

Protection for the Rights and Interests of Local Communities Adversely Affected by Multinational Energy Companies' Activities

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Abstract

Foreign investments of Multinational Corporations (MNCs) bring several advantages for the host states where they operate. In the case of foreign investment in the energy sector, the business activities of MNCs have an impact on social and environmental issues that adversely affect the right and interests of the local communities. In terms of addressing such problems, some binding and non-binding international legal instruments were established and adopted by states and international organizations/bodies. This article discusses the sufficiency of the protection provided by international law for the local communities adversely affected by MNCs in the energy sector especially with regards to human rights, environmental, and anti-corruption matters. This article argues that protection of the rights and interests of local communities from the activities of MNCs are developed through an international legal framework, both general and bilateral treaties, as well as the national law of host States.

Keywords: Energy; Foreign investment; Local communities; Protection; Social and environmental impacts.

1. INTRODUCTION

Resource-rich countries, most of which are developing countries, tend to attract foreign investment to develop their resources through improved technology, expertise, and financial resources.¹ In addition, foreign investments offer opportunities to take advantage of liberal trade, open markets, and supports for the export of goods.² Foreign investors operate their businesses in host states through multinational corporations (MNCs), which are subject to the governance of the international investment law as and domestic law the host country. The presence of MNCs in such countries not only provides advantages but also causes social and environmental impacts on the host states that raise global concerns.³ Multinational energy

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¹ Kevin R. Gray, "Foreign Direct Investment and Environmental Impacts - Is the Debate Over?," *Review of European Community and International Environmental Law* 11, no. 3 (2002): 306.

² *Ibid.*

³ See for example: Subhan Ullah, Kwaku Adams, Dawda Adams, Rexford Attah-Boakve, "Multinational corporations and human rights violations in emerging economies: Does commitment to social and environmental responsibility matter?," *Journal of Environmental Management* 280 (2021): 1-12; Justine Kvoce, Katerina Streltsova, Ufionma Odibo, and Giuseppe T. Cirella, "Globalization Impact on Multinational Enterprises" *World* 2, no. 2 (2021): 219-221; Fahad Khalid, Juncheng Sun, Guanhua Huang, and Chih-Yi Su, 2021. "Environmental, Social and Governance Performance of

companies that operate energy-related activities such as exploitation of resources, trade, investment, transportation, and supply⁴ in those host states could put the environmental and human rights of the local population at risk. Therefore, sufficient protections for those adversely affected are required.

International law regulates and provides protections for all parties involved in foreign investments. These parties include investors, host countries, and local communities that are affected by the activities of MNCs engaged in the energy sector. Particularly for local communities, human rights protection, environmental protection, and anti-corruption protection are among the protection offered. This can be evidenced from the notable number of cases before ICSID regarding the environmental matters of local communities.⁵ The provisions and implementation of these protections depend on the national level,⁶ while host states often do not have an adequate capacity to implement these protections because of the imbalanced position with investors due to investors' powerful capability in the economic sector, particularly in controlling the host states' government.⁷ As a result, investors might set investment conditions for the favor of their businesses, such as adhering to the bare minimum of environmental or other social standards.⁸ Furthermore, the lack of ability to resolve complex cases because of the absence of substantive and procedural law when resolved through litigation also drives the implementation even harder.⁹ In these circumstances, the development of foreign investment law has begun to change, recognizing that MNCs must play a role in providing this protection. Several instruments outline MNCs' obligations to protect the rights and interests of local communities. Some of the obligations in those instruments are legally binding, such as those found in Bilateral Investment Treaties (BITs), while others, such as the OECD Guidelines and other provisions, are not. Therefore, some provisions in the instruments cannot be imposed directly on MNCs.

In general, international law has regulated the obligations that MNCs must carry out, such as the obligations to respect host state laws, human rights, and various environmental obligations, including seeking economic

Chinese Multinationals: A Comparison of State- and Non-State-Owned Enterprises," *Sustainability* 13, no. 7 (2021): 4-8.

⁴Danae Azaria, "Community Interest Obligations in International Energy Law," *Community Interest Across International Law* 1, no. 1 (2018): 297.

⁵ Magali Garin Respaut and Andrew Willcocks, "Environmental Issues in ISDS," <https://jusmundi.com/en/document/wiki/en-environmental-issues-in-isds>, para 4.

⁶ Michael Anderson, "Transnational corporations and environmental damage: Is tort law the answer," *Washburn LJ* 41, no. 3 (2002): 399.

⁷ See for example François Ouzet, "Human Rights and Multinational Corporations: The United-Nations Policies and Companies' Responsibilities to Protect Human Rights In Business" (Master's Thesis, Department of Management University of Exeter, September 2018): 4, 7, 32.

⁸ Iman Prihandono, "Barriers to Transnational Human Rights Litigation Against Transnational Corporations (TNCs): The Need for Cooperation Between Home and Host Countries," *Journal of Law and Conflict Resolution* 3, no. 7 (2011): 90.

⁹ *Ibid.*

development in the country but not interfering with home state domestic politics.¹⁰ However, the issue of environmental damage and human rights violations still frequently arises. Therefore, local communities that are adversely affected need to hold MNCs responsible for the negative impacts caused by MNC's business operations. Various mechanisms are available for taking responsibility and resolving these problems, such as voluntary programs conducted by MNCs to minimize harm and litigation procedures through national and transnational courts. However, if victims decide to sue MNCs over human rights and environmental violations, they might face certain barriers.

