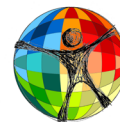


Corporate Social Responsibility Through the Lens of Investment Law: Will Any Solution Work Without the Rule of Law?

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ABSTRACT

While the transnational corporation is a fairly recent concept, its activities around the world have had significant repercussions. Even though transnational corporations have contributed significantly to international commerce and trade, they have been heavily scrutinized as being all-powerful, "stateless," and getting away with poor behaviour. Given their extensive resources and power, attempting to hold transnational corporations liable is no simple feat. It means dealing with multiple jurisdictions, governing laws, and languages, as well as countless political, legal, social, and cultural barriers.

Multiple global organizations, ranging from the United Nations to the International Labour Organization, have recognized the challenges associated with corporate social responsibility. As a result, they have developed soft law rules to encourage corporate social responsibility. While these rules have raised awareness about human rights atrocities committed by transnational corporations, they are not binding.

Currently, the most viable solution is to negotiate clauses that provide for social policy and human rights objectives in bilateral investment treaties. This can be done through various protective clauses that stipulate that investors must respect the communities in which they operate. While bilateral investment treaties provide the most concrete option, they will nonetheless be ineffective in states with a weak rule of law because the rule of law is a precondition to corporate social responsibility. While transnational corporations are heavily criticized in the realm of corporate governance and accountability, they are not the only ones to blame. Even though foreign investment presents an attractive economic incentive, it is no excuse for relaxing the law and jeopardizing human rights.

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Overview of CSR: Legal Frameworks, Trends, and Drivers

With the rise of economic globalization, numerous companies have come to operate and make investments around the world. Consequently, corporate transactions encompass complex legal dimensions that relate to countless transnational actors. Dealing with a TNC means dealing with multiple jurisdictions, governing laws, and languages, as well as a host of political, social, and cultural barriers. As a result, human rights are vulnerable to abuses with few mechanisms to hold corporate wrongdoers accountable. This paper explores the legal frameworks, trends, and drivers for CSR, highlighting key economic and legal challenges. It also discusses whether international investment law, particularly BITs, is a viable way to hold TNCs accountable for human rights violations committed abroad. Ultimately, this essay acknowledges that even the most promising solutions cannot succeed without strong enforcement mechanisms.

(A) Trends and Drivers

Reception to economic globalization and the rise of TNCs has been mixed. On the one hand, TNCs are argued to contribute (along with the rise of innovation and technological advancement) to the global economy by creating jobs and engaging in philanthropic activities. On the other hand, scholars such as Joel Bakan have argued that the corporation is a “pathological institution, a dangerous possessor of the great power it wields over people and societies.”¹ Indeed, major corporations with global reach are highly influential, powerful, and wealthy. As a result, they have become significant global and economic agents in both their home and host states.

The rise of TNCs has also contributed to controversy about market fundamentalism, a liberalized belief that unfettered markets are stable and efficient, and that such markets are the

¹ Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (New York: Free Press, 2004) at 2.

best way to promote growth and development.² The concept of market supremacy has come into question since the 2008 global financial crisis, following which arguments for increased government intervention in global markets have emerged.³ This is particularly relevant to TNCs, as they are key players in economic markets around the world – yet they face minimal regulation.

In response, TNCs have been developing a philanthropic dimension around the world. They have created campaigns and media efforts to address their role in global social development, and they have acknowledged their powerful position across the board. In essence, TNCs have acknowledged a corollary responsibility as key figures in the global economic market – social responsibility to use their power for good. Nike serves a useful example. For example, in 2014, the Nike Foundation launched an initiative to reduce HIV infections in adolescent girls and young women. Along with its partners, the Foundation provided interventions to protect women's health and address HIV risk behaviours, HIV transmission, and gender-based violence.⁴

Indeed, since the 1970s, the concept of CSR has become increasingly important. In particular, a shift to include interests other than those of a corporation's shareholders has begun to emerge. Scrutiny of shareholder primacy has intensified since the 2008 financial crisis, and it has led to an emphasis on accounting for various stakeholder interests. This has been recognized by corporations and senior management in Canada and abroad.⁵

² Joseph Stiglitz, "The State, the Market, and Development" *WIDER Working Paper* (2016) United Nations University 1, available at: <<https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/WIDER%20The%20state.pdf>>.

³ *Ibid.*

⁴ Nike News, "Working Together for an AIDS-Free Future for Girls" (1 December 2014), online: Nike <<https://news.nike.com/news/working-together-for-an-aids-free-future-for-girls>>.

⁵ In Canada, Bill C-97 will make changes to the *Canada Business Corporations Act*: *Bill C-97, An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures*, 1st Sess, 42nd Parl, 2019, cl 141 (1.1) (a) (b) (c) (as passed by the House of Commons on June 21, 2019).

When acting in the best interests of the corporation, directors and officers may consider, but are not limited to, the interests of shareholders and other stakeholders. This Bill is consistent with the Supreme Court of Canada's

For example, in August 2019, the Business Roundtable explicitly acknowledged that “while each individual company serves its own corporate purpose, they [we] share a fundamental commitment to all of their [our] stakeholders.”⁶

Overall, it is now widely accepted that TNCs must be held accountable for the economic, social, and legal repercussions of their actions. This discussion on CSR has generated significant awareness among TNCs and consumers alike. Yet, it goes against years of evidence that TNCs – and corporations in general – exist to serve their shareholders. The bottom line is that, in spite of social change and TNCs’ embrace of CSR, corporations must continue to generate profits to survive. It is worth noting that this economic objective is not the only reason why TNCs encroach on local employment and resources, and that there are many complex and intertwined aspects of TNC behaviour. Against this backdrop, TNCs continue to threaten local economic employment, human rights, and security policies.⁷

This menace to local communities is perpetuated by the high concentrations of power within the international economic system, not to mention the host states’ weak and corrupt governance. It is also furthered by a lack of clarity about what the state’s role should be in regulating TNCs within their territorial lines. These factors cater to corporate economic success and feed into concepts that protect corporations – such as limited liability and shareholder primacy – rather than protecting the rights of citizens affected by TNC operations. While it is important to note the host states’ primary responsibility of law enforcement and holding corporate actors accountable for their bad behaviour, the corollary to this is that TNCs are often wealthier and more powerful than these states themselves.

reasoning in *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 SCC 68 and *BCE Inc v 1976 Debentureholders*, 2009 69.

⁶ Business Roundtable, “Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans’” (19 August 2019), available online at: < <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>>.

⁷ Jennifer Zerk, James Crawford, & John Bell, *Multinationals and Corporate Social Responsibility : Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006) at 9 [Zerk].

Thus, TNCs are the primary beneficiaries of economic globalization.⁸ Considering their cross-border operations, it is difficult to determine the most effective way to hold them accountable for their actions that violate human rights. It is clear that the international economic system and lack of a clear framework for corporate accountability have given rise to concerns about overconsumption, environmental damage, labour and industrial relations, human rights abuses, poverty, and even democracy.⁹ These concerns are all highly complex and deeply intertwined. Yet there is a key question lying at the core of this bundle of economics, law, and politics: what is the most appropriate way to ensure that TNCs are held accountable? More specifically, how can such accountability be achieved in a global framework that is so skewed towards the protection of international trade and commerce?¹⁰

There is no straightforward answer; however, regardless of the proposed solution, there must be a strong rule of law to ensure accountability. More is required than just TNCs' ethical behaviour – corporations must be compelled to respect local and international laws. That said, there is no concrete, simple way to accomplish this. First, as indicated above, the repercussions of CSR are as far-reaching as they are complex: they range from environmental degradation to labour relations to consumer protection. Each facet has profound political, social, economic, and legal consequences. Second, there is no clear legal explanation of how to hold TNCs accountable for their actions. Even if there were a concrete legal framework, the question of *who* should hold TNCs accountable would remain a complicated question of jurisdiction. This paper aims to make sense of this problem through the lens of international investment law, while also taking into account the critical role of the rule of law.

(B) Legal Frameworks: Private International Law, Public International Law, and Transnational Law

⁸ *Ibid* at 8.

⁹ Naomi Klein, *No Logo* (Toronto: Vintage Canada Edition, 2009).

¹⁰ Zerk, *supra* note 9 at 23.

Many scholars have approached corporate accountability by assessing general frameworks of international law. This approach is not entirely appropriate because the notion of CSR encompasses both private and public international law dimensions. Since neither system has a concrete legal framework to specifically address CSR, neither promises a viable solution to hold TNCs responsible for their actions abroad. Nonetheless, because TNCs are often criticized for falling through the cracks of the international legal and regulatory systems,¹¹ both private international and public international law are relevant to this discussion.

