts. OECD sectoral due-diligence guidance has also been

56. *See* Ruggie, *supra* note 10, ¶¶ 92–99.

57. *See* Org. for Econ. Coop. and Dev. [OECD], *OECD Due Diligence Guidance for Responsible Business Conduct*, at 3 (2018), http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.

incorporated into regional and national legislation and rulemaking. General OECD Due Diligence Guidance for responsible business conduct across the full economy was adopted in 2018.[58] Such broadly applicable guidance may be of particular interest with relation to investment treaties that cover all economic sectors.[59]

National and regional law developments have sought, and are seeking, to advance CSR in international business, including through use of the OECD due diligence framework. Efforts to advance human rights and CSR have given rise to intensive policy debates, legislation, corporate action to engage in due diligence, and disclosure at both the national and international levels. Several OECD countries have introduced or are contemplating introducing into their laws various forms of due-diligence requirements.[60] The European Union is currently exploring the possibility of enacting a standard of its own.[61] The OECD due diligence framework has been at the forefront of all these initiatives.

There have also been many voluntary initiatives by business groups, as well as those prompted by legislative developments or investor pressure.[62]

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58. *Id.*

59. A list of guidelines can be viewed by sector on the OECD's website. *See Responsible Business Conduct,* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEV., http://mneguidelines.oecd.org/sectors (last visited Apr. 3, 2021).

60. France passed the law on the duty of vigilance of parent companies and commissioning enterprises in 2017. *French Corporate Duty of Vigilance Law (English Translation)*, RESPECT INT'L (Nov. 29, 2016), https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf. In Switzerland, intensive debates took place over a proposal to introduce mandatory due diligence for companies; a national referendum on the introduction of the Responsible Business Initiative was held in November 2020. *Swiss Government Opposes Responsible Business Initiative Campaign*, REUTERS (Oct. 6, 2020), https://www.reuters.com/article/swiss-companies/swiss-government-opposes-responsible-business-initiative-campaign-idUSL8N2GX1HY. In Finland, the government announced plans to prepare a report with the objective of enacting a corporate social responsibility (CSR) act based on a duty of care imposed on companies regarding their operations in Finland and abroad. MINISTRY OF ECON. AFF. AND EMP. OF FIN., JUDICIAL ANALYSIS ON THE CORPORATE SOCIAL RESPONSIBILITY ACT (Sept. 2, 2020), https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/162411/TEM_2020_44.pdf.

61. On April 29, 2020, the European Commissioner for Justice, Didier Reynders, announced that the European Union plans to develop a legislative proposal by 2021 requiring businesses to carry out due diligence in relation to the potential human rights and environmental impacts of their operations and supply chains. He further indicated that the draft law, once developed, is likely to be cross-sectoral and provide for sanctions in the event of non-compliance. *Commissioner Reynders Announces EU Corporate Due Diligence Legislation*, EUROPEAN COAL. FOR CORP. JUST. (Apr. 30, 2020), https://corporatejustice.org/news/16806-commissioner-reynders-announces-eu-corporate-due-diligence-legislation. On January 27, 2021, the European Parliament's legal committee adopted a draft report containing a proposal for a directive on Corporate Due Diligence and Corporate Accountability (the "draft directive"), calling on the European Union to legally require companies to protect human rights and the environment in their supply chains. The draft directive is scheduled to be discussed in the Plenary of the European Parliament on March 8, 2021.

62. In April 2020, 101 institutional investors representing over $4 trillion in assets under management called for governments to introduce mandatory human rights due diligence laws. INVESTOR ALLIANCE FOR HUMAN RIGHTS, THE INVESTOR CASE FOR MANDATORY HUMAN RIGHTS

Environmental, social, and governance factors have become major considerations in investment decisions for asset owners and managers despite a lack of universally agreed standards.

B. OECD National Contact Points

The UNGPs underline that, as part of their duty to protect under international human rights law, governments are required to provide access to remedy—to take steps to investigate, punish, and redress corporate-related abuse of the rights of individuals within their territory and/or jurisdiction.[63] Ruggie underlines that without access to remedy through these steps, the duty to protect could be rendered weak or even meaningless. For states, these steps to provide for remedies may be taken through judicial, administrative, legislative, or other means. Judicial systems in the host country where the harms occur can provide remedies to victims. But access to remedies is not always easy and is problematic for the implementation of the CSR framework due to governance gaps.

Non-judicial mechanisms, Ruggie observes, whether administered by the state or other actors, should conform to a minimum set of process principles, summarized as legitimacy, accessibility, predictability, rights-compatibility, equitability, and transparency.[64] With this understanding, Ruggie posits that non-judicial mechanisms—including those based on mediation of disputes—have an important role to play alongside judicial processes in providing remedy for human rights-related abuses by companies.[65] Ruggie's conclusion is significant given the contrasting focus of much public discourse on adjudication—and particularly judicial processes—as the preferred, if not essential, means to achieve remedy and justice when human rights are at issue.