This article discusses the sufficiency of the protection provided by international law for the local communities adversely affected by MNCs in the energy sector, *especially with regards to human rights, environmental, and anti-corruption matters*. The analysis, opinion, and argument are mainly established based on general international law, both binding and non-binding instruments; bilateral investment agreements; national law of States; scientific papers, and other relevant documents. The analytical parts are divided into foreign investor obligations and local communities' interest; various international legal framework and investment law protections especially in the context of human rights and environment as well as concern on anti-corruption; corporate social responsibility as a voluntary approach; and mechanisms to redress harm from energy activities. Finally, this article presents a conclusion.

2. RESULT AND ANALYSIS

2.1. Foreign Investor Obligation and The Local Communities' Interest

The relationship amongst investors and host states is generally undermined by domestic law of host countries, BITs, contract concluded between investors and host countries, and other international agreements that are relevant to investment activities. Several regulations relating to activities that may establish responsibilities for the investor in the sense of foreign investment law are subject to both domestic law and international law.¹¹ These obligations can be found in the treaty or non-treaty source that provides various considerations for the tribunal in terms of proceeding with dispute settlement related to investment activities.¹²

For many years, international investment law, a field of international law that governs relationships between states and foreign investors, focused on protecting the investors' interests, and dispute settlements between investors and host states used BITs as a tool to provide such protection.¹³

¹⁰ M. Sornarajah. *The International Law on Foreign Investment*. 4th ed. (Cambridge: Cambridge University Press, 2017): 176.

¹¹ Barnali Choudhury, "Investor Obligations for Human Rights," *ICSID Review - Foreign Investment Law Journal* 35, no. 1 (2020): 88.

¹² *Ibid.*

¹³ See Riva Rathi. "Scope and Evolution of International Investment Law", Latest Law.Com, 23 Sep 2020, <https://www.latestlaws.com/articles/scope-and-evolution-of->

However, it shifted into a more bargaining and negotiable relationship between MNC and host state¹⁴ which reflects the fact that foreign investment brings not only advantages, but also adverse effects to the host states and particularly local communities. Consequently, the issue of investors' responsibilities regarding the local communities' interests is now taken into account by scholars and both central and local governments.¹⁵

Imposing obligations on investors is a difficult process due to the argument that MNCs do not possess a legal personality under international law¹⁶ that is generally conferred by States and intergovernmental organizations. This situation makes it difficult to provide a balanced position between investors and the host state. However, the existence of a BIT as a binding instrument between the parties who are bound by it provides an opportunity to create a more balanced position. The provisions set out in BITs have recently been refocused, with some of the latest generation putting socially and environmentally related objectives together with investment policy objectives.¹⁷ The enlargement of the investors' scope of responsibility in the new generation of BITs is, in some instances, reflected in the preamble language where the social and environmental concerns co-exist with the economic goals of the investment.¹⁸

In addition to BIT provisions, domestic law is also another source of investor obligations. As a business entity operating in the host state's jurisdiction, investors must adhere to the host state's contract, tort, and environmental laws, as well as domestic anti-corruption regulations.¹⁹ For example, in the *Cortec v. Kenya* arbitration, the investor failed to comply with the environmental assessment required by Kenyan law, which caused the investor precluded to initiate arbitration.²⁰

Other investor obligations include respecting property rights and contractual obligations involving local communities. These obligations protect the property rights of those who live nearby the operations of MNCs, allow locals to pass through investor property, create community benefits

international-investment-law/. See also Valentina Vadi. "Jus Cogens in International Investment Law and Arbitration," *Netherlands Yearbook of International Law* (2015): 361.

¹⁴ Erja Kettunen, "On MNC-Host Government Relations: How Finnish Firms Respond to National and Regional Policies in ASEAN," *The Copenhagen Journal of Asian Studies* 34, no. 2 (2016): 56-60.

¹⁵ See for example how the interaction between local governments and MNC by considering the interests of local communities as well as in ensuring they will benefit from the foreign direct investments in K. Kuswanto, Herman W. Hoen & Ronald L. Holzhaecker, "Bargaining between local governments and multinational corporations in a decentralised system of governance: the cases of Ogan Komering Ilir and Banyuwangi districts in Indonesia," *Asia Pacific Journal of Public Administration* 39, no. 3 (2017): 191, 197.

¹⁶ M. Sornarajah, *op.cit.*, 174.

¹⁷ Suzanne A. Spears, "The Quest for Policy Space in A New Generation of International Investment Agreements," *Journal of International Economic Law*, 13 no. 4 (2010): 1044.

¹⁸ *Ibid.*

¹⁹ Barnali Choudhury, *op.cit.*, 93.

²⁰ *Ibid.*

agreements, and finally, contribute to local values and prosperity.²¹ These obligations of foreign investors mentioned above indicate that investors are obligated to protect the rights and interests of the host state's communities, mainly the local communities who live near the project site as they are most frequently affected.

