Multinational Business Entities and their Role in the Global Environmental, Social, and Governance Architecture

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Abstract

In the last decade, a remarkable regulatory shift has taken multinational corporations ("MNCs") by surprise. There is a concerted effort at national, bilateral, and multilateral levels to make MNCs part of the solution of the global environmental, social, and governance ("ESG") agenda rather than odd outliers and part of the problem. This article suggests that this process is predicated on three broad tiers: a) at the national level, many liberal states are adopting extra-territorial corporate legislation, even if it is confined to specific areas of operations; b) at the bilateral level, this process is achieved by a purposive ESG-based interpretation of existing bilateral investment treaties ("BITs"); c) finally, at the multilateral level there is a clear abandonment of the corporate social responsibility ("CSR") paradigm (at least as a key solution) in favor of more ESG commitments in the new generation of free trade agreements ("FTAs"), all of which are subsequently incorporated in corporate commitments through legislative implementation.

I. INTRODUCTION

Multinational corporations ("MNCs") have been embroiled in a long-standing and heated debate concerning their role in the global human rights and development architecture.[1] These debates have come in many names, such as business and human

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1. *See* Ilias Bantekas, *The Human Rights and Development Dimension of Investment Laws: From Investment Laws with Human Rights to Development-Oriented Investment Laws*, 31 FLA. J. INT'L L. 339, 340–42 (2020).

rights, environmental, social and governance (ESG), corporate social responsibility ("CSR"), and many others.[2] Central to them is the idea that the legal personality of all corporate entities is inextricably and solely linked with the country in which they are incorporated. As a result, a corporation's duties are prescribed by and owed under the laws of the state of incorporation. By extension, any extra-territorial obligations can only arise if such laws extend their reach, which is rare. When an MNC establishes itself in multiple states, each new entity is equally and exclusively subject to the laws of its host state. MNCs control each affiliate's assets, profits, and management through effective intra-shareholding.[3]

Intra-shareholding allows affiliates in the group to control not only the overall profits within the group but also the directorship of each affiliate. If affiliates were open to unlimited publicly available purchase of shares (so-called initial public offering), then the parent company, as well as other affiliates, would lose all control over the other affiliates.[4] This is nothing short of catastrophic for MNCs because each affiliate trades in or produces patented products and sought-after brands. If each affiliate were able to profit from such patents or brands without profits going to the parent company and without the parent company controlling the use of trade secrets, then the creation of MNCs in this manner would be detrimental to the parent company and the group as a whole.[5]

While intra-shareholding allows for development-oriented investments and growth across the globe, the weak transnational corporate architecture, with its emphasis on the race to the bottom as far as developing states are concerned, gives rise to serious human rights and environmental concerns.[6]

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2. *E.g.*, Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309, 311 (2004).

3. For an excellent analysis, *see* Katharina Lewellen & Leslie Robinson, *Internal Ownership Structures of Multinational Firms*, Presented at *Colloquium on Tax Policy and Public Finance*, N.Y.U. 1–2 (Mar. 26, 2013), https://www.law.nyu.edu/sites/default/files/ECM_PRO_075236.pdf.

4. *See generally* Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471, 471–73, 491–98 (1999).

5. *See* Press Release, United Nations Conf. on Trade and Dev., Increasingly Complex Ownership Structures of Multinational Enterprises Poses New Challenges of Investment Policy-Makers, U.N. Press Release UNCTAD/PRESS/PR/2016/016 (June 21, 2016).

6. From a budgetary and tax perspective, see Rosanne Altshuler & Harry Grubert, *The Three Parties in the Race to the Bottom: Host Governments, Home Governments and Multinational Corporations*, 7 FLA. TAX REV. 152, 153–55

The first and most obvious is the likelihood of forum/investment shopping through the MNC model for the weakest regulatory regime.[7] Such a choice may be predicated on regulatory compliance costs considerations (e.g., low or no pension contributions, insufficient environmental compliance, and light health and safety requirements), tax avoidance, or avoidance of public scrutiny by civil society organizations, especially in autocratic states.[8] No doubt, MNCs typically set up affiliates chiefly in order to create new consumer bases and expand the range of their operations.

Even so, intra-shareholding does not alter the exclusive territoriality of corporate laws. In the last decade, there has been some effort, chiefly from the United Nations ("UN"), to set out a multilateral treaty by which MNC conduct could be better regulated and that private actions against MNCs other than through the courts of host states could be agreed upon through the prism of private international law.[9] Despite multiple drafts of this treaty having been produced in the last couple of years, we are still not close to a final text.

When MNCs are allowed to operate in weak regulatory environments, it is clear that little or no meaningful development can ever take place in the sense of the human development index[10] and that human rights generally

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(2005).

7. *See* United Nations Conf. on Trade and Dev, *supra* note 5.

8. *See generally* BJÖRN P. EBERT, FORUM SHOPPING IN INTERNATIONAL INVESTMENT LAW: FORUM PLANNING, FORUM ENHANCEMENT, AND FACILITATION OF PROCEDURE 18–21 (2017).

9. *See* Larry Catá Backer, *Shaping a Global Law for Business Enterprises: Framing Principles and the Process of a Comprehensive Treaty on Business and Human Rights*, 42 N.C. J. INT'L L. 418, at 419–20 (2017); Ilias Bantekas, *The Emerging UN Business and Human Rights Treaty and its Codification of International Norms*, 12 GEO. MASON INT'L L. J. 1 (2021).

10. The three indicators of HDI are longevity, knowledge, and decent living standards. *See* UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 1990: CONCEPT AND MEASUREMENT OF HUMAN DEVELOPMENT, 11–12 (Oxford Univ. Press 1990); *see also* Amartya Sen, *Capability and Well-Being, in* THE QUALITY OF LIFE 30, 30 (Martha Nussbaum & Amartya Sen eds., Oxford Univ. Press 1993) (distinguishing between capabilities and wellbeing). Sen's capabilities approach demonstrates that well-being differs from welfare in that the latter concerns prosperity in terms of material needs. *See id.* He measures the developmental progress of states by reference to the capabilities of their citizens (capabilities approach) and distinguishes between positive and negative freedoms. *See id.* Sen, whose influence was significant in the formulation of the HDI, has argued that only bottom-up development is sustainable, whereas development driven exclusively by governments is unsustainable because of the violation of rights and the lack of empowerment

deteriorate.[11] Under such circumstances, inward investment becomes injurious to the host state because it culminates in the depletion of natural resources and assists corrupt regimes to consolidate their power while exacerbating poverty and under-development. This is absurd because investment is meant to augment growth and emulate solid democratic governance practices.[12] Poor regulation further breeds poor corporate conduct, driven by the desire of corporate directors to please shareholders and of elite service providers to find loopholes in the system. Transfer pricing is emblematic of why the business conduct of MNCs should be subject to extraterritorial control. Transfer pricing allows *all* the affiliates of an MNC to declare the *same* losses and expenses incurred in one jurisdiction in their own annual tax returns as long as they possess shares or some form of equity in that other affiliate. Hence, the same losses and expenses are declared in several national tax declarations around the world, even though they have only been incurred once and in only one jurisdiction. This mechanism allows all affiliates to decrease their tax burden and, in doing so, decrease the amount of tax owed to the country of incorporation, which in turn impacts social services and the enjoyment of fundamental rights.[13] Fortunately, the Organization for Economic Co-operation and Development ("OECD") is in the process of taking measures against transfer pricing through its Base Erosion and Profit Shifting ("BEPS") mechanism,[14] but such measures will

involved in the process. *See id.*

11. According to a 2017 survey by the Chartered Institute of Procurement and Supply ("CIPS"), 34% of business entities required by the UK Modern Slavery Act to complete the report/audit stipulated under the Act failed to do so, with a significantly large number found to have adopted no pertinent policies. *See* Jacki Brust, *Third of Firms Fail to Comply with Slavery Law*, CIPS NEWS (Sept. 6, 2017), https://www.cips.org/supply-management/news/2017/september/third-of-firms-fail-to-comply-with-slavery-law/. The survey was bleak in its conclusion that despite the disappointing findings, the industry was adamant that self-regulation was sufficient. *See id.*

12. *See* Zeng Huaqun, *Balance, Sustainable Development., and Integration: Innovative Path for BIT Practice*, 17 J. INT'L ECON. L. 299, 323 (2014) (arguing that the concepts of "balance" and "sustainable development" be inserted in BITs).

13. This has led to scholarly literature arguing in favor of a unitary taxation of MNCs. *See* Alexander Ezenagu, *Unitary Taxation of Multinationals: Implications for Sustainable Development*, CTR. FOR INT'L GOVERNANCE INNOVATION (Nov. 2019), https://www.cigionline.org/sites/default/files/documents/SDG%20PB%20no.4_0.pdf.

14. *International Collaboration to End Tax Avoidance*, OECD, https://www.oecd.org/tax/beps/ (last visited Jan. 30, 2021); *see* Ilias Bantekas,

not have global application absent a multilateral treaty. [15]

The aim of this article is to demonstrate the changes that are being put into place to alter the de-regulation of MNCs outside the state of incorporation, even in the absence of a multilateral treaty. These are not always obvious because in some cases they are not directed at extra-territorial MNC compliance. Section 2 explores the regulation of foreign investment through bilateral investment treaties ("BITs"), which by necessity implicates MNC human rights/ESG conduct, even if such regulation was never envisaged in BITs. Section 3 investigates the manner in which MNCs have become the subject matter of multilateral treaties (other than investment) as well as soft law instruments that are deemed more powerful than treaties. Section 4 examines the role of some domestic courts in their expansion of jurisdiction in respect of extra-territorial torts allegedly committed by MNCs. Section 5 takes a look at a dimension of MNCs that is not obvious; namely that of an influencer of governments in weak states, such that allows them to support more effective ESG despite otherwise lax legislation. Section 6 examines the new generation of extra-territorial corporate laws in discrete fields of regulation, chiefly associated with what is known as modern slavery. Even so, this is a development that was completely lacking a decade ago. Sections 7 and 8 explore new trends in the regulation of international trade. Although such discussions are devoid of any references to MNCs, it is beyond doubt that the beneficiaries from free trade agreements (FTAs) are in fact MNCs. Hence, the inclusion of human rights and ESC references in such FTAs produces significant implications for MNCs as well as states.

II. MNCS AS FOREIGN INVESTORS

Companies cannot set up subsidiaries abroad because each country regulates the incorporation of companies in its legal order. Hence, for a foreign company to control affiliates established in more than one country, it is necessary that the company and other affiliates incorporated elsewhere buy shares

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Inter-State Tax Arbitration in International Law, 8 J. INT'L DISP. SETTLEMENT 507 (2017) (explaining that while BEPS is the most progressive tax mechanism by which to deter transfer pricing, its application is limited).