The general international law approach raises the question of *which* international law would provide the most appropriate framework for CSR: private international law, public international law, or transnational law.¹² Private international law governs how national courts should approach private disputes that contain foreign elements. It is pertinent to CSR because cross-border commercial transactions tend to be private in nature, and they bear various international elements.

Public international law concentrates on state conduct. It is also relevant to this discussion because of the multijurisdictional nature of TNCs' operations, not to mention the amount of power and influence that they wield in the states in which they operate. A key principle of public international law is that of territoriality. This principle is complicated by TNCs because each state has exclusive jurisdiction to regulate the activities of individuals, corporations, and other entities within the limits of its territory.¹³ Meanwhile, foreign-incorporated TNCs' activities are generally outside of the scope of home states' jurisdiction.¹⁴ For this reason, TNCs have been accused of being "stateless" institutions that may escape the confines of a home or host state's legal regime.¹⁵ Imposing public international law rules on TNCs is not the most appropriate solution because the focus of public international law

¹¹ Fleur Johns, "The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory" (1994) 19 *Melb U L Rev* 894.

¹² Peer Zumbansen, "Defining the Space of Transnational Law : Legal Theory, Global Governance, and Legal Pluralism" (2012) *Transnational Law and Contemporary Problems* 21:2 at 305 [Zumbansen].

¹³ Zerk, *supra* note 9 at 195.

¹⁴ *Ibid.*

¹⁵ Zerk, *supra* note 9 at 146.

is on state actors, and it is difficult to reconcile territoriality with the activities of private TNCs.

Essentially, economic globalization has catalyzed the formation of a relatively recent transnational system of power that lies beyond the formal interstate system.¹⁶ This has created tensions in international law and in the traditional roles of states. In particular, the process of economic globalization has decentralized the state: capital moves freely around the world with relatively little direction from states. This process is furthered by technologies that create global networks unattached to physical national boundaries.¹⁷ The growth of cross-border activities and global actors operating outside the formal interstate system has precipitated questions about the scope of international law and whether it can effectively resolve issues flowing from these multijurisdictional transactions.¹⁸ Seeing that the traditional private international law/public international law distinction has failed to provide an answer, it is necessary to consider the framework of transnational law.

In 1956, Justice Phillip Jessup defined transnational law as regulating “actions or events that transcend national frontiers.”¹⁹ This includes domestic law, private international law, and public international law as found in treaties and CIL.²⁰ Considering the evolution of commercial business transactions across state boundaries, transnational law may present a viable way to grapple with problems that span boundaries of geography and law because it shifts the analytical focus beyond the boundaries of the nation-state to transnational legal pluralism.²¹ Scholars have argued that transnational law is a fertile ground for the development of CSR around the world. While it does transcend the challenges faced by public international law and private

¹⁶ Saskia Sassen, “The State and Economic Globalization: Any Implications for International Law?” (2000) 1:1 Chic J Int 109.

¹⁷ *Ibid.*

¹⁸ Berkeley University School of Law, “A Basic Introduction to Transnational Law” in *A Sketch of Transnational Law* at 63, online : <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=7587>.

¹⁹ *Ibid* at 61.

²⁰ *Ibid.*

²¹ Zumbansen, *supra* note 12 at 317.

international law vis-à-vis the concept of CSR, transnational law does not yet seem to provide a concrete legal solution.

For this reason, as will be discussed in Part I, international investment law appears to provide the best solution. International investment law is a special branch of general international law governing the protection of foreign investments.²² International investment agreements essentially link the public and private aspects of international law, as they establish a relationship between the host state, investor, and home state. Nevertheless, without strong enforcement mechanisms, even this solution would fail.

(C) International Soft Law Mechanisms

Numerous international organizations have recognized the difficulty of legally addressing the results of economic globalization, along with the need to achieve a more effective system of CSR. As a result, they have created soft law instruments – most importantly, the Draft UN Code,²³ the OECD Guidelines,²⁴ the ILO Tripartite Declaration,²⁵ and the UN Global Compact²⁶ – each of which will be described below. While none of these instruments entails a formal enforcement measure, they are still significant because they reflect the now widely accepted need for corporate accountability.

²² OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* (2008), online: < <https://www.oecd.org/daf/inv/internationalinvestmentagreements/40471468.pdf>>.

²³ *Draft United Nations Code of Conduct on Transnational Corporations*, 1984, *International Legal Materials*, 23(3), 626-640, online: < <https://www.cambridge.org/core/journals/international-legal-materials/article/draft-united-nations-code-of-conduct-on-transnational-corporations/77FAB2464C062A749DED60D7CE847497>>.

²⁴ *OECD Guidelines for Multinational Enterprises*, 2011, OECD Publishing, online: < https://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en> [OECD Guidelines].

²⁵ *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)*, 2017, International Labour Organization, online: < https://www.ilo.org/wcmsp5/groups/public/-ed_emp/-emp_ent/-multi/documents/publication/wcms_094386.pdf>.

²⁶ *United Nations Global Compact*, online: < <https://www.unglobalcompact.org>>.

Although the Draft UN Code was never finalized, it evidences international consensus on the notion that TNCs should be responsible to the communities in which they do business. It is also significant, in spite of its lack of formality, for contributing to the evolution of CSR. For example, it stated that TNCs must respect human rights and fundamental freedoms in the countries in which they operate.²⁷ This has influenced the development of CSR, and the UNCTAD has even looked to this instrument for guidance for its ongoing work in the field of international investment law and policy.²⁸ In spite of the Draft Code's importance in the literature on CSR, it does not, in and of itself, provide a concrete legal framework to ensure accountability.

The OECD Guidelines are also important soft law rules because they were developed to address mounting concerns about the lack of corporate accountability within the international economic system.²⁹ The most recent revisions of the Guidelines subject TNCs to the framework of applicable law, regulations, and prevailing labour relations and employment practices. The first obligation of TNCs is to obey domestic laws,³⁰ and the Guidelines explicitly recognize that enterprises can impact the entire spectrum of human rights.³¹ Nonetheless, the Guidelines are not binding.

Most international law protecting workers' rights originates from the ILO. One hundred eighty-nine conventions dealing with labour relationships have been adopted and opened to ratification within the framework of this organization.³² Besides these binding instruments, the ILO adopted in 1998 the Declaration on Fundamental Principles and Rights at Work. Additionally, the ILO Declaration was created to encourage the contribution of TNCs to economic and social progress.

²⁷ *Ibid* at para 9.

²⁸ Zerk, *supra* note 9 at 244.

²⁹ *Ibid*.

³⁰ OECD Guidelines, *supra* note 24 at s 2.

³¹ *Ibid* at s 40.

³² Stefano Brugnattelli, "International Investment Law and International Protection of Workers' Rights" in Tullio Treves, Francesco Seatzu, Seline Trevisanut, eds, *Foreign Investment, International Law and Common Concerns* (Routledge Research in International Economic Law, 2014) at 299 [Brugnattelli].

Generally, the ILO embodies four fundamental rights in its constitution and conventions, each crucial to the notion of CSR in the context of labour relations: (1) freedom of association and collective bargaining; (2) elimination of forced labour; (3) abolition of child labour, and (4) elimination of discrimination in respect of employment and occupation.³³ Overall, the ILO Declaration makes it clear that TNCs play an important role in ensuring these fundamental rights for their employees and local communities. Like the other soft law instruments, however, the ILO Declaration is not binding, nor does it enforce these standards or monitor compliance. Even though the ILO has developed a follow-up procedure, few breaches by individual TNCs have been brought to its attention.³⁴

Finally, the UN Global Compact was launched to establish a dialogue between the UN and world business in relation to the social issues arising from globalization.³⁵ The Compact embodies ten core principles relating to human rights, labour relations, environmental issues, and anti-corruption, demonstrating how broad and complex the concept of CSR truly is. Its overall goals include the protection of international human rights, the elimination of forced and compulsory labour, the abolition of child labour, and the promotion of greater environmental responsibility.³⁶ The Compact aims to provide a flexible framework for ongoing cooperation between the UN and TNCs; however, it does not impose formal legal obligations. Rather, participants join by signing an official letter and are asked to publish an annual CSR report.³⁷ Like the other soft law instruments described in this introduction, the Compact is flexible and informal. Consequently, there is cause for concern that participants who fail to live up to their commitments under this scheme will undermine its credibility.

³³ ILO Declaration on Fundamental Principles and Rights at Work (1999), 137 Int'l Lab Rev 253 at s 2.

³⁴ Zerk, *supra* note 9 at 255.

³⁵ Alufemi Amao, *Corporate Social Responsibility, Human Rights and the Law : Multinational Corporations in Developing Countries* (Routledge, 2007) at 23 [Amao].