The local community that is affected by energy-related activities such as exploration and exploitation could be indigenous communities, rural communities, or small communities. However, since many natural resources extraction took place in remote areas are still inhabited by indigenous people, these activities mostly impact indigenous people whose livelihoods are still heavily reliant on those territories. Inter-American Commission on Human Rights has noted some impacts created by oil exploitation activities such as production sites and waste pits built right next to people's habitation, roads have been built through the traditional indigenous territory, seismic blasts have been detonated in hunting grounds, and sacred areas, such as certain lakes have been trespassed.²²

The United Nations Declaration on the Rights of Indigenous Peoples mentions that indigenous people are protected by a full enjoyment of all human rights as recognized in the Universal Declaration of Human Rights (UDHR) and international human rights law.²³ Furthermore, the Indigenous and Tribal Peoples Convention 1989 provided a comprehensive instrument to protect indigenous people's rights including human rights and environmental protections. Article 7 of the Indigenous and Tribal Peoples Convention 1989 stated that "*governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit*".²⁴

Apart from the protection of indigenous people, provisions regarding energy activities generally regulate the obligation to protect the interests of all communities affected by energy activities. Interests such as conservation of energy sources, environmental protection, and human rights must be contained in domestic energy policies that are relevant to international provisions because the state, in this case, the host state government, permits energy activities within its jurisdiction.²⁵ In this situation, the host

²¹Nicolas M. Perrone, "The "invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and The International Investment Regime", *AJIL Unbound* 113 (2019): 17.

²² Barisere Rachel Konne, "Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland," *Cornell International Law Journal* 47, no. 1 (2014):197.

²³ United Nations Declaration on The Rights of Indigenous Peoples, (2007), Art. 1, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

²⁴ International Labour Organization, "Indigenous and Tribal Peoples Convention (1989)"https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314

²⁵ Danae Azaria, *op.cit.*, 315.

state should be able to govern and protect the interests of local communities beyond the fact that certain of the investors' commitments are non-binding.

The oil spill in the Niger Delta demonstrates how MNCs' actions in the energy sector have harmed local communities. The Niger Delta is a large oil resource in Nigeria that was first exploited by Royal Dutch Shell in 1958. Many local communities, notably those from Ogoniland, live in the Niger Delta. The survival of the Ogoni people is primarily reliant on natural resources. Although the profit created by the area is substantial, just a small portion of it has trickled down to the local communities. Instead, the oil sector has exposed people like the Ogonis to oil spills, gas flares, and major environmental contamination, which has ruined farms, streams, and fishing, all of which are vital resources for local communities.²⁶

In the case of the Niger Delta, MNC did not play a single role in such impacts on the local communities. Nigerian domestic law, conflict of interest, and lack of effective sanctions for violations of environmental laws contributed to the disaster.²⁷ Nigerian government applied poor monitoring causing the incident assessment only relies on Shell's assessment, benefiting this MNC in position to swerve from the accident.²⁸ The Nigerian government also held majority partnership in its joint venture with Shell. This situation then created a conflict of interest within the Nigerian government, that is between the Nigerian department that has authority to regulate environmental laws and the Ministry of Energy which is responsible for oil production.²⁹ The lack of enforcement of environmental legislation in Nigeria is also related to the lack of severe sanctions. There is no incentive for MNCs to protect the environment in which they operate if there are no actual consequences for environmental violations. Failure to notify an oil spill to the relevant government agency, for example, will result in a fine of \$3,500, whereas failing to clean up an oil spill at an affected location will result in a fine of only \$7,000. These fines pale in comparison to those enforced on MNC in the case of an oil disaster in the United States.³⁰

2.2. Protection in International Law

International law has provided broad protection for parties involved in international investment activities. Such protection generally appeared in documents adopted by international organisations and bodies of the United Nations.

The Organization for Economic Cooperation and Development (OECD) issued an instrument that aims to establish a more stringent legal framework, which is OECD Guidelines for Multinational Enterprises (OECD Guidelines). The guidelines are recommendations from member-state

²⁶ Barisere Rachel Konne, *loc.cit.*

²⁷ *Ibid.*

²⁸ *Ibid.*, 47.

²⁹ *Ibid.*, 195.

³⁰ *Ibid.*, 196.

governments to be used in governing the practices and operations of MNCs in their territories. However, since these guidelines are voluntary and non-binding, the OECD Guidelines are considered as soft law.³¹ These guidelines need to be adopted into domestic law to increase the likelihood that they will become legally binding. In general, OECD Guidelines' chapters are regulated in the following areas:³² (1) Disclosure, (2) Human rights, (3) Employment and industrial relations, (4) Environmental issues, (5) Efforts to combat bribery, (6) Solicitation of bribery and extortion, (7) Consumer interest, (8) Science and Technology, (9) Competition and (10) Taxation. OECD Guidelines also stress compliance with domestic law as the primary obligation of MNCs according to the concepts and principles of the guidelines.³³ Moreover, concerning MNCs' obligations and the rights and interests of local communities, there are several protections provided by international law.

The United Nations Economic and Social Council, through its Commission on Human Rights also adopted a Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). This document uses the term, 'Transnational Corporations (TNCs) and other business enterprises' rather than MNC, although its preamble repeatedly mentions the term 'Multinational Enterprises (MNEs).' Despite deep academic analysis may able to distinguish the concept behind each term, this paper tends not to make a distinction meaning and used them in a general understanding. The Norms determine obligations in which TNC and other business enterprises shall carry out their activities according to the national law of the host State and relevant international law about the environment and human rights, in a manner contributing to the wider goal of sustainable development.³⁴ Besides, it emphasises the respect of TNC and other business enterprises to the applicable laws regarding the prohibition of corruption.³⁵ Further, the Norms underline the obligation of TNC and other business enterprises to give proper reparation for local communities that have been adversely affected by failures to comply with these Norms.³⁶ The following sub-sections will elaborate more on international law aspects on human rights protections, environmental protections, and the concerns on anti-corruption.

