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SUSTAINABLE DEVELOPMENT AND INTERNATIONAL INVESTMENTS: An Equilibrium Approach to Human Rights

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SUSTAINABLE DEVELOPMENT AND INTERNATIONAL INVESTMENTS: An Equilibrium Approach to Human Rights

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[Abstract: *The current study aims to examine foreign investment and sustainable corporate responsibility projects in bilateral and multilateral treaties under the aegis of SDGs (3, 6, and 9). The study follows a two-fold approach to find the spatial nexus between the 'Normative Superiority of Human Rights' and investment laws compliance with the state with international environmental and human rights treaties. The first approach is (a) the protection of international investors and the implementation of human rights during the execution of investment projects; (b) the cohesive approach of the intersectional study of international investment contracts and treaties by arbitral adjudication and labour and environmental legislation. The economic partnership agreement, which established and evaluated ICSID's (International Centre for Settlement of Investment Disputes) work in dispute-related mechanisms, has also been summarised to address the issues. In this context, the research gap is to address the exigency of sustainable externalities and economic development through foreign investment. The tests of proportionality, compatibility, and necessity are proposed to address the burgeoning need to fill the gap. Likewise, arbitrage with socio-environmental implications on a different footing from the precautionary principle and legitimate expectations of investors results in a discriminatory approach to the evaluation of licensing. The article suggests methodological sequencing when assessing the conduct of the host investment state and human rights catch all restrictive expectations.*]

I

Introduction

Foreign direct investment is a vital engine of growth for economies in transition to development. As delineated in the United Nations sustainable development agenda, this is reflected in Sustainable Development Goal (SDG) 9, which is dedicated to the promotion of infrastructure, which in turn is necessary for the

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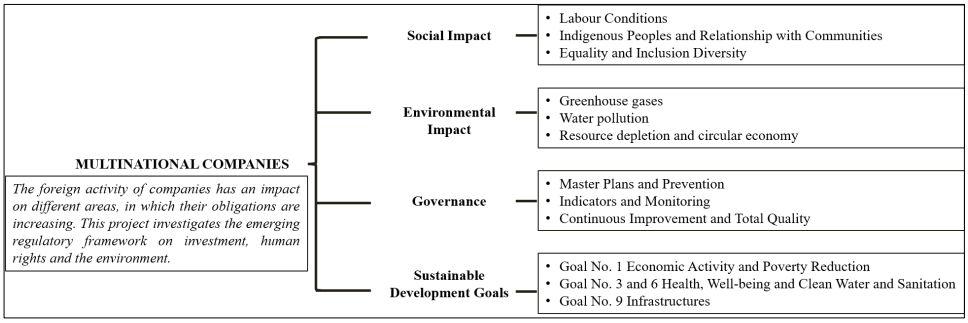
achievement of the other SDGs. The critical infrastructures that will facilitate SDG 3 (health), 6 (water and sanitation), and 7 (clean and affordable energy) are recognised for their specific financial outlay and, on the flip side, for the negative socio-environmental impacts that their construction and implementation may entail.[1] These impacts can be analysed from the perspective of public international law, i.e., by examining the compliance of states with international (treaty or customary) environmental and human rights mandates. Within the framework of corporate social responsibility (CSR) and sustainability, i.e., from a private sector perspective, it is also essential to monitor and mitigate the potential negative consequences of investment projects.



The need to reconcile these investments with due respect for global public interests of a social and environmental nature has emerged in the states that are net recipients of international investment. These socio-environmental concerns, which the private sector must manage through the concept of sustainability, find their legal translation in the framework of human rights under international law.[2]

As discussed below, states must improve the coherence with which they manage their concurrent international obligations. On the one hand, in protecting international investors and, on the other hand, in implementing human rights during the execution of investment projects. In this area, two specialised normative sectors with different substantive standards and different means of settling international disputes come together.[3] It is essential to find legal formulas that allow for a dialogue between the two.[4]

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1 United Nations, CONFERENCE ON TRADE AND DEVELOPMENT, INVESTMENT POLICY MONITOR 34 (2022).

2 Adisa Azapagic, *Developing a framework for sustainable development indicators for the mining and minerals industry*, 12(1) Journal of Cleaner Production 639, 641-652 (2004)

3 Aboutorabifard & Haniehalsadat, INTEGRATING SUSTAINABLE DEVELOPMENT IN INTERNATIONAL INVESTMENT LAW 519 (2020).

4 *Id.*, note 3, ABOUTORABIFARD & HANIEHALSADAT at 523 (2020.

II

International Investment Law: Socio-Environmental Issues

When states ratify a bilateral or multilateral treaty on investment protection among themselves or conclude investment contracts with transnational companies or consortiums, they impose on themselves the obligation to protect the investor and international investment against non-economic risks that may arise in the development and execution of their operations. In this way, a particular legal framework is created that is endowed with a great deal of regulatory autonomy and uses its mechanism for the settlement of disputes: investment arbitration.[5]

Complex regulatory intersections of international investment law

The legal regime to which states voluntarily submit themselves within international investment law is characterised by asymmetry, with rights usually falling on the side of international investors as a whole (transnational corporations) and obligations on the side of states. This situation is replicated if the relationship between international investors and the host state of the investment results from a bilateral or multilateral treaty on investment protection. If, on the other hand, the relationship arises from an investment contract or originates in the domestic law of the host state of the investment, then some obligations for international investors could be identified.[6] In any case, when the conduct of a transnational corporation generates harm in the territory where it operates, investment law does not usually provide mechanisms to remedy the harm to the alleged victims. The latter must turn to other domestic (domestic) or international (regional human rights tribunals) means outside the international investment law to bring a claim against the transnational corporation or the host state of the investment respectively. At the international level, more particularly in the framework of international human rights law, the claim will potentially be brought against the state of nationality of the victims themselves, never against the transnational corporation.[7] In stark contrast, international investors can resolve potential disputes with the host state of the investment directly through investment arbitration, i.e., before an international jurisdictional forum that sometimes bypasses the domestic courts of that state, thus circumventing the rigorous regime of protection imposed by public international law (through the institution of diplomatic protection). The system of international

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5 Pratima Bansal, *Evolving sustainably: A longitudinal study of corporate sustainable development*, 26(3) Strategic management Journal 197, 201-218 (2005).

6 Markus Wagner, *Regulatory space in international trade law and international investment law*, 36(1) UPILR 1, 14 (2014).