³⁶ United Nations Global Compact, "The Ten Principles of the UN Global Compact," available online: <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

³⁷ Amao, *supra* note 35.

All in all, the international soft law instruments demonstrate global consensus that TNCs ought to be responsible for their actions. They also reflect wide agreement that TNCs should play an active role in the well-being of their employees and local communities. As such, and given their economic mite and influence, they should be held to a higher standard than other businesses, such as small and medium enterprises. In spite of the meaning and significance of these instruments, however, they are voluntary and non-binding. As a result, TNCs may not always feel compelled to live up to their commitments under these schemes. But is this enough when human rights and employment conditions are at stake? As will be discussed in the next section of this paper, it is necessary to explore other avenues to achieve more effective regulation of TNC activities.

(D) Potential Solutions: CIL, Emergence of Institutions, and Investment Law

Various scholars have pondered how to ensure corporate accountability to the communities in which TNCs operate. Zerk has argued that international law has the potential to respond to the legal challenges that TNCs pose. Specifically, she argues that the current soft law instruments can eventually develop into hard law by forming new CIL obligations, and that states can develop their own regulatory frameworks to tackle specific facets of CSR.³⁸ While this is an attractive argument, it takes time to form new CILs because CIL “results from a general and consistent practice of states that they follow from a sense of legal obligation.”³⁹

It has also been predicted that new international institutions will emerge to promote and enforce standards for CSR.⁴⁰ While this is an interesting proposition, it does not explain what basis these potential institutions would use to implement these rules, not to mention who would fund them. It is also unclear whether existing institutions are effective in promoting and enforcing these standards. Some scholars have argued that every country has an institutional framework which shapes the national

³⁸ Zerk, *supra* note 9 at 243.

³⁹ Legal Information Institute, *Customary International Law*, Cornell University, available at : <
https://www.law.cornell.edu/wex/customary_international_law>.

⁴⁰ Amao, *supra* note 35 at 64.

business system and informs implicit CSR.⁴¹ On the other hand, some scholars have attacked the notion of using institutions to make CSR a mandatory corporate obligation as a violation of corporate autonomy and an abuse of institutional power to achieve “self-interested goals.”⁴²

Regardless, it seems conceptually sound to establish the starting point as a concrete legal and/or regulatory framework to implement corporate accountability principles. Hard rules are more difficult to ignore than soft law principles, and there is a need for adjudication and enforcement mechanisms. But then the question is how international law and regulation could adequately address the responsibilities of TNCs in such a complicated legal and regulatory framework – one that was not created to address challenges arising out of transnational business operations.

Another key consideration is that soft law instruments seem to place an onus on TNCs to behave more responsibly. From this viewpoint, the most viable solution may not be to create a concrete international legal regime, but rather to motivate TNCs with traditional corporate incentives – namely, benefits to shareholders and improved brand image as rewards for good behaviour. This concept has become increasingly popular, and it has given rise to the notion of a social license to operate.⁴³ Essentially, the social license to operate denotes the importance of community acceptance of business operations. This is now influencing corporate success, considering the increased recognition that TNCs make a huge impact on global and local economies and human rights. Rather than only looking at balance sheets and share value, it is also important for TNCs to respect local communities.

This increasingly popular notion assumes, however, that TNCs are publicly traded when, in fact, corporations are either publicly traded or private. When the TNC is a publicly traded corporation, it is likely that the public will hold it accountable for

⁴¹ Dirk Matten & Jeremy Moon, “ ‘Implicit’ and ‘Explicit’ CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility” (2008) 33:10 *Academy of Management Review* 1.

⁴² Dennis Masaka, “Why Enforcing Corporate Social Responsibility (CSR) is Morally Questionable” (2008) 13:1 *EJBO* 13 at 15.

⁴³ Hans Lindahl, “One Pillar: Legal Authority and a Social License to Operate in a Global Context” (2016) 23 *Int J Global Legal Stud* 201.

its misbehaviour through media reports, product boycotts, and shareholder dissatisfaction. A publicly traded corporation is (supposed to be) transparent and it must explain itself to the public. That said, there is much less transparency when dealing with private companies. As this paper will discuss, this has become a significant concern with Chinese investments in states that have a weak rule of law— for example, Latin American and African states.⁴⁴

Where there are inadequate constitutional protections in the host state of an investment, and the home country also has a weak rule of law, how can TNCs be motivated to act ethically towards the communities in which they operate? This is not an easy question to answer; however, it highlights the importance of a strong rule of law in holding TNCs accountable. As will be discussed in Part II, it is not only up to TNCs to behave ethically – the host state of the investment must safeguard human rights.

For this reason, this paper explores BITs as instruments to protect citizens affected by international investments by ensuring that investors obey local laws and that states do not lower their enforcement standards. Ultimately, however, even this solution cannot work without sufficient enforcement mechanisms in the host state.

Part I outlines the legal framework for FDI and BITs. It also evaluates the relationship between human rights law and FDI, and it explores how CSR fits into this equation. Part II assesses the rule of law as a pre-condition to CSR, regardless of the proposed legal solution. Part III discusses the possibility of host country accountability as a potential recourse for victims of human rights violations committed by TNCs. This final section focuses on North American legal experiences by analyzing recent Canadian and American jurisprudence (the latter were analyzed pursuant to the ATCA⁴⁵). Overall, this essay argues that BITs currently offer the

⁴⁴ See, for example: Jenni Marsh “China just quietly wrote off a chunk of Cameroon’s debt. Why the secrecy?” (5 February 2019), online: CNN < <https://www.cnn.com/2019/02/04/china/cameroon-china-debt-relief-intl/index.html> > ; Max Nathanson “How to Respond to Chinese Investment in Latin America” (28 November 2018), online: Foreign Policy < <https://foreignpolicy.com/2018/11/28/how-to-respond-to-chinese-investment-in-latin-america/> >.

⁴⁵ *Alien Tort Claims Act*, 28 USC § 1350.

best legal option to hold TNCs responsible for their actions in a globalized world with less than ideal mechanisms to hold them accountable.

The Framework for FDI and BITs

As discussed above, the general lenses of public and private international law are insufficient to resolve issues pertaining to CSR. Investment law can be used to bring about change because of the contractually binding power of BITs. This section provides an overview of FDI and BITs before delving into how CSR fits into the equation of FDI and human rights, as well as the relationship between the protection of workers' rights and FDI.

(A) FDI and BITs: An Overview

FDI is a driving factor for economic globalization. The International Monetary Fund has defined FDI as a cross-border investment in which an investor that is "resident in one economy [has] control or a significant degree of influence on the management of an enterprise that is resident in another economy."⁴⁶ The investor's purpose in this context is to gain an effective voice in the management of the enterprise. Some of the objectives underlying investment agreements include protecting investors, encouraging economic cooperation, and promoting higher level of investment flows. According to some scholars, BITs are to be viewed as investment liberalization instruments.⁴⁷ Overall, states can negotiate international investment treaties and tailor them to satisfy their economic and social needs. Thus, international investment law may pave the road for effectively holding TNCs responsible for their actions in host states with sufficient enforcement mechanisms and a strong rule of law.⁴⁸

While most international investment agreements are formulated to protect investors, investment agreements ultimately aim to attract capital, promote international trade and commerce,

⁴⁶ IMF, *Balance of Payments and International Investment Position Manual* 100, 6th ed (2009).

⁴⁷ Abdullah Al Faruque, "Mapping the Relationship Between Investment Protection and Human Rights" (2010) 11:4 J of World Investment & Trade 539.

⁴⁸ *Ibid* at 542.

and contribute to a host state's economic growth and development. International investment agreements can be multilateral or bilateral. MITs are international investment agreements made between several countries. They contain provisions to protect investments made by individuals and companies in each other's territories.⁴⁹

On the other hand, BITs are agreements made between two countries containing reciprocal undertakings for the promotion and protection of private instruments made by the signatories in each other's territories.⁵⁰ Today, over 2,850 bilateral treaties exist.⁵¹ These agreements establish terms and conditions under which nationals of one country invest in the other. Overall, since BITs are negotiated agreements between the signatory parties, their terms vary. As a result, the contractual aspect of BITs may provide a way to effectively hold TNCs responsible.

BITs also outline the rights and protections to which investors are entitled. The most common obligations imposed upon the host state to protect foreign investments include: full protection and security; fair and equitable treatment; prompt and effective compensation in the event of expropriation; compensation for loss caused by war or insurrections; guarantees of free transfers of funds; and, non-discrimination and most favoured nation

⁴⁹ Thomson Reuters Practical Law, *Multilateral Investment Treaty (MIT)*, available at: <[https://uk.practicallaw.thomsonreuters.com/4-502-5545?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-502-5545?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)>.