³¹ Kinnari Bhatt and Gamze Erdem Türkelli. "OECD National Contact Points as Sites of Effective Remedv: New Expressions of the Role and Rule of Law within Market Globalization?," *Business and Human Rights Journal* 6, no. 3 (2021): 444.

³² OECD, "OECD Guidelines for Multinational Enterprises, 2011", available from <https://doi.org/10.1787/9789264204881-zh>.

³³ *Ibid*.

³⁴ The United Nations Economic and Social Council, through its Commission on Human Rights also adopted a Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), para 14.

³⁵ *Ibid*, para 10.

³⁶ *Ibid*, para 18.

2.2.1. Human Rights Protections

A peremptory norm of general international law, generally called *jus cogens*, is given a special position in international law.³⁷ In international law, some types of human rights have been regarded as *jus cogens*, and the state is obliged to take measures to protect such rights.³⁸ In specific, international investment law that mainly focuses on the protection of foreign direct investment seems far outside the traditional scope of *jus cogens* norms (such as the prohibition of torture, slavery, etc.)³⁹

In host states which most of them are developing countries, promoting human rights protection should be seen as a consequence of a better economy. However, in practices investors have started to exploit low human rights standards to increase their revenues. In this case, international law does not deal efficiently with those who violate human rights as there is no clear established mechanism to hold investors' liability due to companies are not being parties to the international instrument.

The OECD Guidelines require MNCs to comply with general provisions regarding human rights as conducted in international law. The minimum standards regulated in the OECD Guidelines are the provisions contained in the International Bill of Human Rights, including UDHR. This instrument also includes provisions covering the rights of indigenous people, minorities, disabled people, migrant workers including families, and other provisions stipulated in the OECD Guidelines.⁴⁰

In sequence, OECD Guidelines state that companies must avoid all violations of human rights in their activities and must mitigate any negative impacts they may cause with their overall business activities. OECD Guidelines also require companies to perform human rights due diligence and adopt a commitment policy to protect human rights. Finally, it also requires companies to provide a process of legitimacy in correcting adverse impacts on human rights if they are found to have caused these impacts.⁴¹

Another instrument that regulates the protection of human rights is the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles). This Guiding Principles emphasises the responsibility of the government to respect and protect human rights. The UN Guiding Principles set forth that they are applied not only to public actors, but also private ones regardless of the ownership, size, and place where the business operates. The Guiding Principles highlight that the obligation to respect human rights 'exists independently of states' abilities and/or willingness to fulfill their human rights obligation.⁴² This instrument widely regulates

³⁷ Vienna Convention on the Law of Treaties (1969), Art. 53 and Art. 64.

³⁸ See SURVA P SUREDI. *International Investment Law: Reconciling Policy and Principle* (London: Hart Publishing. 2020), 213.

³⁹ Valentina Vadi, *loc.cit.*

⁴⁰ OECD, *op.cit.*, 32.

⁴¹ *Ibid.*

⁴² United Nations, "The UN Guiding Principles on Business and Human Rights," (2011): 3.

obligations and responsibilities of the state and companies on a large scale. However, this document does not have sufficient mechanisms to make it legally binding.

2.2.2. Environmental Protections

The provisions of international law require states to protect the environment. Article 192 of the United Nations Convention on the Law of the Sea (UNCLOS) stipulates that its state parties have an obligation to protect and preserve the marine environment. Article 193 of UNCLOS then emphasizes that in the case that a state uses its sovereignty to exploit natural resources, it must comply with domestic provisions regarding environmental policies based on the obligation to protect the marine environment.⁴³ The extraction of offshore oil and gas deposits on the continental shelf, as well as the development of wind farms in the exclusive economic zone, are covered by these provisions.⁴⁴

OECD Guidelines also provide non-binding recommendations agreed upon by member-state governments regarding the environment. The preface of the OECD Guidelines emphasizes that the provision is aimed to encourage MNCs to contribute to economic, environmental, and social aspects and at the same time reducing the issues that may arise in their operational activities.⁴⁵

One of the general provisions stipulated by OECD Guidelines on the environment is to build and maintain an environmental management system. This provision includes the obligation of companies to conduct evaluations not only related to the environment but also health and safety in their business activities. In addition, companies must also set goals to increase environmental sustainability and resource utilization in accordance with the national policies and international environmental commitments. The environmental management system provides an environmental framework that suits the companies' business needs, so that it can control its environmental impact and make it an operational consideration. With this system, all communities associated with company activities can play a role in protecting the environment from the company's activities.⁴⁶

The OECD Guidelines require companies to maintain communication with local communities affected by their environmental, health, and safety policies. This communication should be able to provide information to all stakeholders, including workers, consumers, suppliers, and contractors, as

⁴³ United Nations Convention on the Law of the Sea, Art. 192. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

⁴⁴ Danae Azaria, *op.cit.*, 313.

⁴⁵ Elisa Morgera, "An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantages, Legitimacy, and Outstanding Question in the Lead Up to the 2006 Review," *Georgetown International Environmental Law Review*, 18 no. 4 (2006): 757.