7 Frank J. Garcia, *Reforming the international investment regime: Lessons from international trade law*, 18(4) JIEL 861, 888-892 (2015).

investment protection forms a regime of a particular nature that sometimes comes into tension with the international rules established in other countries.[8]

Bilateral or multilateral agreements on investment protection and/or investment contracts impose an obligation on the host state to create a stable legal framework that allows for the proper development of investment projects that are established on its territory. However, states are often faced with the dilemma that the maintenance of this regulatory framework may erode certain international obligations they have undertaken in other normative areas of the international order (such as international human rights law or international environmental law).[9] When two international legal systems with different goals and interests meet (or collide), the question of how public international law plans to regulate their interaction comes up.

Applicable Law for Investment Arbitration

When an international investor initiates investment arbitration against a state invoking a breach of a bilateral or multilateral treaty on investment protection and/or an investment contract, the ad hoc body called upon to resolve the dispute must, strictly speaking, settle it on the basis of the law that the parties have agreed upon.[10] In this context, it is possible to wonder about the role that international human rights law could have as a possible law applicable to investment arbitration. As a general rule, international investment protection treaties or investment contracts usually provide for disputes to be settled in accordance with the rules established by them—rules that grant jurisdiction to the parties to initiate international arbitration in accordance with their provisions, the domestic law of the host state of the investment, and, where appropriate, other principles and rules of public international law.[11] This last mention of public international law, however, is usually very brief and, in practice, presents some technical issues for its application beyond the general consideration of the principle of systemic integration provided for in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which provides that in interpreting an international treaty, account shall be taken, together with the context, of "any relevant rules of international law applicable in the

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[8] Valentina Vadi, *Standards of review in international investment law and arbitration: multilevel governance and the commonweal*, 16(3) JIEL 613, 626-633 (2013).

[9] Karen Bakker, Karen, *The commons versus the commodity: Alter-globalization, anti-privatization and the human right to water in the global south*, 39(3) Antipode 430, 452-455 (2007).

[10] Roger P. Alford, *The convergence of international trade and investment arbitration*, 12(1) SCJIL 35, 35-38 (2013).

[11] Christoph Schreuer, *Jurisdiction and applicable law in investment treaty arbitration*, 1 McGill JDR, 1-9 (2014).

relations between the parties."[12] Some precedents from arbitral practice illustrate this issue and, at the same time, show open windows for the inclusion of human rights issues in investment arbitration, however limited they may seem.

In principle, it cannot be excluded that public international law is an inapplicable legal system in investment arbitration. Article 42.1 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter ICSID Convention) states that an arbitral body "*shall decide the dispute in accordance with the rules of law agreed upon by the parties, while its second sentence adds that in the absence of agreement (...) it shall apply the law of the state party to the dispute, including its rules of private international law and such rules of international law as may be applicable.*"[13]

Where there is an agreement between the parties on the applicable law, an arbitral body has decided that there is no reason to go beyond that agreement, respecting the principle of party autonomy. Thus, in the case of *AUCOVEN v. Venezuela*,[14] the arbitral body isolated the contract normatively.[15] The arbitral body clarified that it did not feel bound by an earlier decision of another arbitral body in the *Wena Hotels v. Egypt case*.[16] In the latter dispute, on the other hand, it was accepted that both the domestic law of the host state of the investment and public international law could be applied simultaneously, with the arbitral body stating that the law of the host state can indeed be applied in conjunction with international law if this is justified. So, international law can also be applied if the appropriate rule is found in this other ambit.[17] It is difficult to understand why the first sentence of Article 42(1) of the ICSID Convention, mentioned above, would exclude public international law if its application were necessary (where the parties had so provided). In principle, neither the first nor the second sentence should exclude the application of this legal order. In support of this thesis, the arbitral body in *Amco* v. *Indonesia*[18] clarified that both public international law and domestic law were applicable jointly, stating that "*international law is fully applicable, and to classify its role as only supplemental and corrective seems a distinction without a difference.*"[19] In any case, the state's parties to a bilateral or multilateral treaty on investment protection or the parties to an investment contract reserve the right to identify the law applicable to investment

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[12] Benedetta Cappiello, *Applicable Law in Investment Arbitration* in HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 1-26 (2020).

[13] Xuan Shao, *Environmental and human rights counterclaims in international investment arbitration: At the crossroads of domestic and international law*, 24(1) JIEL 157, 157 (2021).

[14] *AUCOVEN* v. *Venezuela* [2003] ICSID case No. ARB/00/5, Award of September 23

[15] *Id.*, note 14, *AUCOVEN* v. *VENEZUELA* at para. 102.

[16] *Wena Hotels* v. *Egypt* [February 5, 2002], ICSID Case No. ARB/98/4

[17] *Id.*, note 16, WENA HOTELS v. EGYPT at para. 40.

[18] *Amko* v. *Indonesia* [1990] ICSID Case No. ARB/81/1

[19] *Id.*, note 18, *AMKO* v. *INDONESIA* at para. 40.

arbitration. It is up to them to determine this issue. Without prejudice to the fact that public international law (and, in particular, human rights law) may be considered applicable law in a dispute, the essential role of the parties in defining this issue, as indicated in Article 42.1 of the ICSID Convention, cannot and should not be underestimated. The States parties to a bilateral or multilateral treaty on investment protection are the owners of that treaty, and, in that capacity, it is up to them to determine the applicable law in cases where a dispute arises from its interpretation and application.[20]

International Human Rights Law in Investment Arbitration

This section has given us enough information to conclude that, in theory, international human rights law still applies to investment arbitration. This means that social and environmental issues don't easily make their way into this specific area of law. The following lines set out the legal reasons that explain this phenomenon and formulate a proposal that could serve to reduce this dialectic between international human rights law and international investment law.

The Normative Superiority of Human Rights

Public international law is characterised by being a system of rules of an eminently decentralised nature where, except for the peremptory norms of jus cogens, the principle of normative hierarchy as it is known and conceived in the domestic legal systems of states does not apply. This being so, and in the light of international practice, it cannot be affirmed that the international law of human rights, due to its nature, occupies a hierarchical position superior to the international law of investments.[21] This has not prevented some arbitration bodies created within the framework of international investment law from contemplating in their decisions the possibility of applying international human rights law, always respecting the absence of a hierarchy of norms in public international law and the principle of party autonomy when deciding on the law applicable to investment arbitration.[22]

The issue in *SPP* v. *Egypt*[23] was the annulment and expropriation of a tourism investment following the discovery of relevant archaeological remains during the construction of a hotel project. The company, Southern Pacific Properties, led a consortium that had already started construction work on the resort in July 1977. Following the discovery at the end of that year, public opposition to the project grew

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[20] Clara Reiner & Christoph Schreuer, *Human rights and international investment arbitration* in HUMAN RIGHTS INTERNATIONAL INVESTMENT LAW AND ARBITRATION 82, 106-107 (2009).