15. *See generally* RICHARD S. COLLIER & JOSEPH L. ANDRUS, TRANSFER PRICING AND THE ARM'S LENGTH PRINCIPLE AFTER BEPS (2017) (analyzing the effectiveness of ALP and BEPS).

in each other (intra-shareholding) and appoint each affiliate's board of directors. This allows for a sufficient degree of control and coordination between the affiliates themselves and between the affiliates and the parent company without violating the incorporation rules of the territorial state.[16] This is a crude description of an MNC. Most MNCs never spell out the exact nature of this relationship and may in fact deny it in order to avoid tax liabilities and take advantage of preferential audit regimes.[17] The autonomy of the parent from its affiliate effectively means that whereas the affiliate may lawfully engage in conduct otherwise impermissible in the home state, it can engage in such conduct in the host state on account of its lax or weak regulatory framework.

Corporate entities, whether MNCs or other, are potent international actors requiring little diplomatic protection in disputes with foreign host states. Corporations satisfying the status of foreign investor because they operate in a state other than their own are entitled to three layers of protection: (1) international law, (2) domestic law, and (3) contract law. Protections under international law arise chiefly through bilateral investment treaties (BITs) and multilateral ones, such as free trade agreements (e.g., the Energy Charter Treaty or NAFTA), as well as general international law, including customary law. Where a general right (such as the right against unlawful expropriation, whether direct or indirect) or an investment guarantee (e.g., most favored nation, fair and equitable treatment, free repatriation of assets etc.) is found in a treaty or customary law it cannot be waived or restricted by domestic law or contract. More importantly, reference to investment or other arbitration under the BIT allows the investor to bypass the ordinary jurisdiction of the host state's

16. *See, e.g.*, OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 17 (2011), www.oecd.org/daf/inv/mne/48004323.pdf.

17. A particularly troubling practice is transfer pricing, whereby entities operating under the umbrella of a parent company fix the price of goods or services that are sold or exchanged between them. Transfer pricing is commonly used by MNCs as a profit allocation mechanism whereby MNCs spread their net profits or losses (before being taxed) to their various subsidiaries in countries wherein they operate so as to minimize the existence of taxable profits in a single jurisdiction. *See* Magdalena Sepúlveda Carmona (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. of the Special Rapporteur on Extreme Poverty and Hum. Rts., Magdalena Sepúlveda Carmona*, ¶¶ 74–78, U.N. Doc. A/HRC/26/28 (May 22, 2014). The Special Rapporteur noted that fiscal policies and unfair tax systems are among the "major determinant[s] in the enjoyment of human rights." *Id.* ¶ 1.

(usually biased) local courts. Protections under domestic law arise through local investment laws, which typically set out investment incentives in the form of investment guarantees, which are binding on the host state. Contract law eliminates the need for all investors to enter into a contract with the host state. Such contracts may overlap with the rights and guarantees under a BIT or customary law, but they may (and usually do) provide other rights and their governing law is the law of a state (e.g., English law). It has long been accepted that rights and guarantees in BITs, multilateral agreements, and customary law are construed under international law and cannot be trumped by domestic law or contract.[18] All three layers of protection are intended to safeguard against interference with the investment (right to property), while at the same time reaping its developmental value (e.g. meaningful job creation, technology transfer etc.) for the host state, although there may of course exist some tension between the two.

Despite the conferral of rights and obligations in BITs and general international law, foreign investors (in the form of MNCs) have been allowed to cherry-pick legal regimes in a manner that affords them a great degree of self-regulation. By way of illustration, they can impose (or at least negotiate) stabilization clauses in contracts with host states, whereby the latter agrees to freeze one or more of its laws for a certain time against a particular investor. Even though stabilization clauses fetter the authority of the state to legislate and obfuscate economic self-determination, their continued use demonstrates the power wielded by investors. In addition, the consistent practice of MNCs, in particular cross-border industries, creates rules recognized by courts and domestic laws as private custom. This rule-making capacity of corporate entities and MNCs is known as *lex mercatoria*,[19] and is part of a much larger field known as transnational law. Therefore, it is clear that MNCs not

18. In the eventuality of conflict between an investment treaty and the parties' contract, the tribunal will distinguish between disputes or violations arising from the treaty (and accordingly apply the governing law prescribed in the treaty) from disputes or violations arising from the contract (and accordingly apply the governing law prescribed there). Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Annulment of Arbitral Award, ¶¶ 26–37 (Feb. 5, 2002).

19. According to Teubner, the ultimate validation of *lex mercatoria* rests on the fact that not all legal orders are created by the nation-state and accordingly that private orders of regulation can create law. GUNTHER TEUBNER, *Global Bukowina: Pluralism in the World Society in* GLOBAL LAW WITHOUT A STATE 10–11, 15 (Gunther Teubner ed., 1997).

only enjoy a significant amount of international legal personality, but a large number of rights and guarantees as foreign investors.

Although MNCs enjoy a wide range of rights under international law, a rather different picture emerges as regards their respective obligations. While it is true that MNCs owe obligations to the host and home state under the terms of their concessions and corporate laws respectively, three issues remain outstanding: (1) international treaties do not as a rule confer obligations on MNCs, subject to observations discussed in following sections; (2) the corporate and other laws of the home state do not, as a rule, apply to MNCs operating abroad through independent affiliates; and (3) the laws of the host state, particularly those that protect human rights and the environment, may be curtailed or stifled by the terms of the contract with the MNC.

A. HUMAN RIGHTS AND FOREIGN DIRECT INVESTMENT

In the last decade, several model BITs have included provisions on human rights and environmental protection, as have the new generation of free trade agreements ("FTAs").[20] Even so, BITs are generally geared towards protecting the interests of investors from industrialized states, and developing host states are so eager to attract foreign direct investment ("FDI") that they are willing to lower their human rights and environmental standards.[21] This process is aptly described as a "race to the bottom." It has to be said, however, that the persistent problem with investment-related human rights is not

20. Examples include the 2012 U. S. Model Bilateral Investment Treaty, arts. 8(3)(c), 12–13; the Canadian 2021 Model Foreign Investment Promotion and Protection Agreement (FIPA), arts. 3, 4, 16(1-2); and their Norwegian counterpart, 2015 draft Model Agreement for the Promotion and Protection of Investments, pmbl., arts. 8(2), 11(1). Indirectly, art. 5.5 of the Model Text of the Indian BIT; art. 16 of the Brazilian Cooperation and Facilitation Investment Agreement (CFIA), which is effectively a model BIT/MIT.

21. Kenneth J. Vandervelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L.J. 469, 499 (2000) (arguing that "BITs seriously restrict the ability of host states to regulate foreign investment"). *See e.g.,* US Model BIT, *supra* note 20, art. 8 (prohibiting performance obligations beyond what is established by international law, such as employability quotas of nationals of the host state); *see also* Tarcisio Gazzini, *Bilateral Investment Treaties and Sustainable Development*, 15 J. WORLD INV. & TRADE 936, 962 (2014) (arguing that the aim of sustainable growth is not directly measurable against the investor guarantees offered in BITs).

so much the indifferent and/or abusive behavior of foreign investors or their home states, but: (1) host states' poor domestication and monitoring of their human rights obligations,[22] which to some degree is predicated on the provision of investment guarantees that are detrimental to poor host states; (2) the absence of a clear developmental plan and objectives in the pursuit of FDI; and 3) the relative absence of extra-territorial legislation by the home state on the activities of investors abroad.[23]

Indeed, in *Institute for Human Rights and Development in Africa v. Democratic Republic of the Congo*, a relatively small Australian mining company operating in Kilwa, DRC, was found to have assisted the DRC army in the killing of more than seventy civilians and several other serious international crimes.[24] The African Commission on Human and Peoples' Rights ("ACmHPR") identified the role of the mining company and recommended that the DRC government take specific measures to indemnify the victims and their families.[25] It is clear from this and similar situations that foreign investors would not have acted in the way they did had it not been for the poor regulatory environment in the host state. No doubt, such an environment may well be a manifestation of the unequal power relationship between developing host states and foreign investors. A brief overview of developing states' investment-related human rights obligations demonstrates that these are

22. *See* Comm. on Econ., Soc. & Cultural Rts., General Comment No. 24 on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, ¶ 13, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017) ("States parties should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist, as required under the principle of the binding character of treaties. The conclusion of such treaties should therefore be preceded by human rights impact assessments that take into account both the positive and negative human rights impacts of trade and investment treaties, including the contribution of such treaties to the realization of the right to development . . . The interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State . . . States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude.") (footnotes omitted).

23. *See* Ilias Bantekas, *The Linkages Between Business and Human Rights and Their Underlying Root Causes*, 43 HUM. RTS. Q. 118, 131 (2021).

24. *See generally* Inst. for Hum. Rts. and Dev. in Afr. v. Dem. Rep. Congo, Communication 393/10, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (June 18, 2016).

25. *Id.* ¶ 154.

weak, or vague, at best. Section 3 of the South African Protection of Investment Act 22 of 2015, which is among the very few with explicit reference to human rights treaties, reads:

> This Act must be interpreted and applied in a manner that is consistent with—
> (a) its purposes as contemplated by section 4;
> (b) the Constitution, including—
> (i) the interpretation of the Bill of Rights contemplated in section 39 of the Constitution;
> (ii) customary international law contemplated in section 232 of the Constitution; and
> (iii) international law contemplated in section 233 of the Constitution; and
> (c) any relevant convention or international agreement to which the Republic is or becomes a party.[26]

The South African Act is exceptional, however. The United Nations Conference on Trade and Development maintains a navigator of investment laws[27] and it is disappointing to see that very few, if any, such laws make direct reference to human rights treaty obligations,[28] as opposed to domestic law more generally, which may be overridden by BITs and, perhaps, contracts.

Apart from poor domestication of international human rights law, a potent tension in foreign investment law is that, sometimes, the legitimate regulatory power of the host state may be curtailed by investment guarantees under a BIT, contract, or host state laws. The *Tecmed* case is illustrative of this tension. It involved an investment agreement between Tecmed and

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26. Protection of Investment Act 22 of 2015 § 3 (S. Afr.).

27. United Nations Conference on Trade and Development, *Investment Laws Navigator*, INV. POL'Y HUB, https://investmentpolicy.unctad.org/investment-laws (last visited Sept. 17, 2023).