⁵⁰ Thomson Reuters Practical Law, *Multilateral Investment Treaty (MIT)*, available at: <https://uk.practicallaw.thomsonreuters.com/Document/11c635e4aef2811e28578f7ccc38dcbee/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad6ad3e0000016efd89febf41cadd2%3FNav%3DKNOWHOW_UK%26fragmentIdentifier%3D11c635e4aef2811e28578f7ccc38dcbee%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=e7e9f43b22f0051a01caca4b18a88508&list=KNOWHOW_UK&rank=4&sessionScopeId=0a261ff942244643c14537cdaa922f40bd728bc72cfd5449f2668f3299b93a4&originationContext=Search+Result&transitionType=SearchItem&contextData=%28sc.Search%29&comp=pluk>.

⁵¹ United Nations Conference on Trade and Development, "World Investment Report: Transnational Corporations, Extractive Industries, and Development" (2007), available at: <https://unctad.org/en/Docs/wir2007_en.pdf>.

treatment.⁵² Another key protection that BITs provide investors is that foreign investors can sue states directly by submitting claims for breach of the BIT to arbitration, rather than to local courts.⁵³ While this can be an advantage where investors are doing business in a country with a weak rule of law, it also denotes a threat to states because of the expensive and time consuming process of such arbitral proceedings. This is exacerbated by the fact that developing countries are most often the state party involved in ICSID Disputes.⁵⁴

This demonstrates that international investment agreements are typically asymmetrical. On the one hand, they offer substantive rights to investors, which may be enforced against States. On the other hand, they do not impose obligations on investors in return.⁵⁵ Given that international investment law interacts with other regimes of international law and affects global trade, it must evolve in response to international legal and societal changes. It must become more balanced to ensure that investors treat the communities in which they operate properly. Overall, international investment law, particularly on the BIT level, offers an opportunity to respect policy goals by including references to non-economic objectives in BITs.

Given that there is no globally binding multilateral treaty, BITs have become the key mechanism to promote and protect foreign investment.⁵⁶ Still, the globalized world is rapidly evolving, and the current investment regime should respond to its changing context. In particular, public policies (such as CSR) can be reflected in the international investment regime so that it goes

⁵² Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (2016: Routledge Research in International Economic Law) at 28 [Mouyal].

⁵³ *Ibid.*

⁵⁴ International Centre for Settlement of Investment Disputes, *The ICSID Caseload – Statistics*, Issue 2019-2, available at: <[https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_\(English\).pdf](https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_(English).pdf)>.

⁵⁵ Naomi Briercliffe & Olga Owczarek, « Human-Rights-Based Claims by States and ‘New-Generation’ International Investment Agreements » (1 August 2018), *Kluwer Arbitration Blog*, online: <<http://arbitrationblog.kluwerarbitration.com/2018/08/01/human-rights-based-claims-by-states-and-new-generation-international-investment-agreements/>>.

⁵⁶ Al Faruque, *supra* note 47 at 540.

beyond protecting international investment and sophisticated parties, to effectively protect the communities that are affected by foreign investments.

One benefit of BITs is that they impose measures on governments whose legal system does not provide adequate protections to foreign investors and their property. Effectively, BITs protect the expectations of foreign investors by requiring fairness and non-discrimination in the host state of their investment.⁵⁷ The legal guarantees provided by BITs make it necessary for host states to create a safe and reliable investment climate – one that is “based on notions of stability and predictability, and protects foreign investors against undue government interference.”⁵⁸ Unfortunately, such investment protections may not always be upheld in countries that lack adequate enforcement mechanisms.

Recently, investments have increasingly been developing to emphasize the promotion of socially responsible and ethical investing.⁵⁹ This notion is broad and highly normative. Further, it is not a binding requirement in the negotiation of BITs. Nonetheless, it connotes an approach to investment that explicitly acknowledges the importance of environmental, social, and governance factors.

Interestingly, the promotion of social responsibility and ethical investing in FDIs is reminiscent of questions pertaining to the soft law mechanisms. In fact, scholars such as Bjorklund have considered that soft law instruments may be useful to the development of international investment law.⁶⁰ In particular, Bjorklund has outlined several scenarios in which soft law instruments may contribute to international investment law. First, she argues that soft law instruments may emerge into hard law and potentially develop into CIL, if not formalized in a legally binding instrument first.⁶¹ As discussed in the introduction, this is similar to Zerk’s argument that international soft law instruments will turn into hard law or CIL. Both Bjorklund and Zerk have

⁵⁷ Mouyal, *supra* note 52 at 48.

⁵⁸ Al Faruque, *supra* note 47 at 542.

⁵⁹ *Ibid.*

⁶⁰ Andrea Bjorklund, “Assessing the Effectiveness of Soft Law Instruments in International Law” in Andrea Bjorklund & August Reinisch, eds, *International Investment Law and Soft Law* (Edward Elgar Publishing Limited, 2012) at 51.

⁶¹ *Ibid.*

cautioned, however, that this process is not likely to happen any time in the near future.⁶²

Second, soft law may “fill the gaps” for hard law, assisting in its interpretation and answering some questions arising out of hard law issues.⁶³ Conversely, soft law may also influence the development of hard law, even though it is not, in and of itself, legally binding. This may be manifested in the drafting of treaties with guidance from soft law principles and the development of international investment law.⁶⁴

While these arguments can be convincing, they overlook the very real issue that BITs rarely refer to responsible business conduct. And when they do, they serve more as policy commitments by states, rather than legally binding commitments for investors.⁶⁵ So, even though soft law may contribute to the development of international investment law to promote policy goals, CSR remains a voluntary concept in which governments only encourage investors to implement responsible business guidelines. This brings up similar conceptual difficulties pertaining to the legal effectiveness of soft law instruments. As will be discussed in the next section, a more viable solution is to include clauses that specifically further social and environmental objectives in BITs.

(B) International Investment Law as a Lens for CSR

Having provided a brief overview of FDI and international investment law, this section of the paper assesses the relationship between international investment law and human rights. Beyond assessing this relationship, this section aims to determine the suitability of international investment law as a lens to ensure CSR. Overall, it appears that the best way to effectively hold TNCs liable for their actions abroad is to incorporate social goals into negotiated BITs.

The principal objective of BITs is to promote economic growth; however, scholars such as Mouyal have argued that they

⁶² Bjorklund, *supra* note 57; Zerk, *supra* note 9.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Mouyal, *supra* note 52 at 104.

possess an inherent social dimension.⁶⁶ In particular, Mouyal has argued that economic development through foreign investments may constitute an essential basis for fertilizing human rights and promotion. In this way, BITs may make positive contributions to international human rights and bring us closer to resolving the challenges pertaining to CSR.

While there is potential for BITs to bring about positive social change, BITs are not immune from criticism. First, there is an undeniable tension between the purpose of international investment law – fundamentally, to promote economic development – and the protection of human rights. In particular, scholars have questioned the compatibility of human rights and investment protections because they arguably “operate on different planes and are thus not amenable to balancing.”⁶⁷ But this kind of argument would make the false assumption that investment law is self-contained and isolated from other branches of law. Further, the rule of law does not just substantively protect human rights. It also protects procedural elements, such as the enforcement of contracts and treaties. As such, this argument presents a false dichotomy. In this line of reasoning, it is arguable that human rights should and will likely assume more prominence in the negotiation of future BITs, given the ongoing debate pertaining to human rights and business.⁶⁸

Another criticism is that BITs are negotiated outside of the public eye. Many have argued that, due to the lack of transparency in BITs – not to mention, their investor-oriented nature – investment treaties are one-sided.⁶⁹ This is bolstered by the fact that investment agreements fail to provide mechanisms to challenge investors who have engaged in improper conduct in their host state.⁷⁰

⁶⁶ Mouyal, *supra* note 52 at 105.

⁶⁷ *Ibid.*

⁶⁸ Moshe Hirsch, “Interactions between Investment and Non-Investment Obligations in International Investment Law” in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) at 154.

⁶⁹ *Ibid.*

⁷⁰ *Human Rights, Trade, and Investment Matters* (Amnesty International, 2006) at 20.