[21] James D. Fry, *International human rights law in investment arbitration: Evidence of international law's unity*, 18(1) DJCLL 77, 77-70 (2007).

[22] *Supra*, note 11, CHRISTOPH SCHREIER at 7

[23] *SPP* v. *Egypt*, [1988] ICSID Case No. ARB/84/3

and forced a legislative change in the protection of cultural heritage, following in the footsteps of the UNESCO World Heritage Convention (which Egypt ratified in 1974, entering into force in 1975 after the first twenty states had ratified it).[24] In 1979, at the initiative of Egypt, the UNESCO Committee agreed to inscribe this archaeological site on the World Heritage List, thereby granting it the highest protection. In the opinion of the arbitration body called upon to resolve this dispute, the obligation of compensation to be borne by the host state of the investment remained in force, even if the expropriation could be considered an unquestionable attribute of its sovereignty. It goes without saying that the legality of the Egyptian State's actions does not diminish the expropriatory nature of the measure taken and its legal consequences in the context of international investment law. However, the UNESCO World Heritage Convention played an important role in the calculation of the compensation to be imposed on the host state of the investment. Indeed, the arbitration body decided that the claimants were not entitled to any *lucrum cessans* for the dates after the official inscription of the World Heritage Site (1979).[25]

In the case of *Compañía del Desarrollo de Santa Elena* v. *Costa Rica*,[26] on the other hand, a typical expropriation case arose. On the other hand, Costa Rica involved a typical case of expropriation. The arbitration body confirmed that any expropriation is subject to compensation, no matter how laudable or beneficial it may be for the company or the environmental reasons behind it (the Costa Rican government had alleged the protection of biodiversity to justify the expropriation of a farm belonging to a group of US investors).[27] States must conduct a thorough review of their international human rights and environmental obligations while making commitments under international investment law to avoid creating situations of tension between the two normative sectors arising from the absence of a hierarchy between the two. These situations are sometimes difficult to foresee and arise as a consequence of an abrupt change in the conduct of the organs of the host state of the investment.

In *Metalclad* v. *Mexico*,[28] also an environmental case, a US company obtained permission from the Mexican federal authorities to build a hazardous waste transfer and landfill station. Despite this, the local authorities refused to issue the final authorisation for its construction on environmental grounds. The arbitration body concluded that the claimant company had a legitimate expectation, i.e., that it let Metalclad believe that the federal and state permits would allow it to establish the

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[24] *Id.*, note 23, *SPP* v. *EGYPT* at para. 158.

[25] *Supra*, note 12, XUAN SHAO, at 157.

[26] *Santa Elena Development Company* v. *Costa Rica* [2000] ICSID case No. ARB/96/1

[27] *Supra*, note 26, *SANTA ELENA DEVELOPMENT COMPANY* v. *COSTA RICA* at para. 72.

[28] *Metalclad* v. *Mexico* [2000] ICSID Case No. ARB(AF)/97/1

landfill. The company "could afford to rely on the assertions of federal officials and believe that it was authorised to proceed with the construction of the landfill."[29]

However, legitimate expectations are not a carte blanche for the investor, as the case *Infinito Gold* v. *Costa Rica demonstrates*.[30] In this litigation, the transnational company had obtained licenses on two occasions. The problem was that in both instances, the Costa Rican courts ruled that the concession was defective and, therefore, annulled it, reducing the investor's expectations to an irrelevant level. Moreover, governmental support for the gold mining project or political statements about the inapplicability of a domestic moratorium cannot be placed above domestic court rulings or create vested rights. In order to generate legitimate expectations, the guarantees must be specific, precise, and in conformity with the domestic legal order, as well as prior to the company's first investments: "The plaintiff could not have legitimately expected that its exploitation concessions would be exempt from judicial control if they were granted contrary to the legal rules in force."[31] In line with the approach set out in the last precedent cited, human rights cannot be seen as a pretext for states to cover up bad practices by their organs that could give rise to their international responsibility. Indeed, the discourse on which human rights obligations must be prioritised and take precedence over investment protection leads to a dialectical trap with no legal basis on most occasions, something some states use as a shortcut to wash their image and circumvent their internal inconsistencies. From this perspective, such reasoning (based on this alleged normative hierarchy of international human rights law) will, in all likelihood, be inadmissible for an arbitration body created within the framework of international investment law.[32]

Thus, in *Border Timbers Limited and Others* v. *Zimbabwe*,[33] the arbitral body was very reluctant to assert that human rights played a central role in arbitration proceedings, and its argumentation demonstrated the difficulties of providing evidence in support of the claim that "international investment law and international human rights law are interdependent, such that any decision of these arbitral tribunals that did not consider the content of international human rights norms would be legally incomplete."[34]

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[29] *Id.*, note 28, *METALCLAD* v. *MEXICO* at para. 85.

[30] *Infinito Gold Ltd.* v. *Costa Rica* [2021] ICSID case No. ARB/14/5, Award of June 3, 2021, para. 514.

[31] *Id.*, notte 30, *INFINITO GOLD LTD*. v. *COSTA RICA* at para. 514.

[32] *Supra*, note 11, CHRISTOPH SCHREIER at 8-9

[33] *Borders Timbers Limited and others* v. *Zimbabwe* [2012] ICSID Case No. ARB/10/25

[34] *Id.*, note 33, *BORDERS TIMBERS LIMITED AND OTHERS* v. *ZIMBABWE* at para. 58.