28. *See* Nicollo Zugliani, *Human Rights in International Investment Law: The 2016 Morocco-Nigeria Bilateral Investment Treaty*, 68 INT'L & COMP. L. Q. 765, 765–70 (2019). For notable exceptions see generally Reciprocal Investment Promotion And Protection Agreement Between The Government Of The Kingdom Of Morocco And The Government Of The Federal Republic Of Nigeria, Morocco-Nigeria, Dec. 3, 2016. (2016 Morocco-Nigeria BIT); Netherlands Model Investment Agreement, Mar. 22, 2019; Agreement Between The Government Of The Republic Of Belarus And The Government Of Hungary For The Promotion And Reciprocal Protection Of Investments, Belr.-Hung., Jan. 12, 2019, (2019 Belarus-Hungary BIT). *See also* Investment Agreement Between The Government Of Australia And The Government Of The Hong Kong Special Administrative Region Of The People's Republic Of China, Austl.-China, Mar. 26, 2019, art. 18, ¶1(b) (2019 Australia-Hong Kong BIT).

Mexico with the purpose of constructing a landfill.[29] Following the expiry of the first license period the Mexican government refused to renew the license, arguing correctly that the project caused adverse environmental and health effects on the local population.[30] As a result, the investment was effectively terminated, and the investor stood to suffer a financial loss.[31] The investment tribunal to which the dispute was referred held that the "government's intention [was] less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measure."[32] In *Philipp Morris v. Uruguay*, the tobacco giant filed for damages under the Swiss-Uruguay BIT when Uruguay imposed more stringent anti-smoking legislation in order to protect public health. [33] Though the claim was ultimately unsuccessful, it is emblematic of the tension between entrenched human rights and investor expectations.

Despite the often-cited fragmentation of international investment law from general international law, there are *some* signs of a human-centered investment architecture. Some model BITs are rendering human rights commitments an integral part of investment. The preamble to the 2015 Norwegian model BIT recognizes 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.[34]

Moreover, in its definition of national treatment in article

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29. Técnicas Medioambientales Tecmed SA v. Mexico, ICSID Case No. ARB/00/2, Award on Merits ¶ 35 (May 29, 2003).

30. *Id.* ¶ 99.

31. *Id.* ¶ 39.

32. *Id.* ¶ 116; *see also* Compãnía del Desarrollo de Santa Elena SA v. Costa Rica ICSID Case No. ARB/96/1, Award on Merits, ¶ 71 (Feb. 17, 2000).

33. Philip Morris Brands Sàrl, Philip Morris Products S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016); *see also* Philip Morris Asia Limited v. Australia, PCA Case No. 2012–12, Award (July 8, 2017).

34. 2015 draft Model Agreement for the Promotion and Protection of Investments, pmbl.

3(1) (i.e., that foreign investors shall be afforded the same treatment as the host state's nationals), as well as most favored nation (MFN) treatment, the BIT includes a very important footnote, which clarifies that:

> . . . a measure applied by a government in pursuance of legitimate policy objectives of public interest such as the protection of public health, human rights, labour rights, safety and the environment, although having a different effect on an investment or investor of another party, is not inconsistent with national treatment and most favoured nation treatment when justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investment.[35]

Even so, the problem with human rights stipulations in BITs is that they are meaningful only if they reinforce the human rights obligations of host states and, in the process, oblige investors to adhere to them. This is hardly the case. Powerful home states have demanded (through BITs and other agreements) that domestic host state laws, including human rights and environmental legislation, not be such as to effectively expropriate assets or strip foreign investors of legitimate investment guarantees. Although this seems like common sense, situations may well arise where a host state's generous BIT or contractual obligations towards a foreign investor are in violation of its treaty-based human rights obligations. Investment treaties deal with such issues by prioritizing breaches of investor guarantees over and above other (including human rights-based) considerations. Exceptionally, such preferential treatment may be side-lined (or carved out) through general exception clauses in investment treaties, as is the case with article 10 of the Canadian Foreign Investment Promotion and Protection Agreements ("FIPA").[36] Article 11 of the FIPA goes on to say that host States must not lower domestic standards when attracting foreign direct investment.[37] This "principle" is accompanied by a consultation mechanism:

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35. *Id.* art. 3(1).

36. Canadian 2021 Model Foreign Investment Promotion and Protection Agreement (FIPA), art. 10.

37. *Id.* art. 11.

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.[38]

The last sentence of article 11 would otherwise be a wonderful display of international solidarity that places the international protection of human rights and the environment above the host state's endeavor to attract foreign investment.[39] However, the authors are not aware of a single instance where such consultations have taken place.[40] Investment tribunals, with few exceptions,[41] are generally weary of allowing human rights claims by host states by which to override guarantees or rights owed to foreign investors.[42] Exceptionally, there is, in practice, a presumption in favor of tax sovereignty (and hence of fiscal self-determination) which renders expropriation claims almost

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38. *Id.*

39. *Accord* Norwegian Model Bilateral Investment Treaty, art. 11; *see also* French Model Bilateral Investment Treaty, art. 1, ¶ 6, 2006, ("Nothing in this agreement shall be construed to prevent any contracting party from taking any measure to regulate investment of foreign companies and the conditions of activities of these companies in the framework of policies designed to preserve and promote cultural and linguistic diversity.").

40. *See* Hupacasath First Nation v. Minister of Foreign Aff. of Can. [2015] FCA 4, (Can.), (upholding the 2013 judgment of the Federal Court, whereby the Canada/China BIT, which is similar to the FIPA, had not been proven to produce any appreciable and non-speculative effects on the rights and interests of the appellants).

41. *See* Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, Award on Merits, (Dec. 8, 2016).

42. *See* Brunno Simma, *Foreign Investment Arbitration: A Place for Human Rights?* 60 INT'L & COMPAR. L. REV. 573, 573 (2011); Edward Guntrip, *Self-determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law*, 65 INT'L & COMPAR. L. REV. 829 (2016); see *also* CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award on Merits, ¶ 121, (2005), ("[T]here is no question of affecting fundamental human rights when considering the [application of the investment guarantees] contemplated by the parties.").

redundant.[43] In the *Methanex* case, the tribunal held that the banning of a harmful gasoline additive was legitimate because it was not discriminatory and was undertaken within the scope of the host state's bona fide police powers.[44] The tribunal in *Saluka* fleshed out the competing tensions as follows:

> It is now established in international law that states are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare. . . . [Given the absence of an appropriate international definition] it thus inevitably falls to the adjudicator to determine whether particular conduct by a state crosses the line that separates valid regulatory activity from expropriation.[45]

A similar approach was recently adopted in *Mamidoil* v. *Albania*, which concerned a fuel distributor's claim that reforms by Albania to its maritime transport sector in pursuit of an environmental policy amounted to creeping expropriation.[46] The International Centre for the Settlement of Investment Disputes ("ICSID") tribunal held that the claimant could not benefit from the BIT because the investment had been undertaken in violation of Albanian law and as a result, no legitimate expectations could be lawfully anticipated.[47] Moreover, the adoption of environmentally friendly laws was within the host state's "legitimate policy choices" given that the only impact on the investment was a decrease in profits.[48] Regulatory sovereignty as a means of promoting and fulfilling fundamental socio-economic policies has been recognized by investment

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43. *See* El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award on Merits, ¶ 297 (Oct. 31, 2011), (stating the export withholding taxes imposed on the investor to be "reasonable governmental regulation within the context of the [Argentinian] crisis"); s*ee also* Ali Lazem & Ilias Bantekas, *The Treatment of Tax as Expropriation in International Investor–State Arbitration*, 30 ARB. INT'L 1, 85 (2015).

44. Methanex Corp v. United States of America, UNCITRAL Rules, Award on Merits part IV, ¶ 7 (Aug. 3, 2005).

45. *See* Saluka Inv. BV (Neth. v. Czech), Partial Award, ¶¶ 255, 262–64 (Perm. Ct. Arb. 2006).

46. *See* Mamidoil Jetoil Greek Petroleum Prod. Societe S.A. v. Republic of Alb., ICSID Case No. ARB/11/24, Award, ¶¶ 500–01 (Mar. 30, 2015).

47. *Id.* ¶ 695.

48. *Id.* ¶¶ 573–74, 731–35.

tribunals. In *Postova Banka AS and Istrokapital SE v. Greece*, an ICSID tribunal noted in respect of measures adopted by Greece following its debt crisis that "[i]n sum, sovereign debt is an instrument of government monetary and economic policy and its impact at the local and international levels makes it an important tool for the handling of social and economic policies of a State."[49] The fact that host states possess authority to undertake regulatory actions in the pursuit of general welfare (i.e. for a public purpose) does not mean that they can directly or indirectly substantially deprive the enjoyment of the investment in an arbitrary and discriminatory manner. Meaningful investments are crucial to the economic development of states.

The stance of the ICSID tribunal in *Postova Banka* is a rarity but has been emulated elsewhere. In a string of investor claims against Argentina arising from measures taken by that country in the water and sewage industries (both of which were heavily privatized) to safeguard fundamental rights in the wake of its financial crisis, the tribunal in *Urbaser* adopted an interpretation of the relevant BIT that was consistent with Argentina's human rights treaty obligations:

> The Tribunal further retains that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of May 23, 1969, and that Article 31 para 3 (c) of that Treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties." The BIT cannot be interpreted and applied in a vacuum. The Tribunal must certainly be mindful of the BIT's special purpose as a Treaty promoting foreign investments, but it cannot do so without taking the relevant rules of international law into account. The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.[50]

A note of caution is necessary. Investment tribunals will not as

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49. Postova Banka, A.S. and Istrokapital SE v. The Hellenic Republic, ICSID Case No. ARB/13/8, Award, ¶ 324 (Apr. 9, 2015).

50. *Compare* Urbaser S.A., ICSID Case No. ARB/07/26, ¶ 1200, *with* Suez, Sociedad General de Aguas de Barcelona S.A. v. Arg., ICSID Case No. ARB/03/17, Decision on Liability, ¶ 240 (July 30, 2010) (showing a similar factual pattern but with different results).

a rule find that human rights treaties constitute a benchmark for the interpretation and application of BITs, or that in the event of conflict BITs are superseded by human rights treaties. Hence, the *Urbaser* award is a beautiful anomaly that transcends the artificial constraints of investment tribunals but certainly showcases how investment tribunals should interpret the parties' treaty obligations.[51]

III. EMERGING HUMAN RIGHTS OBLIGATIONS OF MNCS IN MULTILATERAL TREATIES AND SOFT LAW

International treaties do not confer human rights obligations upon MNCs. Some, however, do so indirectly and this is achieved in two ways. The first comprises provisions that call on state parties to eliminate prohibited conduct from corporate practice. Article 2(e) of the Convention on the Elimination of Discrimination Against Women ("CEDAW"),[52] for example, and article 2(1)(d) of the International Convention on the Elimination of all Forms of Racial Discrimination ("ICERD")[53] require states to take all appropriate measures to eliminate discrimination by both public and private entities, thus implicitly encompassing corporations.