⁴⁶ OECD, *op.cit.*, 42.

well as the officials of local communities and environmental concerns. Other issues stipulated by the OECD Guidelines include mitigating all environmental impacts, paying attention to scientific and technical considerations, maintaining contingency plans, and striving to improve the company's environmental performance.⁴⁷

2.2.3. Anti-Corruption

Recently, the practice of corruption, including bribery, has received special attention in foreign investment activities because of the adverse effects it causes. Local communities are affected mostly by the detrimental impact of this practice as the state's ability to protect its citizens is weakened, especially in developing countries. The international community considers that eradicating corruption is not only the responsibility of the host state but also of the investors, who should play a role in this effort. Thus, the provisions regarding foreign investment also regulate the eradication of corruption through both soft law and hard law instruments.

The United Nations Convention against Corruption (UNCAC) made it illegal to supply and demand corrupt acts. This document indicated critical policies, including anti-corruption, that should be developed as part of the BIT reformation.⁴⁸ The majority of anti-corruption provisions are found in the BITs, which contain state pledges to combat corruption in conformity with domestic laws.⁴⁹ Furthermore, some states include anti-corruption provisions to promote international anti-corruption cooperation and raise standards by referencing international and regional anti-corruption conventions.⁵⁰

OECD Guidelines provide a variety of provisions regarding combating bribery, bribe solicitation, and extortion. This document forbids multinational companies to be involved, directly or indirectly, with anything related to bribery, bribe solicitation, or extortion.⁵¹ Moreover, the provisions on fighting bribery are also stipulated in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).⁵² Except for the convention that has a legally binding nature, OECD Guidelines are soft law instruments and the provisions need to be incorporated into a legally binding document such as BITs and adopted in the domestic host state law to force companies to be involved in this effort.

⁴⁷ *Ibid.*

⁴⁸ Yueming Yan, "Anti-Corruption Provisions In International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance," *Journal of International Economic Law* 23 no. 4, (2020): 991.

⁴⁹ *Ibid*, 992..

⁵⁰ *Ibid*

⁵¹ OECD, *op.cit.*, 42.

⁵² Article 3 (1) of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions determines that bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties of the Party's own public officials.

2.3. Protection in Investment Law

2.3.1. Human Rights Protections

Within the development of international investment practices, the issue of possible threats to human rights is commonly discussed. The source of this threat is that investors often put the minimum standards of human rights due to economic benefit. As a result, foreign investment project sponsors or lenders have recently begun to strengthen their commitment to human rights and environmental protection;⁵³ meanwhile, various international investment agreements also pursue such protections.

The new generation of BITs provides broader provisions related to human rights that align with the increasing number of human rights issues in arbitral proceedings. The Morocco-Nigeria BIT is an example of a BIT that has a comprehensive approach regarding human rights. At the same time, the document links investment protection with human rights protection. The Morocco-Nigeria BIT does not only include human rights provisions in its preamble but also regulates them in more detail in its body text. The preamble of the general provisions regarding human rights emphasizes on non-economic concerns. This allows the arbitral tribunal to have a balance between human rights and economic interests when interpreting the treaty provisions.⁵⁴

The Morocco-Nigeria BIT body text regulates substantive provisions related to human rights, both with provisions on practical relevance and more stringent provisions, as well as several provisions that refer directly to investors. Article 15(5), which regulates labor and human rights, and states that “*each party shall ensure that its laws and regulation provide for high levels of labor and human right protection...*”⁵⁵ clearly shows that the provision requires strict respect for human rights. However, the provision is then limited by the clause “*...appropriate to its economic and social situation...*”, which allows parties to the treaty to use practical relevance when determining their contributions and interpreting the treaty.⁵⁶ Furthermore, Article 15(6) states that “*all parties shall ensure that their laws, policies, and action are consistent with the international human right agreement to which they are a party*”⁵⁷ which emphasizes that each state's investment regulation must comply with the party's agreed-upon human rights obligations.

⁵³ Sheldon Leader, “Human Rights, Risks, and New Strategies for Global Investment”, *Journal of International Economic Law*, 9 no. 3 (2006): 657.

⁵⁴ Niccolo Zugliani, “Human Rights in International Investment Law: The 2016 Morocco Nigeria Bilateral Investment Treaty,” *International and Comparative Law Quarterly*, 68 no. 3(2019): 764.

⁵⁵ Morocco-Nigeria BIT, “Reciprocal Investment Promotion and Protection Agreement Between The Government of The Kingdom of Morocco and The Government of The Federal Republic of Nigeria,” (2016): 14. <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download>

⁵⁶ Niccolo Zugliani, *loc. cit.*

⁵⁷ Morocco-Nigeria BIT, *loc. cit.*

Article 18 (2, 3, and 4) of the Morocco-Nigeria BIT places a stricter provision directly on investors, stating that they:

“... ‘shall uphold human rights in the host state,’ ‘act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work,’ and ‘shall not manage or operate the investment in a manner that circumvents international environmental, labour and human rights obligation to which the host state and/or home state are parties.’”⁵⁸

Furthermore, imposing such provisions on investors in hard-law language binds the state parties and the investors to the human rights provisions.