Cohesive Approach

In situations like the ones described above, where the normative hierarchy doesn't help solve all the problems that come up when different regulatory regimes meet, an alternative solution could be for arbitral bodies that deal with international investment law to take a more integrated approach. This mainstreaming perspective stems from the systemic nature of public international law. It should not be interpreted as a threat to these arbitral bodies, whose priority remains the latter's specialised regime. Human rights can, however, play a certain role in highlighting the different interests at stake in investment arbitration, even if the power of states to protect what some call public interests does not constitute a passe-partout. In the event of a collision between human rights and investment treaty obligations, strictly speaking, the host state of the investment must respect both equally, and the arbitral bodies set up within the international investment treaties must deal with settling a possible breach of the latter.[35]

With regard to the right of access to water and sanitation (SDG 6), an ICSID arbitration body clarified the following: "*In fact, human rights in general and the right to water, in particular, constitute one of the several sources that the Tribunal will have to take into consideration to settle the dispute, as these rights are integrated into the various countries legal system with constitutional rank, and also form part of the general principles of international law. [...] However, these prerogatives are compatible with the rights of investors to the protection offered by international investment law. The fundamental right to water and the investor's right to the protection offered under different planes [...] but the exercise of these powers is not omnipotent but must be combined with respect for the rights and guarantees granted to the foreign investor under the law. [...] Balancing these two principles will be the task that the Tribunal will have to address when analyzing the substantive claims raised by Saur.*"[36]

The compatibility between international human rights law and international investment protection depends on the availability of an alternative that does not violate the international commitments acquired by the host state of the investment.[37] This alternative, which we have called the integrated approach, could be constructed by the arbitral bodies themselves on the basis of an approach that ensures "*the proportionality of such acts or measures with the requirements of the public*

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[35] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *Argentina*, ICSID Case No. ARB/03/19, Decision on Liability of July 30, 2010, para. 261.

[36] *SAUR International* v. *Argentina* [2012] ICSID case No. ARB/04/4, Decision on jurisdiction and liability of June 6, 2012, paras. 330-332.

[37] *S.D. Myers* v. *Canada* [2000] UNCITRAL case, Partial Award of November 13, 2000, para. 215.

interest allegedly protected through them and the protection legally owed to the investor in relation to its investment."[38]

When litigating investment arbitration, states must make a genuine effort to demonstrate credibly their human rights claims, the proportionality of the measures taken on international investment to the public interest pursued, and that the measure chosen was the least inconsistent with concurrent investment protection obligations. A precedent confirming this integrated approach is *Philip Morris* v. *Uruguay*,[39] where the arbitration body dismantled the tobacco multinational's claims individually. The multinational and the tobacco company in Uruguay challenged two measures: on the one hand, the ban on using different presentations (to avoid so-called light packets) and, on the other hand, an increase in the area reserved for the health warning from 50% to 80% of the packet, leaving only 20% of the packet free.

The claimants alleged that these measures were arbitrary, disproportionate, and confiscatory of their prerogatives under trade law. Uruguay won this arbitration, though, by showing that the measures were reasonable and met the adequacy test. This test is broken down into three parts: the measures' necessity, their proportionality, and their compatibility with other general principles. The court ultimately held that the company had to assume an inevitably higher regulatory risk because of the very nature of its business.[40] In the same vein of inspiring a greater cross-cutting application of the international law of human rights, in the case of Urbaser v. Argentina,[41] the arbitration body stated that international law accepts corporate social responsibility as a standard of vital importance for companies operating in the field of international trade. It also insisted that bilateral investment protection treaties do not constitute a closed system and are entirely independent from other sources of international law. The absence of international subjectivity for companies under public international law does not mean that they enjoy immunity.[42]

Another issue is that their rights and obligations are partial, in light of the particularities of international investment law. In this dispute, the arbitration body exhaustively examined the right of access to water and sanitation, allegedly breached by the concessionaire company, citing the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, and even the Declaration on Multinational Enterprises of the International

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[38] *Environmental Techniques TECMED S.A.* v. *Mexico* [2003] ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003, para. 122.

[39] *Philip Morris* v. *Uruguay*, [2010] ICSID Case No ARB/10/7

[40] *Supra,* note 41, *PHILIP MORRIS AND ABAL* v. *URUGUAY* at para. 420.

[41] *Urbaser* v. *Argentina* [2016] ICSID case No. ARB/07/26

[42] *Id.,* note 41, *URBASER* v. *ARGENTINA* at para. 1195.

Labour Organisation, the latter being a complementary soft law text.[43] Within the paradigm of economic, social, and cultural rights, such as those at issue in *Urbaser v. Argentina*, the obligation to provide or provide certain rights is primarily a state obligation, irrespective of the public or private management of the resources.

In contrast, the obligation to refrain from acting against, violating, or impeding the enjoyment of human rights is more easily transferred to a private entity. An example would be a disconnection of supply without assessing the risks of human rights violations.[44] But in the case of *Urbaser v. Argentina*,[45] we are confronted with the inability to undertake the investment x(expansion works) that would lead to access to water in areas of Greater Buenos Aires. Both before and after the concession, the specific obligation to provide drinking water and sanitation fell on the state and not on the private entities. In other words, the obligation to do so lies with states, and if arbitral bodies are to enter into the legal details of the human rights concerned, it is imperatively warranted that CSR is not used as a disguised externalization of the primary responsibilities of states under human rights law.[46]

It can be concluded from the above that the integrated approach is gradually beginning to be recognized in investment arbitration, although it cannot become the appropriate forum for judging the human rights conduct of transnational corporations. This does not prevent human rights from finding a place in the conventional practice of states.[47] This is the case, for example, with CSR standards, which are progressively permeating bilateral or multilateral treaties on investment protection.

Attention to Social Responsibility and Sustainability Clauses

Conventional state practice shows that human rights (including explicitly CSR as such) are gradually finding their way into bilateral or multilateral agreements on investment protection. This approach is based on a new understanding: human rights are a cross-cutting concern of international society.

Among the outstanding precedents in treaty practice is the bilateral accord finalized between Costa Rica and the Netherlands, signed on May 21, 1999, which expressly refers to labor and environmental legislation and regulation. An example at the multilateral level is the Union of the Common Market for Eastern and Southern Africa, whose 1994 treaty provided for a social and environmental impact analysis for investments. Other new-generation bilateral agreements started to follow the

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[43] *Supra*, note 12, XUAN SHAO, at 172.

[44] Nicolas Klein, *Human rights and international investment law: investment protection as a human right*, 4(2) GJIL 179, 181-184 (2012).

[45] *Supra,* note 41, *URBASER* v. *ARGENTINA* at para. 1195.

[46] Fang-Mei Tai and Shu-Hao Chuang, *Corporate social responsibility*, 6(3) Ibusiness 110, 117(2014).