Further, it is arguable that states may find themselves in a difficult position because investment issues are subject to international investment arbitration.⁷¹ This may “insulate business ventures from the new laws and regulations, or allow for [seek] compensation from the government for the cost of compliance.”⁷² In particular, investors may use the provisions of BITs to challenge human rights or social regulations that may negatively impact their investment at arbitration.⁷³ As such, investment arbitration has been criticized as a coercive tool to bind a host state to alternative dispute resolution because investors can trigger compulsory arbitration of a dispute under BITs. This is especially harmful to developing countries, which may not have adequate resources or expertise to participate at the same level as wealthy investors in a complex and expensive arbitration. This reflects the same asymmetries that have been recognized in the negotiations of BITs – in this specific context, such asymmetries in bargaining power put weaker economies at a disadvantage.⁷⁴ Thus, while this investor-friendly avenue protects investors from arbitrary and discriminatory actions by the host state, it can indirectly result in the diminishment of social welfare and labour standards. Nonetheless, this is no excuse for the obligation of states to safeguard the rights of their citizens and enforce the rule of law. The economic incentives underlying FDI are no reason for states to shirk their legal obligations because the weaker the rule of law, the more negative and reckless the corporate behaviour. In order to achieve both CSR and long-term prosperity, it is crucial to invest in the rule of law and adequate enforcement.

Overall, international investment law currently presents the most viable avenue to protect human rights in transnational business. In particular, human rights can be protected through the negotiation of protective clauses in BITs. Nonetheless, no solution

⁷¹ Yulia Levashova, “The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States Through International Investment Law” (2018) 14 :2 Utrecht L Rev 40.

⁷² John Ruggie, “Report of the SRSG to the UN Human Rights Council on the Issue of Human Rights and Business” (2008) at para 12; “Report of the Special Representative of the Secretary-General Business and Human Rights” (2009) A/HRC/11/13 at paras 29-31.

⁷³ *Ibid.*

⁷⁴ Leyla Davarnejad, “Strengthening the Social Dimension of International Investment Agreements by Integrating Codes of Conduct for Multinational Enterprises” (2008) OECD Global Forum on International Investment.

will work unless the state has integrity, political will, and strong enforcement mechanisms.

(C) How to Protect Workers' Rights in BITs: Protective Clauses

Having explored the relationship between human rights and FDI, this section focuses on achieving CSR through investment treaties in the labour law context. As noted in the introduction, there are many layers to the problem of CSR, ranging from climate change to consumer protection. Even within the specific sphere of labour rights, the question of CSR is complex and includes issues like forced labour, child labour, and vicarious liability. While these are all very important facets of CSR, it would exceed the scope of this essay to discuss all of these problems. As such, this section looks specifically at the subject of workers' rights and how BITs can be crafted to protect them.

It is necessary to identify legal mechanisms to balance international rules protecting foreign investments, on one hand, and the implementation of internationally protected workers' rights, on the other hand. Investment treaty clauses accounting for labour rights issues can be divided into five different types.⁷⁵

First, references to labour rights can appear in the preamble of investment treaties.⁷⁶ For example, in the 2012 US Model BIT Preamble, it states that the BIT desires to "achieve these objectives in a manner consistent with the protection of health, safety, environment, and promotion of internationally recognized labour rights."⁷⁷ A reference to labour rights in the preamble of an investment treaty is effective in that, in principle, it should allow arbitral tribunals to consider workers' rights' protection issues in the interpretation of substantive clauses.⁷⁸

Second, it is possible to include Non-Lowering Standards clauses to protect labour rights in BITs.⁷⁹ Some investment treaties contain rules that prevent host states from weakening the level of

⁷⁵ Brugnatelli, *supra* note 32 at 306.

⁷⁶ *Ibid* at 308.

⁷⁷ 2012 US Model Bilateral Investment Treaty, online: <
<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>>.

⁷⁸ Brugnatelli, *supra* note 32 at 310.

⁷⁹ *Ibid* at 310.

labour protection to attract foreign investments. These provisions can be contained within the substantive clauses of the BIT or in side-agreements.⁸⁰ Non-Lowering Standards clauses are provided for in several model BITs. For example, Article 13 of 2012 Model US BIT states that the parties reaffirm their respective obligations as members of the ILO and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work.⁸¹ This same article lists what shall be considered as labour laws under the Non-Lowering Standards provision, such as freedom of association, elimination of forced labour, and child labour.⁸² One of the key consequences flowing from Non-Lowering Standards clauses is that these provisions exclude the possibility that host states will contract out of domestic legislation protecting workers' rights.⁸³

Third, it is possible to add Minimum Standard Clauses to protect labour rights in BITs.⁸⁴ For example, the Belgian Model BIT states that the "parties shall strive to ensure that such labour principles and the internationally recognized labour rights set forth...are recognized and protected by domestic legislation."⁸⁵ Most of the Belgian BITs now have this kind of clause; however, it can be argued that this clause may generate concerns about any supervening exercise of regulatory powers by the host state.⁸⁶

Fourth, it is possible to include Right to Regulate clauses.⁸⁷ These clauses are potentially the most effective because they explicitly safeguard the host state's authority to freely regulate labour issues within its own jurisdiction. This correlates to the necessity of a strong rule of law to protect social goals, contracts, and investment treaties. An example of a Right to Regulate clause

⁸⁰ Brugnattelli, *supra* note 32 at 310.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Lorenzo Cotula, "Responsible Investment Provisions in International Investment Treaties: Where Next?" (16 October 2017), online (blog): *International Institute for Environment and Development* <<https://www.iiied.org/responsible-investment-provisions-international-investment-treaties-where-next>>.

⁸⁴ Steffen Hindelang & Markus Krajewski, eds, *Shifting Paradigms in International Investment Law*, 1st ed (Oxford: Oxford University Press, 2016).

⁸⁵ Brugnattelli, *supra* note 32 at 313.

⁸⁶ *Ibid.*

⁸⁷ Catharine Titi, *The Right to Regulate in International Investment Law* (Oxford: Hart Publishing, 2014).

can be seen in Article 6.1 of the 2002 Belgian Model BIT.⁸⁸ This article recognizes the right of each contracting party to establish its own domestic labour standards, and to adopt or modify accordingly its labour legislation.⁸⁹

Finally, BITs can protect labour rights through clauses that induce foreign investors to respect workers' rights while operating in the host state.⁹⁰ This kind of approach entails the possibility of directly sanctioning the investor for violations of workers' rights committed in the host state, thereby bypassing the inherent discretion of the host state in the exercise of its regulatory powers.⁹¹ This kind of clause has not been widely implemented in investment treaties, so it is unclear what kind of an effect it truly has in the protection of human rights. Even though such a clause might appear to be the best option to directly address CSR, it is flawed because it does not state any sanction if the parties disregard the clause.

Essentially, BITs provide a clear option for the protection of human rights against abusive behaviour of TNCs. At present, BITs offer the most powerful solution as soft law instruments and transnational law have yet to provide concrete or binding frameworks to compel TNCs to respect the communities in which they operate. In theory, this can be achieved through various protective clauses and stipulations; however, even though this is currently the best option, it will not succeed if the host state has a weak rule of law.

The Rule of Law As a Pre-Condition to CSR

Although TNCs play a critical role in the communities in which they operate, the state and its institutions also have a fundamental responsibility to uphold the rule of law. Even though international investment law and BITs offer myriad ways to protect against corporate misbehaviour in host states, they cannot successfully secure CSR unless there is a strong rule of law in the given state. The rule of law can be defined as:

⁸⁸ Brugnatelli, *supra* note 32 at 313.

⁸⁹ *Ibid.*

⁹⁰ *Ibid* at 314.

⁹¹ *Ibid.*

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decisionmaking, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁹²

The rule of law is necessary for the protection of the citizens of a host state on a substantive level, in addition to investors on a procedural level because it ensures the enforcement of contracts and treaties (including BITs) as well. As a result, many corporations want to do business in countries that have strong enforcement mechanisms.⁹³ Thus, it would be a false dichotomy to say that there is a tension for host states in ensuring a strong rule of law while also securing investment. States have a legal duty to protect their citizens, and they can make legal compromises to encourage investment in their territory, such as tax breaks to foreign investors. As a bottom line, economic development and human rights can be compatible if the state's rule of law is strong.

One school of thought is that developing countries relax their regulations to incentivize a TNC to do business in their territory – this has been called a “race to the bottom.”⁹⁴ As a result, proponents of this school of thought argue that the race to the bottom creates an environment that is conducive to human rights violations. So, the bottom line is that you could have the most perfectly drafted bilateral investment treaty that incorporates social policy goals and makes them into contractual stipulations for a transnational corporation, in theory.

This begs the question of how to incentivize state accountability. This is a difficult question with many layers. In a civil, democratic society, democratic accountability could

⁹² *Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels, Report of the Secretary General*, UN Doc A/66/749 at para 2.

⁹³ The World Bank, “Doing Business: Measuring Business Regulations,” online: < <https://www.doingbusiness.org/en/rankings> >.