2.3.2. Environmental Protections

As legally binding agreements, BITs bind the parties more firmly to carry out the environmental provisions regulated by them. The Morocco-Nigeria BIT requires companies to have environmental protection policies.⁵⁹ In addition to regulating the obligations of the parties, the Morocco-Nigeria BIT also imposes direct provisions on investors as stated in Article 14. Investors must comply with an environmental assessment according to their investment objectives as required by the host state law.⁶⁰ The precautionary principle must be applied to the environmental assessments of the investors and host states.⁶¹ Furthermore, the investors also have to conduct social impact assessments according to the standards adopted by the parties.⁶²

The 2012 US Model Bilateral Investment Treaty dwells in detail on environmental issues in Article 12. The environmental objectives in this new model treaty are reinforced by an obligation to take into account international documents signed by the parties. This means the BIT is not limit the scope of states' power and investors to the provision on the treaty. In addition, the parties are also required to enforce domestic environmental laws to ensure high environmental standards, as well as provide opportunities for public participation regarding environmental concerns.⁶³

In contrast with the 2012 US Model BIT, the Model Agreement Promotion and Protection Investment the Kingdom of Norway (Norway Model BIT) does not consider the environmental issue in detail separately. Instead, Article 11 of the Norway Model BIT focuses on the prohibition of lowering the range of standards including environmental measures.⁶⁴

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Morocco-Nigeria BIT, *op.cit.*, 13.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ 2012 U.S. Model Bilateral Investment Treaty
<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>

⁶⁴ Draft Version 130515 Model Agreement Promotion and Protection Investment the Kingdom of Norway:

The provisions in the BITs that directly impose obligations on investors are also a step forward to increase the role of investors in taking responsibility for the adverse effects that occur due to the company's activities. Nevertheless, although some of the other model BITs do not address environmental concerns,⁶⁵ the current development of BITs shows the responsibility of investors and host states to enhance environmental protection by providing wider policy space to integrate environmental concerns into their business.

2.3.3. Anti-Corruption

Incorporating the substance of corruption issue into BITs is necessary to emphasize the obligation of all parties to participate in eradicating corruption and become a reference in resolving investment problems related to corruption practices. In the Morocco-Nigeria BIT, Article 17 regulates some provisions regarding anti-corruption, including regulating investors' obligations. Investors are prohibited from engaging in corrupt practices, and if they violate this rule, they will be considered in violation of the BIT. Hence, the investors will not enjoy protection under the BIT.⁶⁶ In an even stricter sense, investors that violate this provision are also deemed to have violated the domestic law in the host state so that they can be prosecuted.⁶⁷

The preamble of Norway Model BIT states that the parties agreed to eliminate corruption including bribery in international investment practices. Furthermore, Article 14 of the Norway Model BIT expressly states that if an investment is harmed by corruption, an investor loses the right to seek protection in arbitration. This model treaty also emphasizes the relevance of anti-corruption problems in the state-investor relationship, just as they are for other issues like the environment and labour.⁶⁸ The other model BIT that also adopted anti-corruption measures is the Model Text for the Indian Bilateral Investment Treaty (India Model BIT). Article 12 of the India Model BIT advises investors to incorporate anti-corruption standards in their activities and internal policies. In addition, Article 13.3 of the India Model BIT also emphasises that investor may lose their right to arbitration access in terms of the investment that has been made through corruption.⁶⁹ The number of provisions related to anti-corruption shows that corruption practices have been a concern in investment law. However, the occurrence of

<https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf>

⁶⁵ See for example Kathravn Gordon and Joachim Pohl. "Environmental Concerns in International Investment Agreements: A Survey, OECD Working Papers on International Investment," OECD Publishing, 2011, 23-24.

⁶⁶ Okechukwu Ejims, "The 2016 Morocco-Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?," *ICSID Review* 34 no. 1 (2019): 5.

⁶⁷ *Ibid.*, 15.

⁶⁸ Draft Version 130515 Model Agreement Promotion and Protection Investment the Kingdom of Norway, *op.cit.*, 15.

⁶⁹ Model Text for the Indian Bilateral Investment Treaty, https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf

corruption is not only caused by investors but also by corrupt state behaviour. Therefore, emphasizing the obligation to fight corruption in the country itself is not enough. The domestic law of the host state must also firmly implement this provision because the corrupt act could not be stopped if supply and demand sides exist.

2.4. Voluntary Approach: Corporate Social Responsibility

In addition to the protections provided in both the binding and non-binding agreements and instruments above, MNCs are also governed by other obligations concerning the environment, social issues, and human rights through a voluntary approach mechanism. This method arises from the desire of consumers and others to ensure the MNCs regulate themselves on human rights and environmental issues. This voluntary approach mechanism, known as Corporate Social Responsibility (CSR), places a responsibility on a company to its shareholders and all people and communities directly or indirectly affected by the company's operational activities.⁷⁰

CSR is described as a voluntary concept in which businesses contribute to improving the existence of the society and environment.⁷¹ The obligation to promote and respect human rights, as they are regulated in the international and national law, is even more emphasized in the UN norm on the Responsibilities of Transnational Corporations.⁷² OECD Guidelines define the establishment of a National Contact Point (NCP) to ensure that the provisions of OECD Guidelines are known and understood by the domestic business community.⁷³ This NCP serves as a forum for discussion of all matters relating to the Guidelines⁷⁴ and is regarded as a crucial non-judicial mechanism for the accountability of MNCs' human rights abuses with regards to their business activities serves.⁷⁵

Provisions regarding CSR are also regulated by the NGO Guidelines on CSR and the Corporate Code of Conduct. A corporate code of conduct is a policy statement regarding company ethical standards that is different from one industry to another or from one company to another.⁷⁶ One example of a company's commitment is the Shell 1997 Revised Business Principles which stated that the company's support for human rights is in line with its business and makes its position useful for the communities in which it operates. Moreover, CSR is also regulated by states' domestic

⁷⁰ Ilias Bantekas, "Corporate Social Responsibility in International Law," *Boston University International Law Journal*, 22 no. 2 (2004): 311.