[47] *Supra*, note 11, CHRISTOPH SCHREUER at 9

same path. For example, the Investment Promotion and Protection Agreement between the United States of America and Uruguay, signed on November 4, 2005 (its preamble recalls the need for consistency with the protection of health, safety, consumer protection, and internationally recognized labor rights), or the Economic Partnership Agreement between Japan and the Philippines, which entered into force on December 11, 2008 (its article 99 mimics the World Trade Organization clauses by providing for the protection of human, animal, or plant life).[48]

In this context, Canada concluded a Free Trade Agreement with Peru, signed on May 25, 2008, whose preamble mentions sustainable development and encourages companies operating in its territories or subject to its jurisdiction to respect international CSR codes (including their standards and principles) for the achievement of good business practices. More meritorious is Article 8.10, in which both states commit to the promotion of CSR among companies in terms of internationally recognized standards of corporate social responsibility, which the article itself correctly breaks down into labor, environmental, human rights, community relations, and anti-corruption issues.[49] It also establishes an advisory committee (Article 8.17) made up of members appointed by both parties whose function includes advising on CSR and facilitating investments. Precisely under this international treaty, CSR made its presence felt in the *Bear Creek Mining Corporation v. Peru case*,[50] an investment arbitration where the aforementioned provisions (which encourage and promote) were used by the parties as an environmental argument in the proceedings.[51] In the framework of the North American Free Trade Agreement, which ceased to be in force on July 1, 2020, CSR was also explicitly used as an environmental argument by a transnational company that initiated investment arbitration against Canada after the environmental impact audit undertaken for the installation of a mining quarry with its corresponding maritime terminal was rejected and its permit refused.[52] This case also explored factors leading to the arbitration body's declaration of Canada's international responsibility and their significance in implementing Corporate Social Responsibility (CSR) in international investment law. The nature, composition, procedures, and significance of committees overseeing environmental and social impact assessments are critical to this assessment. Their role in potentially implicating a state's international responsibility and the necessary content or scope of such analyses, particularly

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[48] Bruno Simma, *Foreign investment arbitration: a place for human rights?* 60(3) I&CLQ 573, 591-596 (2011).

[49] Steve Hinchliffe, Helping the earth begins at home The social construction of socio-environmental responsibilities, 6(1) JGECILR 53, 60-62 (2019).

[50] *Bear Creek Mining Corporation* v. *Peru*, ICSID case no. ARB/14/2.

[51] *Id.*, note 51, *BEAR CREEK MINING CORPORATION* v. *PERU* at 213

[52] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc.* v. *Canada*, PCA Case No. 2009-4, Award on Jurisdiction and Admissibility of March 17, 2005, paras. 7 and 10.

considering the complex intersections between environmental and social aspects, were central. Considering these points, three reflections emerge: Firstly, the crucial importance of extending and consolidating CSR and human rights clauses to foster consensus among states and international stakeholders. Furthermore, these clauses are pivotal in nurturing a broader regulatory culture, encompassing the private sector by standardizing socio-environmental considerations within business organizations and investor decision-making processes, facilitating the exchange and adoption of corporate policies and procedures. Lastly, on a semantic and taxonomic level, these clauses affirm the importance of aligning legal terminology with evolving societal norms and expectations.

In short, the growing acceptance of this practice is a step toward including human rights issues in the international treaties that govern the legal framework of international investment. More specifically, it is a step toward including these issues in the rules that are interpreted and applied by the ad hoc bodies that settle investment arbitrations brought by multinational corporations against states, who are accused of breaching their accountability under international investment law.[53]

III

Appropriate Pitches for States and Transnational Corporations

The interaction and dialogue between international investment law and international human rights law is beginning to be activated either through instruments intrinsic to investment arbitration (the law applicable to these proceedings and what we have called an integrated approach) or through extrinsic tools (the CSR).[54] The following lines offer some reflections addressed to states and international investors on this incipient interaction.

Socio-environmental measures for international investments

From a public international law perspective, an international investment must be secured in such a manner that a measure taken by the state in defense of human rights or the environment (claiming a public interest) cannot be regarded as a justification to resort to international arbitration or to terminate the investment contract, provided that the restrictive measure is necessary, proportional, and legally permissible, i.e., it passes a test of appropriateness.[55] In addition to being a

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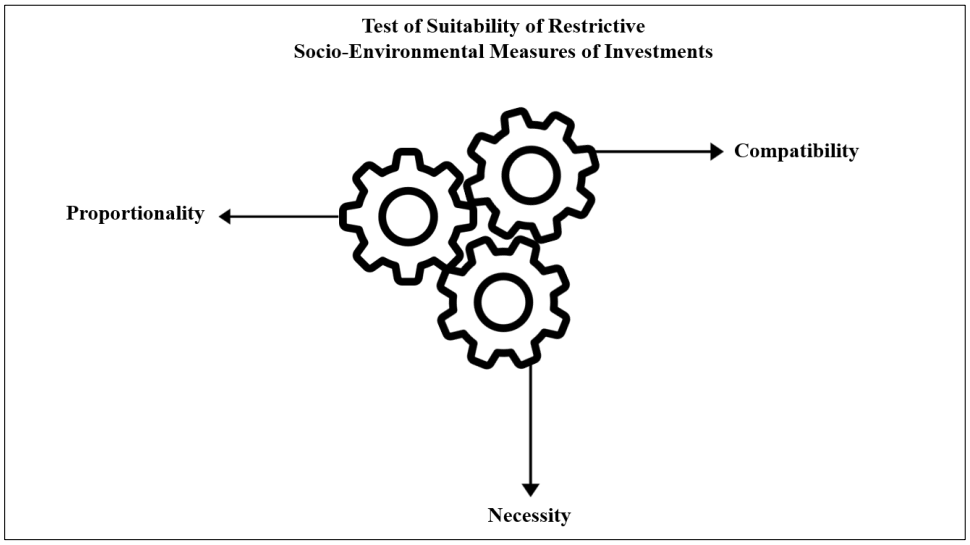
[53] Daria Davitti, *On the meanings of international investment law and international human rights law: the alternative narrative of due diligence*, 12(3) HRLR 421, 446-453 (2012).

[54] Fabio Giuseppe Santacroce, *The applicability of human rights law in international investment disputes*, 34(1) ICSID Review-FILJ, 136, 148-155 (2019).

