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Redefining the Obligatory Contours of Human Rights in Bilateral Investment Treaties:

A New Frontier for Investment Protection and Human Rights

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Abstract

The international investment law regime has often been criticised for its lopsided manner of creating rights for investors without corresponding obligations. This criticism has led to the perception that its protection mechanism could potentially impede states' powers to pursue legitimate policy objectives such as human rights. This raises unique obligatory challenges for a host-state in balancing human rights and investment protection. This paper discusses the nature of these competing interests and analyses the emerging trends balancing the interest and what it holds both for treaty-making and the investment regime. In doing so, this work challenges the adequacy of this emerging trend and argues that the inclusion of a human rights obligation in investment treaties is not, in itself, a sufficient approach in balancing the bilateral investment treaties (BITs) - human rights asymmetry. This work also argues that human rights need to be redefined to properly ascertain what constitutes a human rights responsibility between the investor and the host-state, both in the national and international law context, and within the narrower context of investment law. This article contends that further criteria need to be provided in human rights clauses in BITs to realistically determine the obligatory contours of an investor's human rights responsibility within the context of investment law. Finally, this paper concludes by formulating a mutual obligation principle to serve as catalyst for good corporate human rights responsibility under the BITs regime.

Introduction

Bilateral investment treaties (BITs) have emerged as a fundamental instrument in the modern regulatory landscape of international investment law. States' preference for BITs over customary international law as a protection mechanism is traceable to the enhanced protection, certainty, and clarity of legal rules operational in the flow of foreign investment between countries as well as the investor-state relationship. A BIT is a treaty between two independent countries. The primary aim of this treaty is to ensure that investors from a state-party receive prescribed, minimum standards of treatment and protection when investing in

the other country, provided the investment is a qualifying investment.[1] Where there is a violation of the stipulated standard of treatment under the BIT, the 'victim-investor' is procedurally empowered to proceed to the arbitration tribunal against the host-state. BITs, therefore, confer rights on the citizens of the home-state who invest in the host-state. This protects the investor against acts of the host-state that are inimical to the interest of the investor and his investment.

BITs have been criticised largely because of their disproportionate effects of creating rights for investors without corresponding duties. The extensive protection mechanisms and the ever-expanding scope of rights of the foreign investors has led some to believe that BITs are 'too one-sided'.[2] Traditionally, BITs do not contain provisions enabling governments to challenge an investor's misconduct even if it affects the rights of individuals within their territories.[3] It has, therefore, been argued that the substantive obligations contained in investment treaties and their expansive interpretation by arbitral tribunals have the potential to limit the power of the states to regulate to protect and promote human rights.[4] This is illustrated by situations in which an investor uses the BIT provisions to challenge laws and policies of the host-state aimed at implementation of human rights obligations of the state under the constitution or under international human rights treaties.[5] A notable example arose in 2007, when investors from Luxembourg and Italy, relying on a Belgium-Luxembourg-South Africa BIT provision, brought a claim under the ICSID Additional Facility Rules against South Africa on the primary ground that the 2002 Mining and Petroleum Resources Development Act (MPRDA) contained provisions that expropriated their mining rights.[6] The MPRDA forms part of South Africa's Black Economic Empowerment (BEE) Policy (an affirmative action policy), and requires, equity in mining companies to be partly owned by 'Historically Disadvantaged Persons'.[7] Upon settlement, South Africa terminated the BIT with Belgium and Luxembourg, concluding

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1 J E Alvarez, 'Empire, Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"?' (2009) 60 ALA L REV 943, 957-59.

2 See, N J Schrijver, 'A Multilateral Investment Agreement from a North-South Perspective' in E.C. Nieuwenhuys and M M T A Brus (eds), *Multilateral Regulation of Investment* (Kluwer Law International 2001), 17-33.

3 Amnesty International UK, *Human Rights, Trade and Investment Matters* (May 2006) 20.

4 M Sornarajah, *The International Law on Foreign Investment*, 2nd ed, Cambridge University Press, (2004) 259 In Abdulahi Al Faruque, 'Mapping the Relationship between Investment Protection and Human Rights' (2010) 11 Journal of World Investment & Trade, 539.