The second type of obligation arises from corporate criminal liability provisions in treaties, which suggest that corporations can and do bear criminal (and administrative) liability. This is true with respect of anti-corruption treaties, particularly articles 2 and 3(2) of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[54] and Article 26 of the 2003 UN Convention

51. *See* Phoenix Action Ltd. v. Czech, ICSID Case No. ARB/06/5, Award, ¶ 78 (Apr. 15, 2009) ("To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture, of genocide, or in support of slavery or trafficking of human organs.").

52. As the article says, "(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise." Convention on the Elimination of Discrimination Against Women, art. 2(e), Dec. 18, 1979, 1249 U.N.T.S. 13.

53. The article reads, "(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization." International Convention on the Elimination of all Forms of Racial Discrimination, art. 2(1)(d), Dec. 21, 1965, 660 U.N.T.S. 195.

54. Article 2 reads, "[e]ach Party shall take such measures as may be

against Corruption, [55] among others. It is assumed that because a corporation incurs criminal liability it is under an obligation not only to prevent the conduct in question but also to respect the underlying right or freedom. The right to be free from corruption encompasses numerous underlying entitlements that are not immediately clear. Given that it involves a country's resources and culminates in the deprivation of social welfare services and goods, corruption denies the right to economic self-determination, the right to food, water, health, social security, adequate standard of living, and the overarching right to be free from poverty.

In fact, both treaty bodies and domestic courts have held in unequivocal terms that although human rights obligations are addressed to states, where their implementation is undertaken through the medium of corporate entities, the rights in question are also shouldered by the corporation in addition to the state. In *Etcheverry* v. *Omint* the applicant, who was an HIV sufferer, was provided by his employer with membership of a private health plan.[56] When he was later made redundant, he sought to continue his membership through private funds, but the insurance company refused.[57] The Argentine Supreme Court held that private health providers were under a duty to protect

necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official." Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2, Dec. 17, 1997, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0293. Article 3(2) reads, "[i]n the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials." *Id.,* at 3(2).

55. Article 26 says, "1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention. 2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative. 3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences. 4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions." United Nations Convention against Corruption, art. 26, Oct. 31, 2003, 2349 U.N.T.S. 41.

56. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13 Mar. 2001, Etcheverry v. Omint Sociedad Anónima y Servicios ¶ 5 (Arg.).

57. *Id.*

the right to health of their customers and that their special relationship was not simply of a contractual nature.[58] Given the ever-growing privatization of otherwise public social services, such as education, sanitation, water supply, utilities, health care and pensions, the obligations of corporate entities administering these services must be read in the light of duties to rights-bearers.[59]

Besides reading these human rights obligations in the relevant treaties, it is important to emphasize that in the early 1980s a movement began whose aim was to impose direct human rights obligations on MNCs. This started off as a standard-setting exercise in the form of non-binding guidelines issued by NGOs, business circles or intergovernmental organizations with the hope that MNCs would voluntarily adhere, whether by reason of commitment or reputational fear. Among the many hundreds of these instruments, one may highlight Social Accountability ("SA") 8000,[60] the Caux Principles for Business,[61] the Extractive Industries Transparency Initiative,[62] the UN Global Compact and the OECD Guidelines for Multinational Enterprises. The UN Global Compact, for example, is comprised of ten principles founded on the International Bill of Human Rights, the Rio Declaration on Environment and Development and anti-corruption treaties.[63]

A large number of MNCs jumped enthusiastically on the bandwagon of these initiatives and despite their non-binding character many MNCs implemented them through the adoption of corporate policies.[64] Moreover, the advancement of corporate

58. *Id.* ¶¶ 12–14.

59. *See* Statement, ESCOR, Statement on the Obligations of States parties regarding the corporate sector and economic, social and cultural rights (July 12, 2011) and Communication, ESCOR, Views of the Committee on Economic, Social and Cultural Rights under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Jan. 28, 2014).

60. *See* Soc. Accountability Int'l, *SA8000 Standards*, https://sa-intl.org/programs/sa8000/ (last visited Sep. 16, 2023, 2:55 PM).

61. *See* Caux Round Table for Moral Capitalism, *Principles*, https://www.cauxroundtable.org/principles/ (last visited Sep. 16, 2023, 3:01 PM).

62. EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, https://eiti.org/ (last visited Sep. 18, 2023).

63. *The Ten Principles of the UN Global Compact*, U.N. GLOBAL COMPACT (last visited Sep. 18, 2023), https://unglobalcompact.org/what-is-gc/mission/principles.

64. *See* Ilias Bantekas & Alexander Ezenagu, *Ethical Considerations in Financial (Tax) and Non-Financial Corporate Human Rights Reporting,* 28 UNIV. MIA. INT'L & COMPAR. L. REV. 267, 267 (2021) (finding that neither the

social responsibility has given rise to a trend of voluntary social reporting which makes transparent the human rights and environmental record of MNCs, which in turn induces them to improve. The reporting of financial, social, and environmental information within single or separate reports is known as a "triple bottom line."[65] An illustrative example is the Global Reporting Initiative ("GRI").[66] Its mission is to develop reporting and verification guidelines in respect of economic, environmental, and social performance.[67] The GRI guidelines serve as performance indicators for the corporations, as well as a measure of comparison within a particular industry. Reports prepared on the basis of the GRI guidelines should be transparent, inclusive (i.e., involve the views of all stakeholders), auditable, complete, relevant, built within a sustainability context, accurate, neutral, comparable, clear and timely.[68] Even so, as will be demonstrated elsewhere, private self-assessments in the form of human rights impact assessments ("HRIAs") are non-transparent, their indicators too broad and their ethical underpinnings have been given very little, if any, consideration.[69]

This euphoria that came with voluntary mechanisms was perceived by an expert subsidiary body of the UN Commission on Human Rights as a signal that MNCs were not wholly hostile towards the move from voluntary to more binding obligations. This perception was ultimately erroneous, culminating in the rejection by the business community of the more assertive Norms on Transnational Corporations and Other Business Enterprises with Regard to Human Rights.[70] The Norms sought to impose on MNCs the same range of human rights obligations

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operators of human rights impact assessments (HRIAs) nor audited companies, at least in any manner that is publicly detectable, impose any ethical conduct on human rights auditors).

65. *Id.*

66. *Home,* GLOBAL REPORTING INITIATIVE, https://www.globalreporting.org/ (last visited Oct. 4, 2023, 5:15 PM).

67. *Our mission and history,* GLOBAL REPORTING INITIATIVE, https://www.globalreporting.org/about-gri/mission-history/ (last visited Oct. 4, 2023, 5:17 PM).

68. *Id.*

69. Bantekas & Ezenagu, *supra* note 64. Neither individual auditors nor human rights audit firms have set up independent regulatory bodies that would regulate auditors and audit firms. *Id.*

70. *See generally* Comm'n. on Hum. Rts., *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/12/Rev.2 (Aug. 26, 2003).

under international law as those addressed to states, namely, to promote, respect and fulfill human rights. The Norms' expansive approach linked corporate liability not only to the company's control over particular conduct but also to its influence and benefit. The proposal created deep divisions between the business community and human rights advocates and was abandoned in favor of a special procedure that would undertake an assessment of MNCs' existing human rights obligations.

The UN Secretary-General's Special Representative on Business and Human Rights, John Ruggie, introduced three core principles on the basis of a differentiated yet complementary framework of responsibilities between MNCs and states. These consist of: (1) "the State duty to protect against human rights abuses by third parties,"[71] including business; (2) "the corporate responsibility to respect human rights;"[72] and (3) "the need for more effective access to remedies."[73] In 2011 these were formalized into a set of Guiding Principles on Business and Human Rights: Implementing the UN Protect, Respect and Remedy Framework, which were endorsed by the UN Human Rights Council.[74] Because the Special Representative had worked very closely with the business community for a period of six years and the Principles were realistic, they have very rapidly been accepted as an authoritative statement of MNCs' human rights responsibilities (as opposed to obligations).

At the heart of the Guiding Principles is the notion that states must protect against human rights abuses occurring on their territory by MNCs and other private entities. To this end they must undertake appropriate legislative and enforcement measures and should set out clearly the human rights responsibilities of MNCs and ensure among other things that laws pertinent to business enterprises, such as corporate law, enable business respect for human rights.[75] The dilemma about whether a state should choose to violate a treaty obligation

71. *See* John Ruggie (Special Representative of the Secretary-General), Hum. Rts. Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5, ¶ 9 (Apr. 7, 2008).

72. *Id.*

73. *Id.*

74. *See generally* John Ruggie (Special Representative of the Secretary-General), Hum. Rts. Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31, (Mar. 21, 2011) [hereinafter Guiding Principles on Business and Human Rights].

75. *Id.*

rather than its human rights obligations should not arise in the first place, proclaims principle 9, and the growing investment jurisprudence on the sovereign regulatory authority of host states, as explored in the next section, confirms this principle.

Business and human rights soft law has become so extensive that some mechanisms even encompass an enforcement dimension. The OECD Guidelines on Multinational Enterprises, for example, although voluntary for businesses, requires adhering states to "make a binding commitment to implement them."[76] As a result, adhering states undertake to set up national contact points (NCPs) in order to "further the effectiveness" of the Guidelines. Complainants, which could be anyone, may make a complaint alleging that businesses are in violation of the Guidelines and in turn seek some kind of resolution.[77] The 2011 revision of the Guidelines highlights the responsibility of business to respect rights, which itself arises from the UN Guiding Principles on Business and Human Rights.[78]

Many treaty bodies have highlighted that states have a responsibility to regulate MNCs (and other private parties) in the discharge of their human rights duties.[79] The Human Rights Committee ("HRCtee") emphasized in General Comment 31 that the positive obligations on states parties to ensure Covenant rights will only be fully discharged if individuals are protected by the state, not just against violations of Covenant rights by its agents, but also by acts committed by private persons or entities."[80] This positive duty is expounded further by human rights courts dealing with acts endangering life and health,

76. OECD, *OECD Guidelines for Multinational Enterprises*, at 13, (2011), http://dx.doi.org/10.1787/9789264115415-en.

77. *Id*. at 71.

78. *Id*. at 31.

79. Comm. on Econ., Soc. and Cultural Rts., General Comment No. 18: The Right to Work, ¶ 35, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006); Comm. on Econ., Soc. and Cultural Rts., General Comment No. 15: The Right to Water, ¶ 23, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); Comm. on Econ., Soc. and Cultural Rts., ¶ 11, U.N. Doc. E/1995/22; Comm. on the Elimination of Discrimination against Women, General Recommendation 25, ¶ 7, 29, 31–32; Comm. on the Elimination of Discrimination against Women, General Recommendation 24, ¶ 17; Human Rts. Comm., General Comment 28, ¶ 31.