[55] *Supra*, note 12, XUAN SHAO, at 161.

useful tool for arbitral bodies resolving disputes under investment law, this adequacy test should be conceived not only from a reactive perspective but also from a preventive one. In simple terms, states may use it to plan the adoption of regulatory measures that may affect the implementation of an international investment that is already operational in their territory.[56] The necessity of the state measure is usually considered justified if there is a broad consensus on the overall public interest to be protected or the harm to be avoided. In this first phase of the appropriateness test, the arbitration bodies treat treaties and, complementarily, soft law instruments that show consensus on social and environmental issues.[57] Most of the legal challenges arise at the next stage of the adequacy test, i.e., when it comes to analyzing the proportionality of the measures taken, and, in particular, it must be determined whether there is no less harmful measure for international investors that is equally effective in preventing the harm. Thirdly, the compatibility of the measures at issue, i.e., that they are generalized and non-discriminatory, non-protectionist measures, and that the state's actions have not created legitimate expectations for international investors that may precipitate a breach of the standard of just, fair, and nonpartisan treatment contained in most bilateral or multilateral investment protection treaties, is also unresolved.

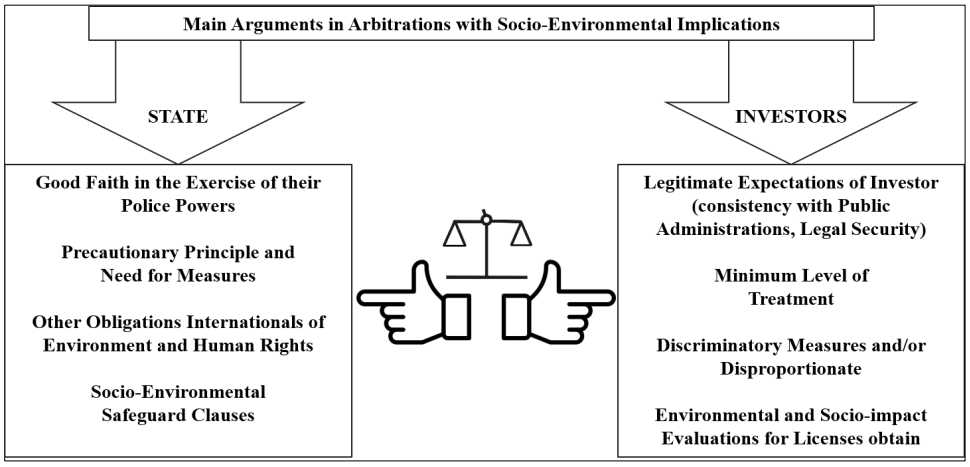


In this context, it is essential that states responsibly manage and administer their various and simultaneous international obligations. For the due protection of international investments, it matters little whether the state's possible inconsistencies are unintentional (due to a simple lack of coordination or institutional fragility) or intentional (in cases of maladministration). In *Eco Oro v.*

[56] Dan Cohen & Emily Rosenman, REPARATIVE ACCUMULATION? FINANCIAL RISK AND INVESTMENT ACROSS SOCIO-ENVIRONMENTAL CRISES 2356-2382 (2022).

[57] *Supra*, note 43, DAN COHEN & EMILY ROSENMAN at 2382.

Colombia,[58] the Canadian transnational extractive company acting as the claimant had its exploitation rights adversely affected by environmental fortification measures in the Páramo de Santurbán espoused by the host state of the investment. The arbitration body accepted that environmental protection was necessary and even akin to the end pursued. It also accepted that the measures were compatible with the general principles of non-discrimination and that they were not arbitrary or protectionist measures. However, it finally decided that Colombia had breached the requisite level of standard owed to the investor insofar as it had acted inconsistently and created legitimate expectations for the transnational corporation.[59] It is clear that the means of dispute settlement under international investment law can enter into human rights considerations where necessary, and the parties to the dispute, especially the respondent state, are able to present convincing arguments that justify the public interest reasons why it adopted the measures at issue in the arbitration by the international investor (which is acting as a claimant in these proceedings). In these cases, the arbitral bodies do so while preserving their nature and particularities, i.e., without transforming themselves into international human rights tribunals. On the contrary, they continue to operate with the structures and processes of international investment law, albeit taking into account a suitability test designed to maintain a balance between the various normative sectors of the transnational licit order in question. An adequacy test in which the jurisprudence of global human rights is timidly emerging.



Protagonist involvement in international organisations

On another front, we are witnessing an increase in transparency about the content and scope of international investment projects, a crucial aspect in the institutional

[58] *Eco Oro Minerals Corp*. v. *Colombia* [2021] ICSID Case No. ARB/16/41, Award of September 8, 2021, para. 781.

[59] Id., note 59, *ECO ORO MINERALS CORP*. v. *COLOMBIA* at para. 781.

practice of international financial institutions when they finance them or in bilateral or multilateral treaties on investment protection and investment contracts when states protect them, with the sole condition of not disclosing sensitive data on transnational companies that could be leaked and favor competition.[60] However, there is still room for improvement in this institutional area, at least in two cases.

First, with regard to the institutional role of financiers played by international financial institutions. When the World Bank Panel wishes to send inspection missions, the hosting state must expressly authorize them. It is advisable that, as a precondition for accessing financing, host states would have to commit themselves to accepting on-site visits without conditions (always within the coordination of the investment project).[61] As we already said, starting an inspection doesn't mean that operations stop. For that reason, precautionary cessations of operations, whether they are partial or total, temporary or sine die, should be taken into account when there exist sound justification to believe that continuing with operations could get in the way of the Panel's inspection work and/or in the worst cases. Nor should requests for inspection be automatically rejected once 95% (or more) of the investment has been disbursed; even if the alleged damage is irreversible, it may assist in remediation. This ex-post system, on the other hand, could be complemented by ex-ante assessments by a specialized and separate department of management, independent of the Panel, so as not to compromise or prejudge its inspections in event of a complaint.

Second, multilateralism and the function of international organisations need to be strengthened to counteract the negative effects of a predominantly bilateral or purely contractual regulatory environment. Multilateral forums are more conducive to the promotion of coherence between the different regulatory sectors of public RTI and to the gradual inclusion and recognition of public interests.[62]

The activity of the intergovernmental working group on transnational corporations created within the United Nations in 2014, although still incomplete, is an excellent example of how the institutional structure is an appropriate forum for promoting reforms and reaching consensus at the international level. In the long term, moreover, this brings with it a not inconsiderable customary potential at the legal level. It is also conducive to the transfer of policies and procedures to the private sector and business culture.

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[60] *Supra*, note 43, DAN COHEN & EMILY ROSENMAN at 2382.