5 R. Suda, 'The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization' (2005) New York University School of Law Global Law Working Paper 01/05, in Abdulahi Al Faruque, 'Mapping the Relationship between Investment Protection and Human Rights' (2010) 11 Journal of World Investment & Trade, 539.

6 *Piero Foresti, Laura de carli and others v Republic of South Africa* (ICSID case No. AR(AF)/07/01. <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB(AF)/07/1> accessed 4th April 2018.

7 See for instance Sections 2 and 12 of the Mineral and Petroleum Development Act No. 22 of 2002.

that BITs 'pose risks and limitations on the ability of the government to pursue its constitutional-based transformation agenda'.[8]

1. BIT provisions and human rights obligation

BITs' provisions are the main source of rights from which an investor derives the power to challenge the action of a state that affects his investment. It does not matter if these actions are motivated by human rights objectives. An aggrieved investor may, for instance, rely on the fair and equitable treatment (FET) clause to challenge the state.

Fair and Equitable Treatment (FET)

The fair and equitable treatment provision is, perhaps, the most important provision in an investment treaty. This is primarily because it offers the investor protection over a wide range of government actions within the ambit of its interpretive context. Yet, it remains difficult to classify the meaning of this clause under one sweeping definition across all BITs, as the precise text and scope vary between treaties.

The malleable language of FET clauses in various treaties has raised unique legal issues regarding the contours of a state's responsibility under the standard and also offered arbitrators a large margin of appreciation, which has contributed to the evolving nature of the clause.[9] More specifically, the case law shows that determining whether the FET has or has not been breached is rendered difficult by the sheer paucity of definitions of the key terms 'fair' and 'equitable' which constitute the standard.[10] Arbitrators have also been forced to apply 'equity' and 'fairness' criteria while acknowledging the subjective, vague, and ambiguous characteristics of those undefined terms. As a result, tribunals have reached inconsistent conclusions, thereby limiting the possibility of establishing a consistent line of precedents.[11]

Even if contextual fluidity is left out of the equation, the FET is tied to a legal context which revolves around issues such as good faith, procedural propriety, abuses of authority, legitimate expectations, and transparency.[12] Although a great deal depends on the contextual interpretation of the action of the state and reasonable expectations of the investor, it is

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8 J Lang 'Bilateral Investment Treaties – a Shield or a Sword?' in S Mutsau, *Revisiting Bilateral Investment Treaties in the 21st Century: A Kenyan and South African Experience* (Anchor Academic Publishing 2017) 55.

9 *Mondev International Ltd v United States of America,* ICSID ARB(AF)/99/2, Final Award (11 October 2002) para 112.

10 S.M Perera, 'Equity-Based Decision-Making and the Fair and Equitable Treatment Standard: Lessons from the Argentine Investment Disputes – Part I' (2012) 13 Journal of World Investment & Trade 210.

11 ibid 213.

12 T J Grierson-Weiler and I A Laird, 'Standards of Treatment' in P Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 272.

expected and assumed that an investor knows all the laws and rules under which its investment will be regulated before deciding to invest.[13] Nonetheless, some tribunals seem to tilt the pendulum in favour of the right of the state to exercise its sovereign powers to regulate.[14] In any case, the threshold standard expected of a state under the FET is to act fairly, reasonably, and equitably in the exercise of its regulatory powers. However, because what is unreasonable, unfair, and inequitable is uncertain - with a lot depending on the circumstances of each case and the contextual limitations, if any, of the clause in a BIT - the case law on the FET has led to arguably inconsistent or unclear results.