⁷¹ *Ibid.*, 317.

⁷² *Ibid.*, 312.

⁷³ OECD. *op.cit.*. 3.

⁷⁴ Ole Kristian Fauchald. "International Investment Law in Support of the Right to Development?." *Leiden Journal of International Law* 34. no. 1 (2021): 197.

⁷⁵ Kinnari Bhatt and Gamze Erdem Türkelli, *op.cit.*, 423-424.

⁷⁶ Ilias Bantekas, *op.cit.*, 322.

legislation that must be obeyed by the companies operating in such countries.⁷⁷

The number of provisions governing CSR shows that the concept of CSR has become a concern and basis for global business ethics. Human rights protection and environmental protection, as stipulated in numerous international treaty documents show that the interests of the local communities affected by MNCs' activities have been protected by international laws. Moreover, the effectiveness of CSR implementation should consider how such a program could contribute to the rights and interests of local communities.

In terms of protecting human rights, CSR should emphasize local communities that are affected by MNC operations either directly or indirectly, usually by paying attention to individual rights as well as making contributions such as establishing schools and health centers and providing scholarships and water supplies.⁷⁸ However, cases of human rights violations and environmental damage by MNCs are still frequently found. In Nigeria, the limited mechanisms for resolving human rights cases through domestic law have resulted in the issue of human rights being taken up by civic organizations in both local and international areas.⁷⁹ The issue of labor rights is also a concern in the implementation of CSR by MNCs. OECD Guidelines and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work stipulate several provisions regarding labour standards that must be implemented, but these also often face several obstacles.⁸⁰ For example, the labour freedom to assemble in organizations and participate in decision-making processes is often limited in authoritarian countries. In other cases, the domestic host state provisions regarding health and safety are often inconsistent with the provisions of the home state.⁸¹

Apart from protecting human rights and labour rights, environmental protection is another important focus in CSR because of MNCs' activities, especially those of companies in the energy sector that explore natural resources, are likely causing environmental imbalances. Unlike human rights and labour rights problems, the environmental problems caused by resource exploration can be minimized by using technology. However, the need for this technology may become an obstacle due to the provision limitations of the host state in regulating companies that operate with high technology, such as those in the oil and gas industries. Therefore, provisions to control and regulate pollution and environmental impacts are often

⁷⁷ *Ibid.*, 325.

⁷⁸ *Ibid.*, 330.

⁷⁹ Olufemi O. Amao, "Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States," *Journal of African Law*, 52 no. 1 (2008): 102.

⁸⁰ Ilias Bantekas, *op.cit.*, 332.

⁸¹ *Ibid.*

inadequate because they lack of technical and institutional capacity among the host state governments.⁸²

Various provisions of international law have been set to govern the host states' and MNC's obligations to protect local communities. Indonesia, in this regard, can be used as an example. Indonesian law determines an obligation to companies having its business activities in the field of and/or related to natural resources to perform Social and Environmental Responsibility, which is budgeted and calculated as the cost of the Company, to be implemented in appropriate and fair manner.⁸³ However, in practice, these obligations are often not fully met, leaving the risk of human rights violations and environmental damage. Most of the provisions are still in the form of soft law, and there are conflicts with state interests. On the one side, the state is the authority obliged to protect its people's rights and interests, while on the other side, it has the interest to attract investment. An easy and clear settlement mechanism is needed to deal with such violations if they occur.

2.5. Redressing Harm from Energy Activity

International law provides several ways to redress harms caused by activities of MNCs in the energy sector, such as through litigation and non-litigation mechanisms. Due to its potential to resolve human rights violations, issue judgments, and provide opportunities to obtain compensations as enforceable awards, litigation is one of the most important ways to pursue remedies through a judicial process.⁸⁴ MNCs are governed by the laws of both their home and host states, making legal cases against them valid in both jurisdictions.⁸⁵ However, most victims are reluctant to bring cases to the domestic court of the host state because of its inadequacy to offer relief.⁸⁶ In terms of bringing a case against MNCs through the domestic court of the host state, the government might be part of the case. Host states are often involved in MNC business operations, and it offers security to the firm's ventures. In most practices, a host state official or corporation is also assigned to manage and supervise multi-national operations, and consequently, state entities tend to be participants in the abuse or damage that may occur.⁸⁷ Besides their lack of independence, domestic courts in host states are frequently challenged by a lack of

⁸² Jędrzej G. Frynas, "Corporate Social Responsibility or Government Regulation? Evidence on Oil Spill Prevention," *Ecology and Society*, 17 no. 4 (2012): 8.

⁸³ Article 74 (1) of the Law of the Republic of Indonesia No. 40 of 2007 concerning Limited Liability Company.

⁸⁴ Iman Prihandono, *op.cit.*, 89.

⁸⁵ *Ibid.*, 90.

⁸⁶ George S. Akpan, "Litigating Problems that Arise from Natural Resources Exploitation in Foreign Courts: Impediments to Justice," *Journal of Energy & Natural Resources Law*, 20 no. 1 (2002): 55.