State-based non-judicial systems include both national and international mechanisms. The OECD National Contact Points (NCPs) are a unique, leading international grievance and implementation mechanism on responsible business conduct that has supported access to remedy on a global scale by providing a platform for mediation and conciliation.[66] While States have flexibility in how they organize their NCP, the 2011 Guidelines state that such arrangements must allow NCPs to "operate in accordance

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DUE DILIGENCE (Apr. 2020), https://investorsforhumanrights.org/sites/default/files/attachments/2020-04/The%20Investor%20Case%20for%20mHRDD%20-%20FINAL_0.pdf.

63. *See* Hum. Rts. Council Res. 17/4, *supra* note 3; *Protect, Respect and Remedy: A Framework for Business and Human Rights*, *supra* note 10.

64. *Protect, Respect and Remedy: A Framework for Business and Human Rights*, *supra* note 10, ¶ 92.

65. *Id.* at ¶¶ 93–95.

66. Org. for Econ. Coop. and Dev. [OECD], *Cases Handled by the National Contact Points for Responsible Business Conduct*, https://mneguidelines.oecd.org/Flyer-OECD-National-Contact-Points.pdf [hereinafter *National Contact Point Cases*].

with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence."[67]

The NCPs handle complaints, known as "specific instances." They have broad potential reach in terms of complainants and covered companies in these specific instances. Since the 2000 update of the Guidelines, any entity—an individual, organization, or community—may allege that a company has not observed the OECD Guidelines and may submit a formal request to an NCP.[68] NCPs are not judicial bodies and specific instances are not legal cases. NCPs contribute to the resolution of complaints and the process is voluntary. An NCP cannot compel parties to participate in the resolution of issues, impose sanctions, or order compensation, absent a government mandate. The Guidelines call on enterprises to remedy impacts they caused or contributed to: "[a]void causing or contributing to adverse impacts on matters covered by the *Guidelines*, through their own activities, and address such impacts when they occur."[69] Furthermore, they provide that "[p]otential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation."[70] As such, remediation is central to both the purposes and effectiveness of the Guidelines. While NCPs cannot compel specific actions or award compensation, they can play an important role facilitating remedy discussions amongst parties, thereby potentially contributing to the resolutions of the issues.[71]

Identifying different ways in which NCPs can use informal problem-solving methods in specific instances and improving mediation skills have been identified as high priority for NCPs following the 2011 update of the Guidelines. NCPs of the Netherlands, Norway, and the United Kingdom have sponsored a Mediation Manual by the Consensus Building Institute

67. For instance, in 2014, the Dutch NCP was mandated by the government to conduct cross-sector investigations. In October 2016, the government requested that the NCP investigate compliance with the OECD Guidelines by the Dutch oil and gas sector. In January 2019, the NCP delivered the results of the investigation to the government, concluding that implementation of the OECD Guidelines is poor, and transparency is insufficient across the oil and gas sector. This is the first time that an NCP was asked to conduct research on a specific sector and give findings on the matter. Denmark's NCP, the Mediation and Complaints Handling Institution for Responsible Business Conduct (MKI), is established by law and is mandated to consider cases concerning non-compliance with the OECD Guidelines of both private and public organizations. The Norwegian NCP is established as an independent expert advisory body and comprises four independent experts. Org. for Econ. Coop. and Dev. [OECD], *OECD Guidelines for Multinational Enterprises*, at 71, annex (May 25, 2011), https://www.oecd.org/daf/inv/mne/48004323.pdf.

68. *National Contact Point Cases*, *supra* note 66.

69. *OECD Guidelines for Multinational Enterprises*, *supra* note 67, at 20, ¶ 11.

70. *Id.* at 23, ¶ 14.

71. Org. for Econ. Coop. and Dev. [OECD], *Guide for National Contact Points on the Initial Assessment of Specific Instances*, at 13 (2019), http://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-the-Initial-Assessment-of-Specific-Instances.pdf.

that clarifies whether, when, and how NCPs could use mediation and other informal problem-solving methods to resolve claims in specific instances.[72]

Indeed, various specific instances have been concluded in which NCPs have facilitated the provision of remedy to a submitter by an enterprise. There have been roughly thirty specific instances submitted annually to NCPs since the 2011 last update of the Guidelines, for a total of over 500.[73] There was a record fifty-two new submissions brought to NCPs in 2018. Human rights are the fastest growing basis for claims—accounting for over half of the cases since 2011 (57 percent) as opposed to only 4 percent prior to 2011, followed by expectations related to due diligence, employment and worker issues, and environment. Most cases are brought by trade unions and NGOs (40 and 38 percent, respectively).[74] Individuals, including parliamentarians, have brought a number of cases. A company has also brought a case against another company. The financial sector has grown to be a leading sector for specific instances submissions in recent years. NCPs are required to issue a final statement upon concluding a specific instance process. Some NCPs also make determinations, setting out their own views on whether a company observed the OECD Guidelines or not. This is not required by the OECD Guidelines but is a growing practice.