⁹⁴ Larry Cata Backer, “Multinational Corporations, Transnational Law : The United Nations’ Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law” (2006) 37:2 Colum HRLR 287.

incentivize a nation to account for its weak rule of law and enforcement measures. On the other hand, in countries with *de facto* governments in place, the answer is not so simple. How is it possible to incentivize such states to strengthen their rule of law, and enforce contractual rights and BITs?

This concern has been brought to the forefront of international growth and development due to China's One Belt One Road initiative. Although this initiative underscores the need to strengthen social and environmental impact assessment and risk management of projects, "it is unclear how the Chinese Government intends to fulfill this need, nor what the extent of social and environmental impact assessments would entail in practice."⁹⁵ This lack of transparency regarding the terms of this project has led to various concerns, "in particular, in terms of how it relates to the perception of a fair, inclusive, and participatory multi-stakeholder approach."⁹⁶ This concern is highlighted by reports of Chinese investment companies' labour rights violations in Africa.⁹⁷ These reports speak of lack of labour contracts, excessive working hours, wages below minimum wage standards, disregard for local labour laws, and violations of ILO conventions.⁹⁸ More recently, China has invested in the Caribbean, sparking criticism over its intentions to "extract mineral resources, develop strategic ports and shipping lanes, and to provide opportunities for Chinese labour" – all at the expense of Jamaican tax payers.⁹⁹ This supports the argument that, without adequate enforcement mechanisms, any legal solution addressing CSR is powerless.

⁹⁵ André Capretti, "Rethinking Development & Human Rights in the Era of China's 'One Belt One Road'" (McGill Term Essay, Unpublished) at 26.

⁹⁶ *Ibid.*

⁹⁷ *Ibid* at 27.

⁹⁸ *Ibid.*

⁹⁹ Tiffany Foxcroft, "Jamaica has China to thank for much-needed infrastructure – but some locals say it has come at a price" (28 November 2019) CBC News, online: <<https://www.cbc.ca/news/world/china-power-belt-and-road-caribbean-jamaica-1.5374967>>.

TNC Accountability in the Home State

The lack of rule of law in some host states emphasizes the need to provide possible recourse to victims of human rights violations in the home states of TNCs. In some host states, it is unlikely that the victims would be able to have a fair and neutral trial (or at all) due to corruption and violence.¹⁰⁰ As a result, many victims have sued TNCs in their home state. While this is not exactly a simple task, it is still expensive and time-consuming due to legal fees and international travel. Yet, the victims are able to be heard in a fair trial by a neutral judge. Given the limited scope of this paper, this section focuses on potential recourse in TNC home states in Canada and the United States.

(A) Recourse for International Victims in Canadian Courts

In recent years, the victims of human rights violations perpetrated or abetted by Canadian corporations have taken their claims to the Canadian legal system. The most recent case is *Araya*, in which victims of forced labour sued a Canadian mining company (Nevsun) for human rights violations committed in Eritrea.

Nevsun involved human rights violations at the Bisha mine in Eritrea. *Nevsun* is a publicly held corporation incorporated in British Columbia. *Nevsun* engaged in a commercial venture with the government of Eritrea to create the first operating modern mine in the country. To provide a clearer picture of the context of this case and the allegations against *Nevsun*, it is necessary to provide a brief summary of Eritrea as a state. Eritrea is “one of the most oppressive regimes in the world,” with a history of forced labour, arbitrary arrests, torture, infringement of assembly, and gender-based violence, to name a few.¹⁰¹ In terms of its political landscape, Eritrea is a “dictatorial, one party state which has never held elections or implemented a constitution.”¹⁰² It is clear that Eritrea has a very weak rule of law (or perhaps, one can suggest that it has no rule of law at all, given that all power is concentrated in the hands of the Eritrean president).

¹⁰⁰ *Araya v Nevsun Resources Ltd*, 2017 BCCA 401 [*Araya*].

¹⁰¹ *Araya*, *supra* note 100 at para 8.

¹⁰² *Ibid.*

In this case, Nevsun was allegedly complicit in a contracting company's use of forced labour, slavery, and torture of military conscripts. Allegedly, Nevsun knew of this and turned a blind eye because the Eritrean Government forced them to accept Segen as a subcontractor for the joint venture.¹⁰³ Nevsun argued that, procedurally, British Columbia was the wrong forum because the locus of the asserted wrongs was Eritrea.¹⁰⁴ In this vein, Nevsun defended its position by claiming that a ruling on Nevsun's alleged wrongs would amount to judging Eritrea's conduct, and that CIL principles could not create a private law cause of action against corporations under Canadian law.¹⁰⁵ Both the British Columbia Supreme Court and the British Columbia Court of Appeal concluded that Nevsun failed to prove that the plaintiffs' claims were bound to fail. Although British Columbia courts allowed the case to move forward on the merits, and the Supreme Court of Canada made a decision in 2020, it is not yet clear what the implications of *Nevsun* are for labour rights.¹⁰⁶

In the *Nevsun* case, the British Columbia Court of Appeal held that the onus was on Nevsun to establish that it would be fairer and more efficient to depart from a trial in British Columbia. The Court had to then balance expenses, inconvenience, and the practical difficulties of mounting a trial in British Columbia with the prospects of no trial at all, or a trial in an Eritrean court subject to Eritrean military control. In this case, the Court considered these factors in light of the grave allegations that the plaintiffs were making. Given the gravity of their allegations of torture and forced labour, compounded by the very weak rule of law in Eritrea, the Court held that the British Columbia courts represented a more appropriate forum than any court in Eritrea.¹⁰⁷

Nevsun also argued that the court should apply the Act of State doctrine to dismiss the lawsuit, but the court rejected this argument as well. Rather, it found that acts involving torture, forced labour, and slavery prevented the State from requesting immunity because all of these acts were "contrary to both peremptory norms of international law and a fundamental value

¹⁰³ Araya, *supra* note 100 at para 3.

¹⁰⁴ *Ibid* at para 17.

¹⁰⁵ *Ibid* at para 73.

¹⁰⁶ Supreme Court Docket, *supra* note 98.

¹⁰⁷ Araya, *supra* note 97 at para 198.

of domestic law.”¹⁰⁸ In its decision, the Court acknowledged that international and transnational law were in flux, especially in connection with human rights violations that were not effectively addressed by traditional international mechanisms.¹⁰⁹ Overall, the British Columbia Court of Appeal’s decision highlights some of the key legal and policy issues involved in holding TNCs liable for their breaches of human rights. Yet, many questions remain unanswered – in particular, whether the case will even be heard on the merits in the future, and what this means for future victims of Canadian TNCs’ human rights violations. As mentioned earlier, the Supreme Court of Canada’s pending decision will hopefully provide some answers. Regardless, the *Nevsun* case highlights the lack of tools available to victims seeking redress against TNCs operating in states with a weak rule of law.

This case is of particular note because the Supreme Court of Canada heard the case on January 23, 2019.¹¹⁰ The Supreme Court released its decision on 28 February 2020, assessing whether *Nevsun* as a private, non-state actor, could be held accountable in Canada for its violations of customary international law abroad. The majority held that, while the Act of State doctrine is not part of Canadian law, customary international law is part of Canadian law through the doctrine of adoption.¹¹¹ Thus, courts could find Canadian companies liable for violating customary international law. This is a step in the right direction in terms of corporate liability for breaches of law outside of Canada. That said, in the labour context, the Supreme Court did not decide whether *Nevsun* violated workers’ rights.

Aside from *Nevsun*, numerous international plaintiffs have brought their claims to Canadian courts to seek reparation for harms committed by Canadian TNCs. The two most recent cases in which plaintiffs were successfully allowed to bring their claims to Canadian courts were *Choc v Hudbay Minerals*¹¹² and *Garcia v Tahoe Resources Inc.*¹¹³ In *Hudbay*, the plaintiffs alleged that

¹⁰⁸ *Ibid* at para 169.

¹⁰⁹ *Ibid* at para 197.

¹¹⁰ Docket 37919 of the Supreme Court of Canada, *Nevsun Resources Ltd v Araya et al* [Supreme Court Docket], online: <<https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37919>>.

¹¹¹ 2020 SCC 5 at paras 44, 90.

¹¹² *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414 [*Hudbay*].

¹¹³ *Garcia v Tahoe Resources Inc.*, 2017 BCCA 39 [*Tahoe Resources*].

Hudbay was responsible for killing a community leader, shooting a man, and gang-raping eleven women.¹¹⁴ The victims were all indigenous Mayan Q'eqchi in Guatemala, and the crimes took place on ancestral lands by Hudbay's Fenix mine.¹¹⁵ In this case, Hudbay argued that its corporate structure meant that it – as the parent company – could not be held responsible for the alleged behaviour of its subsidiary. The Ontario Superior Court allowed the action to proceed on the merits; however, no decision has been rendered yet.¹¹⁶ While the outcome of this case is not yet clear, it appears to be a step in the right direction. Its treatment by the Ontario Superior Court demonstrates that victims of human rights violations committed by Canadian TNCs will at least have the opportunity to a fair trial. At the very least, there is a chance for them to be heard.