⁸⁷ *Ibid.*, 56.

substantive and procedural law in complicated cases or low administrative capacity causing the legal action in the local court to be ineffective.⁸⁸

Almost all MNCs are incorporated in developed countries that have better justice systems and procedures than those in developing countries.⁸⁹ However, to run the business in the host state, the domestic law in most host states requires the local resident or subsidiary company to develop the natural resource in their territory.⁹⁰ The subsidiary, then, is the party that potentially files lawsuits because it is directly involved in the exploration.⁹¹ The parent company that is incorporated in the home state and possessing the whole subsidiary is not *prima facie* liable for its subsidiary's illegal or violent behavior.⁹² In terms of bringing cases to the home state court, some parties who lose do not need to pay court fees to the winning party, so bringing the case to court is not risky.⁹³ Plaintiff can also use the defendant's evidence and information when suing case in the home state. In addition, the plaintiff may be given a significant amount of compensation⁹⁴ that indicates legal action in the home country is an effective avenue to seek to redress harm caused by MNCs.⁹⁵

Despite the advantages of bringing the case into an international forum, there are also concerns in accessing the courts. Common adversity is when the plaintiff and the defendant in different jurisdictions cannot decide on the proper forum.⁹⁶ European Union (EU) courts that apply the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters can be used as an example. The Convention determines that "... persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that state."⁹⁷ Article 5(5) of the convention also states that "as regards a dispute arising out of the operation of a branch, agency or another establishment, in the courts for the place in which the branch, agency or other establishment is situated", providing possibilities to the plaintiff to go against a multinational parent company in the home state or seek redress in every EU member state. Under EU law, however, courts can only hear lawsuits if the defendant corporation is licensed and headquartered in one of the EU member states.⁹⁸ Another barrier to taking a case to the transnational litigation process is the concept of *lex loci damni*, which means that the law enforced by the court should be the country's law where the impact occurs.⁹⁹

⁸⁸ Michael Anderson, *op.cit.*, 409.

⁸⁹ Iman Prihandono, *op.cit.*, 90.

⁹⁰ George S. Akpan, *op.cit.*, 56.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ Iman Prihandono, *op.cit.*, 90.

⁹⁴ *Ibid.*

⁹⁵ Michael Anderson, *op.cit.*, 409.

⁹⁶ *Ibid.*, 411.

⁹⁷ European Economic Community. Brussel Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968), Art. 2.

⁹⁸ Iman Prihandono, *op.cit.*, 94.

⁹⁹ *Ibid.*

Suing MNCs in the home state court is possible for human rights violation, where the most attractive forum is the US Federal court under the Alien Tort Claims Act (ATCA).¹⁰⁰ It allows aliens to file tort claims and civil suits over human rights violations by MNCs in the US federal court.¹⁰¹ However, this has proven to be difficult for plaintiffs as having a case against MNCs using ATCA is a complicated process due to different views on human rights violations by MNCs.¹⁰² For instance, the court in *Doe I v. Unocal* confirms that plaintiffs can bring a lawsuit against the company even though there is no state intervention, while in another case, *Kiobel v. Royal Dutch Petroleum*, the court ruled that ATCA cannot be used as a basis to sue a corporation.¹⁰³ This example shows that the possibility to bring a lawsuit against a MNC under ATCA is not a simple procedure because the different views have been taken by judges, causing inconsistency in such issues.

Resolving cases of violations of the rights and interests of local communities against MNCs through litigation can be done in various forums. The forums that are provided to solve the problems have different advantages and disadvantages. In the case of local communities that have been adversely affected by MNCs' activities in the energy sector, the litigation procedures provided by international law do not seem to make it simple to bring the case to court, and the awards often do not satisfy both plaintiffs and defendants.

3. CONCLUSION

International law provides various provisions and instruments for protecting the rights of parties involved in international investment. The government of the host state is obliged to protect both investors and local communities who are affected by MNCs' activities in their area. The development of international law also extends protection to the local community by determining the obligations of investors to participate in protecting and respecting human rights and interests through affirmations in international treaties, OECD guidelines, UN bodies documents, and bilateral investment treaties (BITs). With the existence of various obligations to parties involved in foreign investments, violations of the rights and interests of local communities could be prevented.

In addition to determining MNC's obligations and provisions to protect the local communities, international law also provides various forums to seek solutions for the adverse impacts caused by MNCs' activities. This settlement can be pursued through litigation in the host states and home states. Thus, it can be concluded that international law has provided sufficient provisions to protect the local communities that are adversely

¹⁰⁰ *Ibid.*, 90.

¹⁰¹ Bahareh Mostajelean, "Foreign Alternatives to The Alien Tort Claims Act: The Success (Or Is It Failure?) Of Bringing Civil Suits Against Multinational Corporations That Commit Human Rights Violations", *The George Washington International Law Review* 40 no. 2 (2008): 497.

¹⁰² Iman Prihandono, *op.cit.*, 91.

¹⁰³ *Ibid.*

affected but providing a simple and clear process is necessary, in terms of the problems will be resolved through a litigation process. Furthermore, to minimize the occurrence of these adverse impacts, international law needs to develop better mechanisms and provisions for prevention purposes so that violations of the rights and interests of local communities can be avoided.

ACKNOWLEDGMENT

This article is an advanced version of an essay made by the Author during her study at the University of Westminster-London, Energy and Environmental Change – Master of Arts Programme in 2021, on International Energy and Climate Change Law course (Code: 7LLAW019W). The author would like to express a great honor to Ruth Mackenzie who taught this course. The argument and opinion contained in this article is an academic view of the author and do not necessarily link to Author's affiliation.

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