Provisions for monitoring and follow-up were included in 78 percent of the final statements issued in 2018. In a few cases, agreements reached among parties have included direct remedy for the complainants.[75] Between 2011 and 2019 over a third of all cases which were accepted for further examination by NCPs (36 percent) resulted in some form of agreement between the parties while approximately 33 percent resulted in an internal policy change by the company in question to mitigate impacts.[76]

During the 2011 revision of the OECD Guidelines for MNEs, it was agreed that NCPs will engage in peer learning activities and are encouraged to carry out voluntary peer review. Following sharp criticism by OECD Watch about the results achieved by NCPs in the field of CSR including

72. CONSENSUS BLDG. INST., NCP MEDIATION MANUAL (rev. July 2012), https://www.responsiblebusiness.no/ansvarlignaringsliv-no/files/2015/10/NCP_mediation_manual.pdf.

73. *See* Meeting of the OECD Council at Ministerial Level, *Progress Report on National Contact Points for Responsible Business Conduct* (May 22–23, 2019), http://www.oecd.org/mcm/documents/NCPs%20-%20CMIN(2019)7%20-%20EN.pdf [hereinafter *the Progress Report*]; *National Contact Point Cases*, *supra* note 66.

74. *National Contact Point Cases*, *supra* note 66.

75. For example, a specific instance filed at the Dutch NCP involving former employees of Bralima (a subsidiary of Heineken) resulted in financial compensation to 168 employees, a remedy they had been seeking for nearly seventeen years, and changes to Heineken's human rights due-diligence policy. However, such remedies remain rare. Ministry of Foreign Affairs, *Final Statement Specific Instance Former Employees Bralima vs. Bralima and Heineken* (Aug. 18, 2017).

76. *National Contact Point Cases*, *supra* note 66.

human rights violations by companies,[77] OECD members committed themselves in June 2017 to peer review all NCPs by 2023.[78] To date, twenty-three governments have either completed or committed to a peer review.[79] Peer reviews completed to date have highlighted a range of challenges faced by NCPs. These challenges range from insufficient allocation of resources with just twenty-six NCPs having at least one full-time staff member, through to challenges concerning NCP location and structures and an increased complexity of cases being handled by NCPs. In order for the entire community of NCPs to meet the expectations set out by their mandate, appropriate government support, resources, and institutional arrangements are required so that their work can be carried out in a way that demonstrates the full potential of these unique agencies for responsible business conduct.[80]

The functioning of the NCPs needs improvement, as has been highlighted by NGOs and recognized by the OECD governments and the wider membership of the Guidelines. The impact of this mechanism would be enhanced by strengthened support from participating governments and wider awareness of this mechanism by all appropriate constituencies. There is, nevertheless, no doubt that this long-tested, constantly evolving, flexible, non-judicial mechanism, which includes mediation and conciliation, is a promising avenue for the observance of responsible business practices and CSR through the application of the soft law instrument of the OECD Guidelines.

CONCLUSION

The increasing criticism of the legitimacy of the system of investor-state arbitration has brought the issue of corporate social responsibility of foreign investors into the frontline of international investment law. The current international investment law regime, through its network of IIAs, is ill-equipped to respond to calls for holding investors accountable for potentially harmful behavior related to human rights, labor risks, environmental

77. In its 2015 report, Remedy Remains Rare, OECD Watch highlighted that "the overwhelming majority of complaints (brought before NCPs) have failed to bring an end to corporate misconduct or provide remedy for past or on-going abuses, leaving complainants in the same or worse position as they were in before they filed their complaint" and noted that many NCPs failed to respect the procedural guidance set forward in the OECD Guidelines. OECD Watch's plan for why and how to unlock the potential of the OECD Guidelines, identifies ten key reforms needed to strengthen most NCPs' performance. Org. for Econ. Coop. and Dev. [OECD], *A "4x10" Plan for Why and How to Unlock the Potential of the OECD Guidelines* (Nov. 1, 2008), https://www.oecdwatch.org/a-4x10-plan-for-why-and-how-to-unlock-the-potential-of-the-oecd-guidelines.

78. During a peer review, the Secretariat and representatives of two to four different NCPs assess whether the NCP is functioning in a visible, accessible, and transparent manner. *See the Progress Report*, *supra* note 73, at 12.

79. *Id.*

80. *Id.*

impacts, or corruption. Some new generation IIAs try to rebalance, in order to both ensure the effective protection of investors and to secure and enlarge the policy space for host states to regulate in the public interest, by holding these investors accountable in various degrees. Attempts to create a binding instrument on business and human rights are well underway, but differences among participating governments currently make this a far-fetched endeavor. At this time, investor-state arbitral tribunals have limited tools to delve into claims related to investors' responsibilities, given the limitations of counterclaims. In light of this, the mechanism established under the soft law OECD Guidelines for Multinational Enterprises through mediation and consultation as provided by its National Contact Points may be the best option currently available to manage conflicts between foreign investors and the community in which they operate. Accompanied by the application of due diligence requirements, as also advocated in the context of UNGPs, the observance of this requirement by businesses can provide the best current answer to the question of securing observance of CSR obligations by investors.