Another important Canadian case is *Tahoe Resources*. In this case, the plaintiffs alleged that Tahoe was negligent and authorized the violent behaviour of its security personnel (who opened fire on peaceful protesters at its mine in Guatemala).¹¹⁷ The British Columbia Court of Appeal emphasized that the appellants would not receive a fair trial in Guatemala, especially not against a powerful TNC whose mining interests in Guatemala aligned with the political interests of the state¹¹⁸ (which, incidentally, also had a very weak rule of law). Similarly to the *Nevsun* case, Tahoe's argument of *forum non conveniens* failed because British Columbia was more appropriate than Guatemala as a legal forum to hear this dispute. This demonstrates that the Canadian courts are very much aware of the legal and social environments in the home states in which TNCs operate. This is a key consideration, illustrating yet again the necessity of a strong rule of law to hold TNCs accountable. The outcome of *Tahoe Resources* is not yet known, as the Supreme Court of Canada refused to hear Tahoe's appeal and the case has been sent back to the British Columbia Supreme Court to be heard on the merits.¹¹⁹

¹¹⁴ *Hudbay*, *supra* note 106 at para 4.

¹¹⁵ *Ibid*.

¹¹⁶ *Choc v Hudbay Minerals Inc.*, 2018 ONSC 1288 (case conference).

¹¹⁷ *Tahoe Resources*, *supra* note 107 at para 6.

¹¹⁸ *Ibid* at para 126.

¹¹⁹ *Ibid* at para 132.

Overall, *Nevsun*, *Hudbay*, and *Tahoe Resources* represent the obstacles that victims face when fighting against powerful TNCs. If they try to fight in a home state that has a weak rule of law, they risk interference by political entities, corruption, and difficulty accessing legal aid and qualified counsel. That said, the victims of such human rights abuses may also face some of these difficulties if they sue the TNC in its host state – for example, financial constraints may deter them from accessing qualified counsel. Beyond the practical challenges, the victims also face an uphill climb in terms of possible defences. In addition, the complex structure of TNCs represents a legal challenge for the victims – for example, most TNCs have multiple subsidiaries operating around the world. On the merits, it is not yet clear whether parent TNCs will always be held liable for the actions of their foreign subsidiaries. This complicates the question of who bears the duty of care towards the victims, and it makes it very difficult to ascertain who should bear responsibility.¹²⁰

Another legal difficulty is that victims cannot always articulate their claims in legal terms that adequately capture the gravity of their allegations. For example, in the *Nevsun* case, *Nevsun* argued that the plaintiffs should have framed their claims using the torts of assault and false imprisonment.¹²¹ Yet these torts did not convey the severity of the human rights violations endured by the plaintiffs – they were not *just* assaulted. They were tortured and put through forced labour as military conscripts of the violent and corrupt Eritrean government. Further, if *Nevsun* were to be held liable for the torts of assault and false imprisonment rather than violations of CIL, then this would reduce the gravity of the victims' harrowing experiences and minimize their available remedies.¹²²

Scholars such as Lauzon and Cassell have argued for a common law duty of care that targets businesses' international human rights obligations.¹²³ According to Cassell, "the time is ripe for common law courts to enforce the now widely recognized human rights responsibilities of business enterprises to exercise

¹²⁰ Jolane Lauzon, "Araya v *Nevsun Resources*: Remedies for Victims of Human Rights Violations Committed by Canadian Mining Companies Abroad," (2018) 31:1 RQDI 143.

¹²¹ *Ibid* at 162.

¹²² *Ibid*.

¹²³ *Ibid* at 166.

human rights due diligence.”¹²⁴ Further, Cassell argues that such a duty of care would be the most appropriate way for states and businesses to fulfill the remedial goals set out in the Guiding Principles on Business and Human rights.¹²⁵ Such a duty of care would present victims with the opportunity to bring a tort action in negligence against TNCs if they could establish that their injuries were reasonably foreseeable by the exercise of due diligence. This would overcome the burden represented by the corporate veil doctrine, as parent companies would be responsible for their failure to exercise due diligence with regard to subsidiaries and push for improved oversight.¹²⁶ Further, such an analysis would not depart from the factors that courts must consider while determining whether a duty of care exists – for example, foreseeability, proximity, and public policy.

Overall, although Canadian courts are open to hearing claims from victims of human rights violations by TNCs in states where the rule of law is weak, it is unclear how successful these claims will be on the merits. Scholars such as Zerk have posited that the only private law redress mechanisms to recognize a cause of action for human rights is a statute.¹²⁷ This is the situation in the United States, where the ATCA has been used to sue TNCs.

(B) The American Experience and the ATCA

American jurisprudence pertaining to the ATCA reveals this statute’s potential to address human rights claims against TNCs. Litigation under the ATCA seeks to enforce legal norms of behaviour beyond the enforced law of the host country, and this statute has even been regarded as a “human rights statute.”¹²⁸ The statute appears simple, as it reads in its entirety: “The district courts shall have original jurisdiction of any civil action by an alien

¹²⁴ Douglass Cassell, “Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence” (2016) 1:2 Bus & Hum Rts 179 at 180.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ Zerk, *supra* note 9.

¹²⁸ David Dana & Michael Barsa, “Three Obstacles to the Promotion of Corporate Social Responsibility by Means of the Alien Tort Claims Act” (2010) 21:1 Fordham Intl LJ 79.

for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹²⁹

The ATCA was dormant until the Second Circuit upheld federal jurisdiction over a claim in *Filártiga v Peña-Irala*.¹³⁰ In this case, a Paraguayan man was tortured and murdered for his father’s political activities in Paraguay. Although the facts of the case took place in Paraguay, the Court found that “an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.”¹³¹ Following this case, the ATCA was successfully used to recover civil damages for serious human rights violations, such as torture, crimes against humanity, and extrajudicial killings, even if they occurred in a foreign country.

Yet, recent cases demonstrate that the American courts’ interpretation of the ATCA tends to undermine CSR. In *Doe v Unocal*,¹³² the plaintiffs brought an action against Unocal Corp, Total SA, and Union Oil Company of California, which were operating a project of extraction and transportation of natural gas in Myanmar. The plaintiffs alleged that, during the execution of the project, they suffered at the hand of the Myanmar military with the complicity of the responding companies, grave human rights’ violations such as death of family members, assault, rape, and other torture, loss of their homes and property, and forced labour. The abuses were committed in the mid-1990s by soldiers providing security for Unocal’s natural gas pipeline in Myanmar. In this case, the Superior court rejected the defendants’ arguments, prompting Unocal to settle with the plaintiffs. While the case ultimately was closed, it does provide some encouragement in that the case against Unocal pushed the TNC to compensate its victims for having been complicit to the military’s brutal human rights violations. Taken a step further, it provides hope in that the victims were villagers from a remote region living under a brutal

¹²⁹ 28 U.S.C. § 1350.

¹³⁰ *Filártiga v Peña-Irala*, 630 F.2d 876 (2nd Cir 1980) [*Filártiga*].

¹³¹ *Ibid* at 5.

¹³² *Doe v Unocal*, 395 F.3d 932 (9th Cir 2002).

dictatorship. Yet, they faced an American TNC in court, won, and received a significant settlement.¹³³

In *Sinaltrainal v Coca Cola Company*,¹³⁴ the Colombian trade union Sinaltrainal and five individuals filed a lawsuit in the Florida Third District Court of Appeal against Coca Cola Company and two of its Latin American bottlers. The plaintiffs alleged that the responding companies hired paramilitary forces to threaten, kidnap, torture and murder the leaders of Sinaltrainal in Colombia. The union attempted to bring the case within the jurisdiction of the American district court by using the ATCA, since the ATCA grants American courts jurisdiction in any dispute where a tort has been committed in violation of the “law of nations.” On appeal, the U.S. District Court dismissed the charges against the Coca Cola Company because the case occurred abroad and did not have a substantial origin within the United States. Before the United States Court of Appeals for the Eleventh Circuit ruled in favour of Coca Cola, affirming the District Court’s decision. In dismissing the ATCA claims, the Court of Appeals cited a lack of evidence to link the actions of the paramilitaries to the Colombian government and Coca-Cola.¹³⁵

In *Kiobel v Royal Dutch Petroleum Co*,¹³⁶ the plaintiffs alleged that members of the Nigerian military had attacked their villages in the early 1990s. They shot, killed, beat, and raped Ogoni residents, and destroyed and looted their property. In particular, the plaintiffs argued that the Royal Dutch Petroleum company provided transportation to military forces and compensated Nigerian soldiers for their work.¹³⁷ This case, arising out of corporate complicity in brutal human rights violations, focused on the possibility for corporations to be sued under the ATCA for violations of CIL. The Court of Appeals for the Second Circuit refused to recognize corporate liability under the ATCA because corporate liability had not risen to the level of a specific, universal, and obligatory norm encompassed by the law of

¹³³ EarthRights International, “Summary: Doe v Unocal”, online : <
<https://earthrights.org/case/doe-v-unocal/>>.