80. Hum. Rts. Comm., General Comment 31, ¶ 8. *See also* Arenz et al. v. Germany, Human Rts. Comm., Communication No. 1138/2002, U.N. Doc. CCPR/C/80/D/1138/2002 (24 Mar. 2004), ¶ 8.5 and Cabal & Pasini Bertran v. Australia, Human Rts. Comm., No. 1020/2001, U.N. Doc. CCPR/C/78/D/1020/2001 (7 Aug. 2003), ¶ 7.2, (discussing the admissibility of individual communications relating to abuse by private parties.)

particularly the European Court of Human Rights.[81]

IV. MNC LIABILITY UNDER TORT LAW

The corporate responsibility to respect human rights is complementary to that of states. At the very least, MNCs must respect domestic human rights law in their country of operation. This entails a duty to "avoid infringing the human rights of others and addressing adverse human rights" effects caused by their operations.[82] The Principles clearly suggest that, where domestic law falls below fundamental human rights, MNCs should seek ways of honoring them.[83] Although MNCs are not the direct bearers of duties under international human rights law, they are nonetheless obliged to respect human rights to the degree that these are prejudiced by their operations and so they have the capacity to take appropriate action. This obligation is premised on a threefold dimension. First, MNCs should adopt policy commitments upon which all future internal and external company dealings must be predicated. For example, a policy commitment to respect the right to water should be interpreted by the company's legal team and management board as prohibiting all contracts that infringe this right, including arbitral suits which, if successful, risk depriving a local population of its right to water.[84] Although there is not consistent practice within policy commitments, these public instruments make available all relevant company information to the company's stakeholders, including affected communities and consumers. A consumer could reasonably argue that the policy commitments are an integral part of its agreement with the company through the so-called incorporation by reference doctrine, which is arguably a general principle of contract law.[85]

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81. *See* Osman v. United Kingdom, 29 Eur. Ct. H.R. 245, ¶ 115 (1998).

82. Guiding Principles on Business and Human Rights, *supra* note 74, ¶ 11.

83. *Id.* ¶ 23.

84. *See id.* ¶ 19.

85. Incorporation by reference means that reference in a contract to any policy, terms, or other document, is binding on the parties, provided that the reference is such as to make that document part of the contract. It is generally accepted that the instrument incorporated by reference need not be an agreement previously concluded by the parties. It may just as well be one of the parties' standard terms or an instrument to which none of the parties has any other relationship. *See generally* Thyssen Canada Ltd v. Mariana, [2000] 3 F.C. 398 (Can.); Fai Tak Eng'g Co. Ltd v. Sui Chong Constr. & Eng'g Co. Ltd [2009] HKDC 141 (H.K.).

In any event, there are sensible restrictions on what a corporation can publicly claim, even if its statements are not viewed from the perspective of contract or tort. In *Kasky* v. *Nike* an activist sued Nike Corporation, arguing that it had used false advertising in a publicity campaign to defend itself against accusations of engaging in manufacturing under inhuman manufacturing conditions in Asia.[86] The California Supreme Court argued that since a company's public statements could conceivably persuade consumers to buy its products, such statements deserve only limited freedom of speech protection.[87] The responsibility of MNCs to respect international human rights law in the course of their operations, especially extraterritorially, is not a mere theoretical construction. This responsibility has been enforced since World War II in cases where a number of senior industrialists were convicted for their role in accepting slave labor provided by the Nazis in their factories.[88] As far as the Guiding Principles are concerned, the human rights responsibilities of MNCs and their corresponding liability may arise in three situations: (1) by directly committing a violation, (2) by means of complicity, and (3), by failing to use leverage where the MNC has the "ability to effect change in the wrongful practices of an entity that causes a harm."[89] In *Doe* v. *Unocal*, a group of companies, including an American one, had undertaken the construction of a pipeline project in Myanmar. The regime of the country was notoriously brutal and autocratic, so it was no surprise that the government procured local workers under conditions of enforced labor. The same people endured acts of murder and rape by the government while working on the project. The plaintiffs relied on the US Aliens Tort Claims Act ("ATCA"), which confers federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[90] When they filed a suit in the United States under the ATCA there was no contention that Unocal had orchestrated the violations, but it

86. *See* Kasky v. Nike, Inc., 45 P.3d 243, 319 (Cal. Sup. Ct. 2002), *cert. dismissed as improvidently granted,* Nike, Inc. v. Kasky, 539 U.S. 654 (2003).

87. *Id.*

88. *See* United States v. Krauch, 15 ILR 668 (U.S. Mil. Trib. for the Trials at Nuremberg (July 29, 1948); *see also* United States v. Flick,14 ILR 266 (U.S. Mil. Trib. for the Trials at Nuremberg (Dec. 22, 1947); *see also* United States v. Krupp, 15 ILR 620 (U.S. Mil. Trib. for the Trials at Nuremberg (June 30, 1948).

89. *See* Guiding Principles on Business and Human Rights, *supra* note 74, ¶¶ 17, 19.

90. 28 U.S.C. § 1350 (1948).

was clear that it had accepted the situation in full knowledge of the laborers' predicament. The California District Court held that MNCs may be held liable for violations of treaties and customary law independently of the actions of states, as well as for state-like acts or state-related conduct.[91] This ruling conformed with the extraterritorial rationale of the ATCA but has subsequently been eroded by the United States Supreme Court.

In 2010, the Second Circuit Court of Appeals in *Kiobel* v. *Royal Dutch Petroleum Co.* entertained a suit by Nigerian nationals alleging that various MNCs, including the sued oil giant, were complicit in human rights violations in Nigeria.[92] The allegations were dismissed on the ground that the ATCA does not allow claims against corporations.[93] Upon granting certiorari, the United States Supreme Court affirmed the District Court's ruling against the extraterritorial presumption of claims under the ATCA, holding that

> all the relevant conduct took place outside the United States . . . and even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application . . . Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.[94]

The Supreme Court's opinion seems to exclude tort claims alleging violations of customary law based solely on conduct occurring abroad.[95] However, given that the Supreme Court never actually stated that corporations can never incur criminal liability, other district courts have taken exceptional the view that corporations can indeed be found liable under the ATCA.

In *Re South Africa Apartheid Litigation*, a tort action was brought against US corporations, such as Ford and IBM, alleging that they were complicit in violations during the apartheid era by manufacturing vehicles and computers for the

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91. Doe v. Unocal Corp., 963 F.Supp. 880, 890–91 (C.D. Cal. 1997), *aff'd*, 248 F.3d 915 (9th Cir. 2001).

92. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 124 (2d Cir. 2010).

93. *Id.* at 149.

94. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013).

95. Balintulo v. Daimler AG, 727 F.3d 174, 182 (2d Cir. 2013).

then racist South African regime.[96] The court distinguished whether particular conduct violates a universal international norm, which is regulated by international law, and the question of who bears liability for the conduct, which is a matter for domestic law.[97] The court had no problem finding that corporations can indeed incur liability in tort, rejecting the idea that a group of individuals could escape liability simply because they had incorporated into a legal person.[98]

Of equal importance are cases which the parties settle, even under strict confidentiality, because they demonstrate that the courts of the parent company are willing to entertain suits brought by foreign victims. In the *Trafigura* case, thirty-one Ivorians sued Trafigura, a Dutch company, in London for illegally dumping hundreds of tons of toxic waste in an area outside Abidjan, which ultimately had a serious health impact. Trafigura was reported as having agreed to a significant settlement with both the victims and the Ivorian government, the details of which were never officially disclosed.

In 2014, the Human Rights Council adopted Resolution 26/22, requesting the Office of the High Commission for Human Rights ("OHCHR") "to facilitate the sharing and exploration of the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses."[99] The OHCHR had already set up its Accountability and Remedy Project and issued a comprehensive report in 2016.[100] The report noted that poor access to judicial remedies was the result of "fragmented, poorly designed or incomplete legal regimes; lack of legal development;

96. *In re* South Africa Apartheid Litigation, 617 F.Supp. 2d 228, 241–42 (S.D.N.Y. 2014).

97. *Id.,* at 248.

98. *Id.*; *see also* Doe v. Nestle USA, Inc., 766 F.3d 1013, 1022 (9th Cir. 2014) (holding that allegations whereby the corporation was aware of child slavery among its supply chain, yet nonetheless retained these suppliers to enhance profits, were sufficient to establish the "aiding and abetting" of child slavery under the ATCA).

99. Human Rights Council Res. 26/22, U.N. Doc. A/HRC/RES/26/22, at 3 (June 27, 2014).

100. *See OHCHR Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses*, OHCHR, https://www.ohchr.org/en/business/ohchr-accountability-and-remedy-project, (last visited Sept. 17, 2023, 11:29 PM). *See generally* U.N. High Comm'r. for Hum. Rts., *Improving Accountability and Access to Remedy for Victims of Business-related Human Rights Abuses,* U.N. Doc. A/HRC/32/19 (May 10, 2016).

lack of awareness of the scope and operation of regimes; structural complexities within business enterprises; problems in gaining access to sufficient funding for private law claims; and a lack of enforcement."[101] While state-based judicial mechanisms were identified as key to accessing adequate remedies, the report highlighted the importance of state-based non-judicial mechanisms and non-state grievance mechanisms.[102] By way of illustration, there is a proliferation of agreements between corporations and local communities, the purpose of which is to set up grievance mechanisms, adequate consultation and disclosure. [103] In 2011, the mining law committee of the International Bar Association produced a model mining agreement for use by mining companies and mining communities known as the Model Mine Development Agreement ("MMDA").[104] Although the MMDA recognises that mining projects must be financially viable, it also asks the parties to take a broader look at the social, natural, and economic environments of their operations. The Agreement imposes human rights obligations on the parties,[105] the duty to negotiate community development agreements with the local population,[106] as well as a company grievance mechanism with access rights for the community.[107]

V. MNCS AS INFLUENCERS AND THEIR DUE DILIGENCE OBLIGATIONS

What is evident thus far is that despite the lack of direct obligations on MNCs in countries whose laws favor or turn a blind eye to human rights violations, MNCs can play a distinct role in protecting human rights. They can do this because of their asymmetric financial relationship with the host nation. CocaCola Co., for example, declared a net profit of US$9.54

101. U.N. High Comm'r. for Hum. Rts., *supra* note 100, ¶ 4.

102. *Id.* ¶ 3.

103. *See* Native Title Act, 1993 (Act No. 110/1993) (Austl.) at 174 and 196; *see also* Oil and Gas Act (c. 162/2002) (Yukon Can.) at 64 (regarding statutory obligations to resolve such disputes involving a human rights element through arbitration).

104. International Bar Association, Model Mine Development Agreement 1.0, April 4, 2011, MMDA PROJECT, https://www.mmdaproject.org/.

105. *Id.* at 82.

106. *Id.* at 109.