[61] Ching-Hsun Chang, *Proactive and reactive corporate social responsibility: antecedent and consequence*, 53(2) Management Decision 451, 451-468 (2015).

[62] SH Terence Tsai & John Child, *Strategic responses of multinational corporations to environmental demands*, 23(1) JGM, 1022 (2009).

Proactive and reactive strategies for transnational corporations

The private sector needs confidence in the environment which it seeks to finance. This confidence is the upshot of a combination of legal certainty, geopolitical stability, and social peace, which, in business management terms, correspond to non-financial risks.

The overriding priority is to verify whether any operation may involve, even indirectly through local suppliers without direct operational control, a transgression of peremptory norms, considered jus cogens, relating to the prohibition of slavery, torture, or racial discrimination, among others. It should be recalled that these peremptory norms do enjoy normative hierarchy in public international law and therefore prevail over the rights granted by bilateral or multilateral treaties on investment protection. In other words, international investors who engage in any of the above conducts will hardly be able to benefit from the protection conferred by these treaties.[63]

After this first filter, it is advisable to undertake a detailed diagnosis of the negative impacts that the specific operations of the company or consortium may have on the social, environmental, and governance environment. These impacts can be by action or omission, direct or indirect, and will in turn lead to potential operational and reputational crises. In the current context, operational and reputational crises do not function as watertight compartments but are contagious and can trigger a change in the attitude of the host state's organs towards the project. This exercise is eminently preventive and is steered prior to project implementation, but it is useful to have indicators to help review performance during implementation.

Start by identifying precisely which international human rights and environmental treaties the host state has signed up to, and, if there is funding from an international financial institution, review their respective socio-environmental performance standards. In addition, the international instrument(s) that may give rise to investment arbitration against the host state (a bilateral or multilateral investment protection treaty or the investment pact established for project development) should be reviewed for possible safeguards or safeguard clauses. Environmental and social circumstances that permit the implementation of measures which would not be covered by the scope of international protection offered by investment arbitration.

A common problem is the lack of coordination and mutual understanding between finance and operations, communication, legal, sustainability, and/or quality departments. Another mistake is to underestimate the applicable soft law standards (with the legal value of a recommendation). These standards can help to

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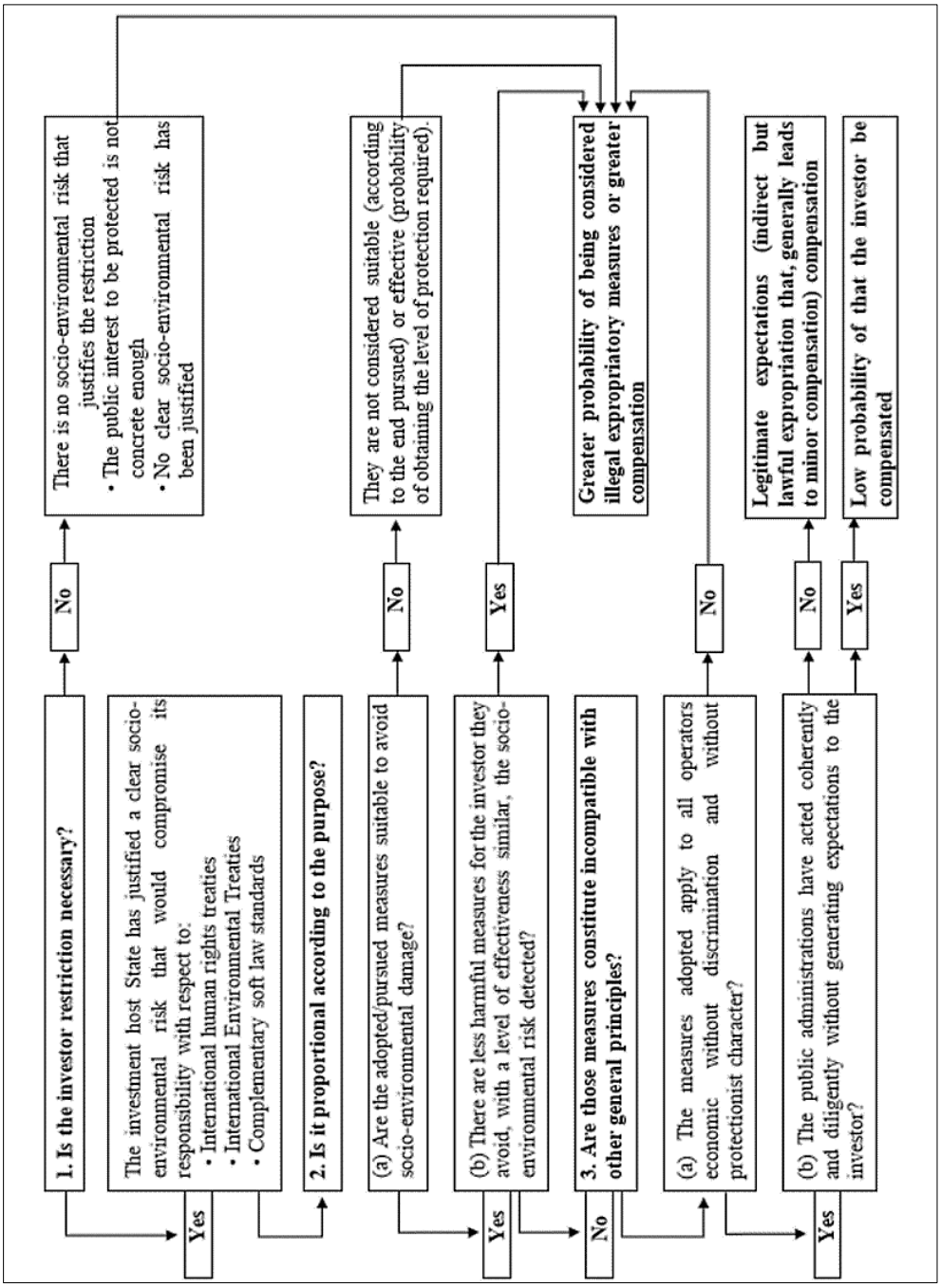
[63] Rob van Tulder, *Transnational corporations, and poverty reduction: Strategic and regional variations* in CORPORATE SOCIAL RESPONSIBILITY AND REGULATORY GOVERNANCE: TOWARDS INCLUSIVE DEVELOPMENT? 151-179 (2010).

demonstrate certain evidentiary aspects such as the toxicity of materials or products, protected animal and plant species, climate change, health, and safety, among others.