¹³⁴ *Sinaltrainal v Coca-Cola*, 578 F.3d 1252.

¹³⁵ *Ibid*.

¹³⁶ *Kiobel v Royal Dutch Petroleum Co*, 569 US 108 (2013).

¹³⁷ *Ibid* at 1.

nations.¹³⁸ The Supreme Court relied on the presumption that American law governs domestically – it does not rule the world. To displace the presumption against extraterritorial application, the plaintiffs would now have to show sufficient jurisdictional ties with the United States.¹³⁹ In this case, the only connection to the United States was the office of an affiliated company of Royal Dutch in New York City. According to the Supreme Court, this link was too tenuous to rebut the presumption because “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.”¹⁴⁰ As a result, the plaintiffs were not able to receive compensation and Royal Dutch, in spite of its complicity in human rights atrocities, was not held accountable.¹⁴¹ While this may not have been a success in the court room, this case (as with many high profile cases) can be argued to have an indirect impact on improving behaviour of TNCs worldwide.

In *Jane Doe I et al v Nestle SA et al*, former child slaves who were trafficked and forced to work harvesting cocoa beans in Côte d’Ivoire filed a lawsuit against Nestle, Archer Daniels Midland, and Cargill. They alleged that they were forced to work long hours without pay, kept in locked rooms when not working, and severely physically abused by those guarding them. Ultimately, the plaintiffs alleged that the TNCs aided, abetted, or failed to prevent their torture, forced labour, and arbitrary detention. While their case was dismissed by the trial court, they prevailed in the Ninth Circuit Court of Appeals when the Appeals Court rejected the TNCs’ arguments that corporations could not be sued under international law. The case was sent back to trial court to determine whether the plaintiffs could satisfy the new jurisdictional standard set by the Supreme Court in *Kiobel*.¹⁴²

The ATCA and its relationship to CSR was revisited in *Jesner v Arab Bank*, in which the Supreme Court affirmed that foreign corporations may not be defendants in suits brought under the ATCA.¹⁴³ The plaintiffs were victims of terror attacks in Israel,

¹³⁸ *Ibid* at 3.

¹³⁹ *Ibid* at 13.

¹⁴⁰ *Ibid* at 14.

¹⁴¹ *Ibid*.

¹⁴² *Ibid*.

¹⁴³ *Jesner v Arab Bank*, PLC No 16-499, 584 US (2018) [*Jesner*].

West Bank, and Gaza. Some of the plaintiffs were Americans and some were non-Americans, so they brought two separate law suits. The non-American plaintiffs relied on the ATCA. They alleged that the Arab Bank funnelled millions of dollars through its New York branch to finance terrorist attacks perpetrated in Israel to reward families of suicide bombers. In this case, the Supreme Court of the United States held that “any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government.”¹⁴⁴ The Court reasoned that this statute was intended to promote harmony in international relations by ensuring international plaintiffs a remedy for international law violations when the absence of such a remedy might provoke foreign nations to hold the United States accountable.¹⁴⁵ Further, the Supreme Court stated that the tenuous link between the terrorist attacks and the United States demonstrated the danger of extending the scope of liability under the ATCA to foreign TNCs like Arab Bank. Thus, foreign corporations may not be defendants in suits brought under the ATCA.

All of the above cases entailed situations in which workers’ internationally protected rights were violated. In each case, a state with a poor rule of law hosted a foreign investment in which the investors either directly participated in the violations, aided and abetted them, or at least tolerated their commission. While developing states could try to argue that enforcing their human rights obligations would have conflicted with economic investment goals – not to mention the threat of investor-state arbitration¹⁴⁶ – this does not change the fact that these states have a legal duty to enforce the rule of law in their territory and safeguard the rights of their citizens. In these cases, the best recourse available was to go to the courts of the TNC home state and try to seek redress. Unfortunately, this possibility has been severely limited in the United States because it requires a substantial connection to the United States. This is somewhat ironic, considering that the ATCA was “intended to promote harmony in international relations by

¹⁴⁴ *Jesner*, *supra* note 143 at 29.

¹⁴⁵ *Ibid* at 25.

¹⁴⁶ Brugnatelli, *supra* note 32 at 304.

ensuring foreign plaintiffs a remedy for international law violations...¹⁴⁷

Overall, the issues raised by CSR are far from settled. Where there is a weak rule of law in jurisdictions where TNCs operate, suing in the corporation's home country is more viable than suing in a state with a weak rule of law. However, it is not a complete solution, given the complexity and multijurisdictional nature of TNCs.

Conclusion

Given their extensive resources and power, attempting to hold TNCs liable is no simple legal feat. It means dealing with multiple jurisdictions, governing laws, and languages, not to mention countless political, legal, social, and cultural barriers. Catalyzed by global technologies that decentralize the state, this threatens humanity: citizens of developing countries, labourers, and the environment are all left at the mercy of all-powerful institutions with minimal regulation.

Multiple global organizations, ranging from the UN to the ILO, have recognized the challenges associated with CSR. As a result, they have developed soft law rules addressing corporate governance and accountability. While these rules have raised awareness about human rights atrocities committed by TNCs, they are not binding. This is not enough because human rights are at stake. The problems pertaining to CSR call for a concrete legal solution; however, current legal frameworks have not yet been able to resolve these issues.

In particular, the traditional frameworks of private international law and public international law are not sufficient to hold transnational corporations accountable for their poor behaviour. Neither provides a concrete legal framework to deal with these private institutions that transcend state boundaries and wield power and influence around the world. Not even the framework of transnational law has offered a solid next step.

While the reputational importance for corporations must not be undervalued, the recent "social license to operate" is also

¹⁴⁷ *Jesner*, *supra* note 137 at 25.

not enough to compel TNCs to respect human rights. Further, this concept is more of an issue for publicly traded corporations, rather than private ones. Essentially, the public's emphasis on CSR has not changed the fact that profit maximization is still the bottom line for both privately and publicly held corporations to survive in the business world.

Currently, the most viable solution is to negotiate clauses that provide for human rights objectives in BITs. Such protective clauses could stipulate that investors must respect the communities in which they operate. Additionally, they could hold states to their fundamental legal obligation to uphold the rule of law. This would protect both the citizens of the state and the investor, and perhaps minimize the "race to the bottom." Nonetheless, not even the most brilliantly crafted BIT can work without sufficient enforcement mechanisms.

Still, incentivizing a state to hold TNCs responsible for their actions is complicated. In civil, democratic states, part of the answer could be public accountability. But in states with *de facto* governments, corruption, and violence, what can be done to incentivize states to uphold the rule of law and safeguard human rights? As this essay has attempted to demonstrate, there is no clear-cut answer. Regardless, the state is a crucial actor in any discussion of CSR, and its bargaining power and economic desires do not absolve it from enforcing the rule of law in its territory.

At the very least, it is possible for victims to seek recourse in TNCs' home state. Still, in the legal setting, the plaintiffs must take the initiative to institute a claim there. Taken a step further, this option is not always promising because of the possibility of complex legal arguments and practical challenges. For example, it is challenging for international plaintiffs with little funding to find legal counsel in the home state and pay the expenses of litigation – particularly when they are fighting sophisticated corporations with extensive resources. This is evidenced by recent Canadian and American experiences.

To conclude, CSR has emerged as a key concern in international business, but there is still a lot of work to do. This paper has attempted to demonstrate that international investment law presents the best option to achieve social justice. But this solution can only succeed if there is a shift of norms – particularly, the rule of law. It is also necessary to acknowledge that, aside

from investment law, there are countless other avenues to improve corporate behaviour and ensure TNC accountability to global communities. This ranges from civil society to the media to the importance of corporate image for the purpose of recruiting talented employees and attracting consumers. Overall, this dilemma possesses a real social dimension in that we all play a part. Governments and consumers alike support TNC operations to continue their way of life. TNCs are vital to the global economy and, as a consequence, to solid societies. Thus, to hold TNCs accountable and achieve a framework for CSR, the rule of law – and social norms – must change across the proverbial board.

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