107. *Id.* at 123.

billion in 2022,[108] while the gross domestic product ("GDP") of Malawi US$9.8 billion,[109] US$6.2 million for Togo,[110] and a meager US$4.6 million for Sierra Leone.[111] No doubt, this asymmetry, if coupled with a sincere corporate commitment to human rights, grants MNCs sufficient negotiating power vis-à-vis the host state to ensure compliance with human rights. Specifically (but not exclusively) within the context of its operations, despite domestic laws and practices to the contrary. Although under no obligation, powerful MNCs can equally exert their influence on local governments to abstain from committing human rights violations.

MNCs have been criticized not only for failing to exert their influence over governments with which they are in close collaboration but also for undermining the realization of rights and the environment by "exerting undue influence over domestic and international decision-makers and public institutions." This phenomenon is known as corporate capture.[112] No doubt, lobbying is a democratic right, but unchecked it risks corroding trust in public institutions.[113]

The exertion of influence and defiance of arbitrary laws and practices by MNCs has been found to give them a reputational advantage in the global consumer market, as the *Ogoniland* case aptly demonstrated.[114] In 1995 the Abacha regime in Nigeria

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108. *CocaCola Net Income 2010-2023,* MACROTRENDS, https://www.macrotrends.net/stocks/charts/KO/cocacola/net-income#:~:text=CocaCola%20net%20income%20for%20the%20twelve%20months%20ending%20June%2030,a%2026.13%25%20increase%20from%202020 (last visited Nov. 4, 2023).

109. *Malawi GDP*, WORLDOMETER, https://www.worldometers.info/gdp/malawi-gdp/#:~:text=Nominal%20(current)%20Gross%20Domestic%20Product,when%20Real%20GDP%20was%20%2411%2C205%2C123%2C955 (last visited Nov. 4, 2023).

110. *Togo GDP*, WORLDOMETER, https://www.worldometers.info/gdp/togo-gdp/#:~:text=Nominal%20(current)%20Gross%20Domestic%20Product,when%20Real%20GDP%20was%20%247%2C461%2C731%2C407 (last visited Nov. 4, 2023).

111. *Sierra Leone GDP*, WORLDOMETER, https://www.worldometers.info/gdp/sierra-leone-gdp/#:~:text=Nominal%20(current)%20Gross%20Domestic%20Product,when%20Real%20GDP%20was%20%245%2C214%2C643%2C812 (last visited Nov. 4, 2023).

112. *See Corporate Capture Project,* ESCR-NET, https://www.escr-net.org/corporateaccountability/corporatecapture (last visited Sept. 15, 2023).

113. *See* Barry Solaiman, *Lobbying in the UK: Towards Robust Regulation*, 73 PARLIAMENTARY AFFS. 270, 270 (2021).

114. *See* Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria (Communication No. 155/96)

executed Ken Saro Wiwa and other activists who had fought a public campaign showing that the oil giant Shell had colluded with the authorities in oil-rich Ogoniland to expel the defiant local population.[115] Moreover, it was demonstrated that both the government and Shell were responsible for polluting the water and other natural habitats to the detriment of the people's health.[116] Weeks prior to Wiwa's deplorable execution, Shell was petitioned by NGOs worldwide to intervene and use its influence to avert the government's plan.[117] Shell adamantly refused to be dragged into local politics, but following Wiwa's execution, the company's public image and finances suffered such a shock that it proceeded to change its official policy on human rights in 1997 through its General Business Principles.[118] Consumer pressure is a significant aspect in the voluntary human rights policies and public pledges of MNCs and to a large degree has helped shape these policies.[119] It is no wonder that several models of corporate responsibility have been suggested by reference to corporate involvement in structural injustice. Iris Young's social connection model of responsibility, for example, posits that all agents who contribute by their actions to the structural processes that produce injustice have responsibilities to work to remedy these injustices.[120]

In between the responsibility to adopt corporate policies and prevent human rights violations through non-complicity, including the use of adequate leverage, MNCs are under a duty to undertake human rights due diligence. Just like environmental impact assessment studies, which are now mandatory in all projects, human rights due diligence aims to

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(Communication 155 of 1996) 2001 ACHPR 35, ¶ 50 (27 October 2001).

115. *Id.*

116. *Id.*

117. *See* Kristian Tangen, Kare Rudsar, & Helge Ole Bergesen, *Confronting the Ghost: Shell's Human Rights Strategy, in* HUMAN RIGHTS IN THE OIL INDUSTRY 185, 187 (Asbjorn Eide et al. eds., 2000).

118. *Id.,* at 188.

119. *See* Corporate Social Responsibility Survey (illustration), in Cone Corporate Citizenship Study, Opinion Research Corporation International (2002), https://conecomm.com/ (studying US consumer awareness of a corporation's negative corporate social responsibility (CSR) practice). If a consumer was aware of the negative CSR practice, 91% would most probably prefer another firm, 85% would disseminate this information to family or friends, 83% would refuse to invest in that company, 80% would refuse to work at that company and 76% would boycott its products. *Id.*

120. *See* I. M. Young, *Responsibility and Global Justice: A Social Connection Model*, 23 SOC. PHIL. & POL'Y. 102, 105 (2006).

identify, prevent, mitigate, and account for the adverse human rights effects of corporate operations.[121] This should be an ongoing process and must consider all those factors where the MNC might cause or contribute to a negative impact through its own activities, or by a direct link to its operations, products, services, or even by its business relationships.[122] By way of illustration, a garments producer setting up a production line in a developing country should be alert to the following factors, among others, that can have a negative human rights impact: whether its suppliers are employing children and if they are in conformity with international labor standards;[123] whether the authorities are discharging waste from the plant into potable reservoirs or agricultural land; and whether its own workers are prevented by government orders from striking. Due diligence of this nature essentially ensures that all the corporation's departments and suppliers are in conformity with human rights law.[124]

Unless due diligence obligations move beyond their current

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121. *See e.g.*, Corte Constitucional de Columbia [C.C] [Constitutional Court of Columbia], Sala Sexta de Revisión, 21 de marzo de 2013, Nilson Pinilla Pinilla, Sentencia T-154/13, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) (holding that the right to a healthy environment created an obligation on the operator of a coal mine, especially in accordance with the protective and precautionary principles). As one summary of the case notes, the operator was to take "effective measures to prevent environmental degradation and health risks." *See Tutela action filed by Orlando José Morales Ramos against Drummond Ltd.*, ESCR-NET, https://www.escr-net.org/caselaw/2014/tutela-action-filed-orlando-jose-morales-ramos-against-drummond-ltd (last visited Oct. 4, 2023, 8:52 PM). *See also* Corte Suprema de Justicia [C.S.J.] [Supreme Court], 25 septiembre 2013, "SOLANGE BORDONES CARTAGENA Y OTROS c. COMPAÑIA MINERA NEVADA SPA Y OTRA," Rol N° 5339-2013, In Jurisprudential Search engine of the Supreme Court (https://juris.pjud.cl/busqueda/u?k7jv) (Chile).

122. Guiding Principles on Business and Human Rights, *supra* note 74, ¶ 17.

123. For an example of Shell's heavy emphasis on human rights, see *Shell Supplier Principles*, SHELL GLOB. SOL. INT'L, (2019), https://www.shell.com/business-customers/powering-progress-in-supply-chain/supplier-principles/_jcr_content/root/main/section/simple/simple/call_to_action_copy__1059910774/links/item0.stream/1650989312784/efd2c5fdab8a47d568fadd517af5f8b83c8d2fc8/shell-supplier-principles-online-eng-final.pdf.

124. For an example of a binding Accord between brands and trade unions in Bangladesh following a devastating fire that caused loss of life to many Bangladeshi garment laborers as a result of poor health and safety, see 2018 Accord on Fire and Building Safety in Bangladesh, July 1, 2018, https://bangladesh.wpengine.com/wp-content/uploads/2020/11/2018-Accord.pdf.

self-regulated character where content, procedure, and ethics are optional and subject to the contractual relationship between auditor and audited company, human rights audits will suffer from significant ethical pitfalls and culminate in box-ticking exercises.[125] Despite the existence of several recognized frameworks for sustainability/human rights corporate due diligence, such as the GRI Sustainability Reporting Standards,[126] the OECD Due Diligence Guidance for Responsible Business Conduct (2018),[127] the UNGC's Communication on Progress,[128] the International Organization for Standardization ("ISO") 26000[129] and the UN Guiding Principles Reporting Framework,[130] no framework hints at ethical rules or regulation of auditors and audit firms. The pertinent ethical issues in due diligence make the difference between human rights-based reporting and potentially tarnished outcomes. Chief among these are

> respect for participants, informed consent, specific permission required for audio or video recording, voluntary participation, participants' right to withdraw, full disclosure of funding sources, no harm to participants, avoidance of undue intrusion, deception techniques, issues with anonymity, participants' right to check and modify a transcript, confidentiality in respect of personal matters, data protection, enabling participation, ethical governance, provision of grievance procedures, appropriateness of research

125. *See* Jonathan Bonnitcha & Robert McCorquodale, *The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights*, 28 EUR. J. INT'L L. 899, 901 (2017). *But cf.* John Gerard Ruggie & John F. Sherman III, The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale, 28 EUR. J. INT'L L. 921, 925 (2017) (arguing that the Bonnitcha and McCorquodale discussion misunderstands the Guiding Principles and their proposal to move to state-based law is needless).

126. *GRI 2: General Disclosures 2021*, GRI (2021), https://www.globalreporting.org/standards/.

127. *OECD Due Diligence Guidance for Responsible Business Conduct*, OECD (May 31, 2018), https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.

128. *Transparency Builds Trust*, U.N. GLOB. COMPACT (2021), https://www.unglobalcompact.org/participation/report.

129. *ISO 26000 Social Responsibility*, ISO, https://www.iso.org/iso-26000-social-responsibility.html (last visited Feb. 13, 2021).

130. *U.N. Guiding Principles Reporting Framework*, SHIFT & MAZARS LLP, https://www.ungpreporting.org (last visited Feb. 13, 2021).

methodology. . .[131]

and transparent reporting of methods, conflicts of interest, moral hazard, and duty of care.[132] Finally, empirical studies have aptly shown that non-financial disclosures of particular industries (e.g., mining) are not susceptible to neat comparisons and benchmarking against other corporations in diverse industries.[133]

VI. EXTRA-TERRITORIAL LEGISLATION AND MONITORING BY MNC HOME STATES

As a matter of unilateral state practice, extra-territorial laws regulating particular aspects of corporate conduct are on the rise, chief among these being the United Kingdom's Modern Slavery Act of 2015[134] and the Australian Modern Slavery Act of 2018.[135] Section 54 of the United Kingdom's Act requires commercial entities with a turnover of £36 million, irrespective of their place of incorporation, but which undertake even a part of their business in the United Kingdom, to prepare annual slavery and trafficking statements.[136] In equal measure, the French Corporate Duty of Vigilance Law 2017 ("Vigilance Law")[137] imposes a duty of care on large French companies (on the basis of number of employees) and their subsidiaries or entities under their control for a wide range of environmental

131. Frank Vanclay et al., Principles for Ethical Research Involving Humans: Ethical Professional Practice in Impact Assessment Part I, 31 IMPACT ASSESSMENT & PROJECT APPRAISAL 243, 251 (2013), DOI: 10.1080/14615517.2013.850307.