In any case, if the transnational corporation wishes to enforce its rights through investment arbitration, it might be of interest to design its litigation strategy through the following algorithm, based on the suitability test presented a few pages ago.

In sum, human rights cannot be abused or used to circumvent other concurrent international obligations of States to avoid international responsibility in cases involving breaches of investment law. The following table summarises the logical sequence followed by the bodies that resolve investment arbitrations to apply the suitability test presented throughout this paper. Two of the precedents discussed in previous pages are taken as examples, one of them with an outcome favorable to the state and the other favorable to the international investor.

Case	*Necessity*	*Proportionality*	*Compatibility*	*Arbitration Decision*
Phillip Morris v. *Uruguay*	The right to health is contemplated in Article 12 of the ICESCR and is a public interest that the state has the responsibility to protect.	The arbitral tribunal understands that tobacco is an addictive substance whose harmful effects on health are scientifically proven. Therefore, the company is exposed to greater regulatory risk.	In this case, Uruguay applies the measure to all tobacco trading companies, not constituting a protectionist measure or an abuse of rights.	The arbitral tribunal concludes that Uruguay is not acting arbitrarily by approving by law the obligation to dedicate 80% of tobacco packs to health notices. Therefore, it does not constitute an expropriation of the Phillip Morris brand image.
Echo Gold v. *Colombia*	The arbitral tribunal recognizes by majority a pertinent exercise of the police powers of Colombia due to the necessity to protect the ecosystems of the Raramo de Santurban.	The award confirms that the precautionary principle is relevant when considering the effect and proportionality of the measures pertaining to the protection of the moors.	Colombia applied generalized and non-discriminatory measures. However, it issued exploitation permits and declared the national interest of certain economic activities, generating a legitimate expectation.	The legality of the expropriation does not diminish the need to compensate investors for the legitimate expectations generated by the inconsistent actions of the Colombian administration.

IV

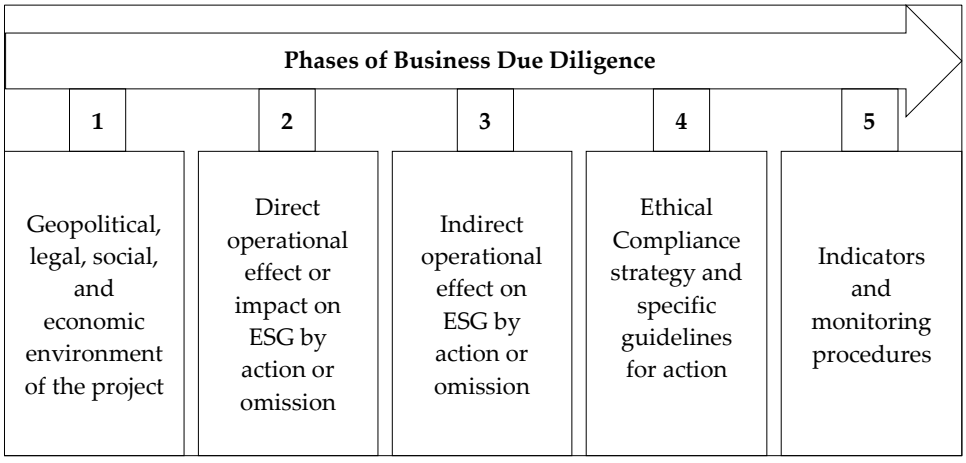
Final Considerations

The proliferation of investment arbitrations involving socio-environmental issues confirms the need to move from policy to process in corporate governance. ESG (environmental, social, and governance) perils are becoming progressively significant among the so-called non-financial risks. They should be managed considering two final considerations that this paper brings to the table:

1. Its legal root is international human rights law.
2. They are being used by arbitration bodies to "mitigate" the effects of states' international liability when states enact measures that restrict the rights acquired by international investors.

A systemic approach should be holistic (holistically covering the negative impacts of projects) and integrated (transversally involving the organization and its different departments). This is also reflected in private CSR standards such as ISO 26000.

In this sense, the "Plan-Do-Check-Act" cycle, which is widespread in quality management systems (ISO 9001:2015, para. 0.3.2), could be extrapolated to human rights due diligence systems. Its implementation will strengthen the arguments of international investors in arbitration, subject to the condition that they are technically pertaining to the principal international human rights treaties and the main soft law standards on sustainability. Proper management of these risks, with emphasis on processes, will help to ensure that human rights are smoothly incorporated into the day-to-day work of companies and organizations. To achieve this objective, it is also advisable to strengthen coordination and communication between the different departments that serve to structure the activities of companies.



The initial stage of corporate due diligence involves comprehending the operating environment within which an investor intends to engage. This step involves scrutinizing factors directly or indirectly influenced by the project's implementation within the socio-economic landscape. It is imperative to comply with various regulatory and institutional frameworks, including assessing regional stability. Additionally, we must consider social tensions that may not be overtly linked to the project but could impact its feasibility. Furthermore, it is pertinent to develop impact matrices to evaluate and prioritize corporate mitigation strategies systematically. Notably, emerging methodologies such as those introduced by the Small Industries Development Bank of India (SIDBI) and EU Regulation 852/2020 on sustainable finance provide valuable insights. These methodologies promote a dual approach, wherein we evaluate the positive contributions of the project towards Sustainable Development Goals (SDGs) alongside assessing potential negative externalities. For instance, a hydroelectric dam project may positively contribute to SDGs such as infrastructure development (SDG 9), poverty reduction (SDG 1), and the promotion of affordable and clean energy (SDG 7). However, it is crucial to acknowledge the likelihood of adverse impacts on SDG 15 (terrestrial ecosystems) due to the flooding of specific areas and potential infringements on SDG 16 (peace and justice) if involuntary displacement of communities becomes necessary. Therefore, understanding the positive and negative ramifications is essential in making informed investment decisions.

Finally, the investor must carefully follow the logical sequence we have summarised in this paper when assessing the conduct of the host state of the investment. Neither can human rights act as a catch-all to restrict investments indiscriminately by the state nor are investors' legitimate expectations a blank cheque to determine the state's international responsibility. A process that seems irreversible in light of the arbitral practice studied has begun in the direction of an optimum and enhanced synergy and strengthened compatibility between international investment law and human rights law, or, in other words, between the rights and obligations of companies developing and implementing international investments.