132. *Id.*

133. *See* Alberto Fonseca et al., *Sustainability Reporting Among Mining Corporations: A Constructive Critique of the GRI Approach*, 84 J. OF CLEANER PROD. 70, 75 (2012).

134. Modern Slavery Act 2015, c. 30 (UK).

135. *Modern Slavery Act 2018* (Cth) (Austl.); *see also Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities*, MODERN SLAVERY BUS. ENGAGEMENT UNIT (2019).

136. Modern Slavery Act 2015, c. 30 (UK).

137. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017–399 of Mar. 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017, p. 1 (Fr.). For a useful English summary, see *French Corporate Duty of Vigilance Law – Frequently Asked Questions*, EECJ (Feb. 23, 2017), http://corporatejustice.org/wp-content/uploads/2021/04/french-corporate-duty-of-vigilance-law-faq-1.pdf.

and human rights obligations.[138] A similar initiative was undertaken by India through the adoption of its National Guidelines on Responsible Business Conduct in 2018.[139] This trend is increasingly witnessed in the case law of industrialized states. In *Nevsun Resources Ltd. v. Araya*, the Canadian Supreme Court held that Canadian corporations may be liable for the breach of customary and *jus cogens* obligations.[140] Significantly, such liability is not limited to tort, particularly given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.[141] Even so, the extra-territorial reach of these national laws concerns specific conduct and do not encompass the impact of MNCs on human rights.[142]

These extraterritorial laws were preceded by the introduction of human rights impact assessment ("HRIAs") and due diligence requirements by international financial

138. Cour de cassation [Cass.] [Court of Cassation], crim. Sept. 7, 2021, 19–87.367. In this case, the Court of Cassation held that there was enough evidence to suggest that Lafarge had been complicit in crimes against humanity in Syria by making large cash payments to the Islamic State. *Id.* The Court held that the company, among others, endangered the lives and fundamental rights of its employees and was further liable for terrorist financing. *Id.*

139. MINISTRY OF CORP. AFF., NAT'L GUIDELINES ON RESPONSIBLE BUS. CONDUCT (2018), https://www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf.

140. Nevsun Res. Ltd. v. Araya, [2020] 1 S.C.R. 166 (Can.).

141. *Id.*; *see* Vedanta Resources PLC v. Lungowe [2019] UKSC 20, at 59–62 (finding, unlike other cases, a duty of care can arise from a company's sufficient intervention in overseas business operations).

142. See, e.g., AAA v. Unilever PLC [2018] EWCA (Civ) 1532, [36], [40]–[41] (Eng.) (holding no duty of care by a U.K. parent company in respect of third parties harmed by the business conduct of a foreign subsidiary); *see also* Kalma v. African Minerals Ltd., [2020] EWCA (Civ) 144, [144]–[147], [151] (deciding that there was no liability for a UK company's operations in Sierra Leone mired by police abuse).

institutions ("IFIs"),[143] UN bodies,[144] and the EU,[145] among others. The success of each of these varies significantly and, with the exception of EU requirements, all others have largely been peripheral.

At the same time, a major development is underway in the form of a draft treaty on business and human rights. There is some resistance to the treaty from industrialized states, although these states have failed to tackle root causes of extra-territorial human rights abuses by MNCs under their control.

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143. Comm. on Econ., Soc. and Cultural Rts., Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights, ¶¶ 4, 11, U.N. Doc. E/C.12/2016/1 (July 22, 2016). *See, e.g.*, Juan Pablo Bohoslavsky (Independent Expert), Hum. Rts. Council, Rep. of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social And Cultural Rights on His Mission to Greece, ¶¶ 81(a), 83(b), U.N. Doc. A/HRC/31/60/Add.2 (Apr. 21, 2016). The World Bank Group has set up quasi-judicial mechanisms, such as the Bank's Inspection Panel and the Multilateral Investment Guarantee Agency (MIGA) Ombudsman, which are competent to hear complaints concerning violations of the Bank's internal rules, not violations of human rights law, albeit as these arise from violations of assessments incumbent on corporate borrowers. For an overview of the Inspection Panel and the Bank's Internal Rules see The World Bank, *The World Bank Inspection Panel* (Aug. 13, 2023) https://www.inspectionpanel.org/sites/default/files/publications/IPN_Brochure_English_0.pdf. For an overview of MIGA guidelines see Compliance Advisor Ombudsman, *Policies & Guidelines* (June 28, 2021) https://www.cao-ombudsman.org/sites/default/files/documents/CAO%20Policy/ifc-miga-independent-accountability-mechanism-cao-policy.pdf.

144. *See* Olivier De Schutter (Special Rapporteur), Guiding Principles on Human Rights Impact Assessment for Trade and Investment Agreements, ¶¶ 2–3, U.N. Doc. A/HRC/19/59/Add.5 (Dec. 19, 2011); Magdalena Sepúlveda Carmona (Special Rapporteur), Guiding Principles on Extreme Poverty and Human Rights, ¶¶ 99–102 U.N. Doc. A/HRC/21/39 (18 July 2012); Comm. on Econ., Soc. & Cultural Rts., General Comment No. 24, (Aug. 10, 2017) ¶¶ 17, 21–22; Comm. on Rts. of the Child, General Comment No. 19, U.N. Doc. CRC/C/GC/19 (July 21, 2016) ¶ 47.

145. EU Commission, *Staff Working Paper Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments*, SEC (2011) 567 Final (May 6, 2011). The Court of Justice of the European Union (CJEU) has, in fact, emphasized the importance of such HRIAs in the adoption of primary and secondary EU legislation. *See* Joined Cases C-92/09 & C-93/09, Schecke and Eifert v Land Hessen, Judgment, 2010 E.C.R. I-11063. HRIAs are also required through two EU instruments, namely: the Directive on Public Procurement and the Directive on Non-Financial Information Disclosure. *Id.* Under the latter, companies with over 500 employees are required to disclose information on policies, risks, and results as regards their respect for human rights. Assent, *What is the EU Non-Financial Reporting Directive?*, https://www.assent.com/resources/knowledge-article/what-is-the-eu-non-financial-reporting-directive/#:~:text=(EU)%20Non%2Dfinancial%20Reporting,in%20their%20yearly%20management%20reports.

While the draft treaty does not absolve states of their primary responsibility as human rights duty bearers, it does establish a triangular relationship requiring that MNCs observe strict due diligence requirements, as well as provide remedies to victims of human rights violations and abuses caused directly or indirectly by them. The state is compelled to facilitate and enforce corporate due diligence as well as extensive access to justice for victims, including through the provision of legal aid, physical security, effective jurisdiction, corporate and personal sanctions, and even mutual legal assistance.

VII. AN ENHANCED GENERALIZED SYSTEM OF PREFERENCES IN INTERNATIONAL TRADE

We have already stated that GSPs constitute a mechanism incorporated in trade agreements whereby developed states promote growth in LDCs by unilateral and non-reciprocal preferential treatment (chiefly through low or no import duties on products originating from LDCs). Not every developed country is willing to offer GSPs, but of those that do, the US and the EU condition their GSPs on human rights and sustainability standards. In this sense there is a clear trade-off (consideration in the contractual sense), albeit of a different value, between reduced import duties in exchange for human rights. The EU GSPs, which are broader than their US counterparts, are predicated on three distinct layers,[146] namely: a) Everything but Arms ("EBA"), which grants LDCs tariff-free access to all EU products, save for military equipment; b) Standard GSP and; c) GSP Plus, which imposes an obligation on LDCs to ratify and implement fundamental human rights, labor and sustainability treaties, as well as promote good governance.[147]

As is expressly emphasized by the EU, GSP Plus is a complex incentive-based mechanism, which promotes the effective human rights compliance and improvement by offering preferential treatment. Consequently, any regression serves to

146. Kevin C. Kennedy, *The Generalized System of Preferences after Four Decades: Conditionality and the Shrinking Margin of Preference*, 20 MICH. STATE INT'L L. REV. 521 (2011); European Commission, *The EU's Generalized Scheme of Preferences (GSP)*, (Aug. 2015), https://dokumen.tips/download/link/the-euas-generalised-scheme-of-preferences-gsptradeec-highlights-of-the-generalised.html.

147. Regulation 978/2012 of the European Parliament and of the Council of 25 October 2012 (EU) Applying a Scheme of Generalized Tariff Preferences and Repealing Council Regulation (EC) No 732/2008, 2012 O.J. (L 303/1) 1, 1.

withdraw or reduce such treatment. The incentive structure of GSPs ensures that the underlying mechanism requires enhanced collaboration, dialogue, and civic participation within the LDC.[148] This is certainly different as compared to the performance exacted from states in respect to multilateral treaties that offer no performance incentives. It is important that the EU GSP Plus envisages that assessment of compliance will be based, among others, on comments and reports of UN treaty bodies and the ILO.[149] Moreover, the EU Commission sets out a "list of issues" for each GSP Plus country based on input from civil society and trade unions in order to identify priorities and issues of concern.[150] It is on the basis of this list that the EU Commission engages with the target country. Such engagement, which is multi-layered (e.g., through meetings, evaluations, self-assessment exercises), culminates in a biennial report that is communicated to the EU Council and Parliament,[151] who are ultimately responsible for retaining or reducing preferential treatment. In the event that the target state is unwilling to address the list of issues, it is subjected to so-called "enhanced engagement", which may lead to the development of detailed action plans or the withdrawal of tariff preferences. By way of illustration, in 2020 the EU Commission decided to withdraw preferences from Cambodia because of the latter's persistent and systematic violation of civil and political rights.[152]

United States ("US") GSPs, although sharing many common

148. In 2020, the EU Trade Directorate set up a "single entry point" through which companies, civil society, and trade unions can submit complaints concerning with an LDC is compliant with its GSP Plus obligations. *See* European Commission, Chief Trade Enforcement Officer (2020) https://policy.trade.ec.europa.eu/enforcement-and-protection/chief-trade-enforcement-officer_en.

149. Further reliance on these entities has been demanded by the EU Parliament. *See* European Parliament, *Implementation of the Generalised Scheme Preferences (GSP) Regulation (EU),* at ¶ 9, No. 978/2012 (Mar. 14, 2019), https://www.europarl.europa.eu/doceo/document/TA-8-2019-0207_EN.pdf.

150. European Commission, *European Union's GSP+ scheme* (2019), https://trade.ec.europa.eu/access-to-markets/en/country-assets/tradoc_155235.pdf.

151. *See* European Commission, *Joint Report on the Generalized System of Preferences Covering the Period 2018-19* (2020), https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2020)19&lang=en.

152. See Commission's Delegated Regulation *of 12.2.20 amending Annexes II and IV of Regulation (EU) No 978/2012 as regards the temporary withdrawal of the arrangement referred to in Article 1(2) of Regulation (EU) No 978/2012 in respect of certain products originating in the Kingdom of Cambodia*, COM (2020) 673 final (Feb. 12, 2020) (act not yet in force).

features with their EU counterparts, have in the past been attacked for being discriminatory and arbitrary. It has been reported, for example, that US domestic industries regularly lobby in favor of protectionist measures against LDC imports,[153] further aided by the fact that the executive's assessment of such measures is not subject to independent review.[154] Another protectionist US measure is the denial of GSP status to those LDC products that occupy a significant place in market percentage terms. Moreover, GSP status is denied in respect of those LDC products that are crucial in terms of their export capacity, such as agricultural goods, textiles, and clothing, thus rendering these preferences more or less redundant.[155] Despite these criticisms, GSPs have the capacity to enforce and ensure human rights compliance with crucial input from civil society in a manner that no human rights treaty mechanism can.

VIII. HUMAN RIGHTS COMPLIANCE IN THE NEW GENERATION OF FREE TRADE AGREEMENTS

Many issues have been partly addressed through the adoption of discreet human rights chapters in the new generation of free trade agreements ("FTAs"), other than the WTO/GATTS agreements. It is now generally acknowledged that FTAs may and usually do expose local LDC businesses to greater competition and have an adverse effect on the availability of food, medicines, and essential items. In order to mitigate these effects, the new generation of FTAs (many of which are bilateral and plurilateral, as opposed to multilateral such as the WTO agreements) include entire sections or chapters devoted to human rights (at least some anyway), labor protection, sustainability, and the environment. In addition, just like the GSPs mentioned in the previous section, the new generation of FTAs provide for a plethora of *ex ante* (prior to the FTA coming into force), as well as *post facto* monitoring and compliance mechanisms. Unlike their GSP counterparts, which are aimed at securing the compliance of LDC target states, the FTA substantive and procedural human rights provisions are

153. Philip Alston, *Labor Rights Provisions in US Trade Law: "Aggressive Unilateralism?"*, 15 HUM. RTS. Q. 71, 84 (1996).

154. International Labour Rights Education and Research Fund v. Bush, 752 F. Supp. 495 (D.D.C. 1990), *aff'd*, 954 F.2d 745 (D.C. Cir. 1992).

155. ANDREW E. CASSIMATIS, HUMAN RIGHTS RELATED TRADE MEASURES UNDER INTERNATIONAL LAW (2007) at 411.

meant to ensure that all states, developed and otherwise, are in conformity with their obligations.

In regards to substantive obligations, it is worth mentioning that all FTAs to which the EU is a party include a so-called "essential elements" clause.[156] This obliges all parties to uphold and respect democratic values, human rights and the rule of law and at the same time acknowledge all three constitute essential elements of the FTA.[157] By extension, these "essential elements" constitute a rule of interpretation, as well as a ground for assessing the existence of a breach, which in turn allows the aggrieved party to seek damages (in the event of harm) or termination (which does not require harm).[158] In fact, FTAs to which the EU is a party encompass so-called "non-execution" clauses, whereby non-compliance with essential elements can lead to "appropriate measures", including access to dispute resolution procedures and ultimately termination.[159] Until 2019, the EU had taken "appropriate measures" in twenty-four cases under article 96 of the Cotonou Agreement.[160] These consisted of the suspension of development aid and cooperation but not the withdrawal of trade preferences.[161]

The human rights (broad or narrow) chapters in FTAs are extensive and in most cases are as detailed, if not more, than human rights treaties. A case in hand is chapter 23 of the EU-Canada CETA on trade and labor, as well as chapter 13 of the EU-Vietnam FTA, entitled "Trade and sustainable development." Both instruments specifically address the race to the bottom through the decrease of labor standards and commit the parties to uphold high standards and respect all relevant multilateral instruments.[162] Although the regulation of labor

156. *See* Free Trade Agreement, European Union-S.Kor., art. 1.1, May 14, 2011, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22011A0514(01); s*ee also* Association Agreement, European Union-Geor., art 2., https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830(02).

157. *See* Ionel Zamfir, *Human Rights in EU Trade Agreements: the human rights clause and its application*, EUROPEAN PARLIAMENT (July 2019) https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf.

158. *Id.*at 3, 12 n.14.

159. *Id.* at 8–10.

160. *Id.* at 9.

161. *Id.*

162. Free Trade Agreement Between the European Union and the Socialist Republic of Viet Nam, Eur. Union-Viet., arts. 13.3, 13.4, June 30, 2019, 2020 O.J. (L 186) 1; Comprehensive Economic and Trade Agreement Between

rights is more extensive, some FTAs, such as the 2019 Canada-Israel FTA, contain chapters on "trade and gender".[163]

It is the enforcement, however, of these specialized chapters and the essential elements of the FTAs that has received heightened attention. Given the fact that each FTA is an individually negotiated treaty, there are differences in implementation, monitoring, and dispute settlement mechanisms.[164] The vast majority of FTAs set out consultative mechanisms, which in turn serve as contact points, whereby relevant stakeholders can voice their concerns about issues falling within the FTA's remit.[165] This consultative mechanism is usually known as a joint committee or council, which is tasked with gathering information and facilitating dialogue, whether alone or in conjunction with national contact points.[166] Public participation is a crucial aspect of these processes, which, among others, reinforces democratic values and civil and political rights in places where they would generally not exist.[167] This is a poignant feature of EU FTAs, which comprise of locally constituted Domestic Advisory Groups ("DAG") whose role is to funnel information to the FTA's joint mechanism.[168] In order to further enhance public participation, EU FTAs envisage the creation of an annual joint Civil Society Forum in order to encompass all those stakeholders that do not participate in the DAG.[169] It should, of course, be highlighted that the joint committees and DAG do not serve as human rights treaty bodies, and their mandate is not restricted to the human rights chapters. In equal measure, they do not possess investigative authority.[170]

Much reliance is therefore placed on periodic evaluations of the implementation of the human rights chapters of FTAs by a

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Canada and the European Union, Can.-Eur. Union, art. 23.4, Oct. 30, 2016, 2017 O.J. (L 11) 23 [hereinafter CETA].

163. Canada-Israel Free Trade Agreement, Can.-Isr., ch. 13, May 28, 2018, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/text-texte/toc-tdm.aspx?lang=eng (Canada).

164. *See* James Harrison et al., *Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda*, 18 WORLD TRADE REV. 635, 650 (2019).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

joint committee set up by the state parties.[171] Exceptionally, the parties to an FTA may enter into a side agreement or a memorandum of understanding ("MoU") by which to set up a more extensive mechanism for assessment. In 2010, Canada and Colombia entered into a special agreement that was ancillary to their mutual 2008 FTA, whereby they agreed to undertake annual human rights impact assessment on the impact of the FTA in their own and their counterparty's territory.[172] To date, the most ambitious post-FTA evaluations have been undertaken in the context of EU FTAs on the basis of the EU's so-called "Better Regulation Agenda". This policy, as engineered by the EU Commission, was aimed at demonstrating how EU spending and non-spending activities produce an impact on social and economic development, not only within the EU but also abroad, as well as how to enhance public participation and transparency.[173] Given that EU FTAs produce human rights-related impacts, ex post assessment of FTAs was undertaken. By late 2021 the EU Commission had completed two ex post assessments, one for the EU-Mexico FTA in 2017 and another for the EU-South Korea FTA in 2018. The reports relied on human rights indicators, a granular investigation of the FTA's impact on discreet human rights, more detailed screening, and a focus on vulnerable persons.[174]

IX. CONCLUSION

It is evident that a change is occurring in the global landscape of MNCs. States, or at least some of them, have begun heeding the call to regulate certain activities of their MNCs operating abroad and, in doing so, have set out ground-breaking extra-territorial corporate law. Fears that such legislation might

171. CETA, *supra* note 162, art. 22.3, ¶ 3.

172. Agreement Concerning Annual Reports on Human Rights and Free Trade Between Canada and the Republic of Colombia, Can.-Colom., art. 1, May 27, 2010, https://www.treaty-accord.gc.ca/text-texte.aspx?lang=eng&id=105278&_ga=2.234614174.1407437666.1694989909-559774586.1694989909 (Canada); *see* James Rochlin, *A Golden Opportunity Lost: Canada's Human Rights Impact Assessment and the Free Trade Agreement with Colombia*, 18 INT'L J. HUM. RTS. 545, 551 (2014).

173. *Commission Staff Working Document on Better Regulation Guidelines*, at 5, Eur. Comm'n (2021) 305 final (November 3, 2021).

174. JENNIFER ZERK & ROSIE BEACOCK, ADVANCING HUMAN RIGHTS THROUGH TRADE: WHY STRONGER HUMAN RIGHTS MONITORING IS NEEDED AND HOW TO MAKE IT WORK 23 (Chatham House ed., 2021).

not be well received in developing host states as a potential encroachment on their regulatory authority have not been realized. In fact, it seems that host states welcome such legislation. At the same time, there is multilateral momentum that is being waged on multiple fronts and in ways that do not openly target the ESG effect of MNCs. By way of illustration, climate change discussion at the UN seemingly gives rise to state (public) commitments of concrete action on the basis of a determined set of steps and indicators, although clearly the move from fossil fuels has a deep impact on the operations of MNCs. In equal measure, consumer behavior following climate change-related commitments necessarily entails a radical shift in production, policies, and operations of MNCs. This article has pointed to human rights commitments undertaken by states in a new generation of FTAs where no reference to MNCs, whether as investors or commercial actors, was made. Even so, a big part of these commitments will have to be shouldered by MNCs because the FTA state commitments will ultimately be embodied in corporate laws in the home state that are binding on relevant corporations. There is little doubt that these developments, whether multilateral or unilateral (i.e., at state level) will become more profound, more intrusive, and certainly less isolated and more centralized. It is the opinion of this author that MNCs do not generally go out of their way to violate ESG norms or institutions, nor do they have any interest in partaking in or contributing to human rights violations in the host state. There is little to no incentive to do so. However, when most developing states are racing to the bottom, and their competitors are taking full advantage of lax regulatory regimes, it is difficult to escape the temptation. In the absence of a robust multilateral regime and in light of the fact that bilateralism (e.g., through BITs) only drives competition higher among MNCs, enhanced unilateral action at home state level is key to stemming the tide of poor corporate conduct, as well as inciting poor developing states to conform to higher standards.