In light of the ever-growing modern governmental regulatory powers and the expansive nature of the FET standards, regulatory action poses an ever-increasing risk of sparking a claim against the state. Claims may occur when a host-state, in a bid to fulfil its human rights obligations, adopts legislative, regulatory, or other measures that affect its observance of the FET minimum standards. Problems may also arise in regulatory spheres such as environmental rights, labour rights, indigenous people's rights, public health, etc…[15] For example, in the *Piero Foresti* case, the adoption by South Africa of legislative measures aimed at improving the rights of historically disadvantaged people was challenged as allegedly violating the FET.[16] In addition, there is a great deal of arbitral inconsistency due to the failure to uniformly define key terms constituting the FET standard and the conditions that tribunals can rely on to determine a breach of that standard. Indeed, some argue that until BITs begin to offer clear guidance as to the limit of this clause, particularly with regard to an investor's human right obligations, the FET will remain an attractive option for investor claims and a potential fetter on states' human rights regulatory autonomy.[17]

2. Emerging Paradigms in BITs and human rights

Given that the state is under an obligation under customary international law to protect human rights, as well as an obligation on the part of the corporation to respect human rights, a state's interference with an investment in response to this obligation should be justified and non-compensable. This should also be the case when such an interference is based on an existing international convention defining the relevant human rights standard or where there

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[13] *MTD Chile, SA v Republic of Chile (MTD Chile)* ICSID Case No. ARB/01/7, Award (25 May 2004) section 4.

[14] See on the other hand the decision in *Parkerings-Compagniet AS v Republic of Lithuania,* ICSID Case no ARB/05/8, Award (11 September 2007) para. 332.

[15] For several arbitral decisions on this, see I Knoll-Tudor, 'The Fair and Equitable Treatment Standards and Human Rights Norms' in P-M Dupuy, F Francioni and E U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 339.

[16] *Piero Foresti, Laura de carli and others v Republic of South Africa* (ICSID case no AR(AF)/07/01. <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB(AF)/07/1> accessed 4th April 2018.

[17] See S G Gross, 'Inordinate Chill: BITs, Non-NAFTA MITs, and Host-State Regulatory Freedom: An Indonesian Case Study' (2003) 24 Michigan Journal of International Law 893 (on the different contexts in which the clause has been invoked to limit the regulatory autonomy of the state).

is otherwise a clear violation of human rights.[18] Another result of the lack of protection cased in these situations, many have called for including binding human rights obligations on the investor in international investment agreements.[19]

This debate has become especially contentious since both developing and developed states have been hindered by the restrictions placed by investment treaties on states acting in the public interest. For example, the Argentina awards and the NAFTA awards involving the US and Canada; both countries have never been found to have violated the FET due to measures they have taken to protect public health and the environment.[20] These awards, among others[21], have demonstrated the potentially high degree of encroachment that investment treaties impose on the powers of a state.

It is little wonder then that states have moved towards protecting their sovereign power to regulate. Some have recalibrated international investment agreements (IIAs) or free trade agreements (FTAs) with investment chapters to strengthen the policy space of the host state. Others have been systematically rejecting older BIT models, as seen in the actions of India, Indonesia and South Africa, while others have denounced the investor-state dispute settlement mechanism. Some states such as Bolivia, South Africa and Ecuador have already enacted domestic investment protection laws with protections like those contained in BITs, but with a degree of balance between investors' rights and obligations, thereby enhancing state regulatory autonomy.[22] For instance, South Africa's Protection of Investment Act 22 of 2015, which came into force on July 13, 2018, was an attempt to codify BIT protection standards and provide a regulatory balance in investor-state relations.[23]

Furthermore, some states have opted for adopting more 'balanced' investment treaties to accommodate human rights and preserve their regulatory powers.[24] Over sixty countries are estimated to have made new model BITs since 2012.[25] Most of these new BITs are responding to the growing regulatory challenges the existing models have posed. This was stated by UN members during the Addis Ababa Action Agenda for Development, an offshoot of the United Nations Conference on Financing for Development:

> The goal of protecting and encouraging investment should not affect our ability to pursue public policy objectives. We will endeavour to craft trade and investment

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18 M Sornarajah, *The International Law on Foreign Investment* (4th edn Cambridge University Press 2017) 473.
19 B Choudhury, 'Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements' (2017) 38 UPJILR 425.
20 ibid 263.
21 See for instance *Aguas del Tunari v Bolivia* (2005) and *Parkering*s *v Lithuania* (2005) involving the right to water and the protection of cultural property, respectively.
22 The Constitutional Court of Ecuador has gone ahead to declare that all BITs are unconstitutional.
23 L Magubane, 'Investment Protection Legislation in South Africa', available at <www.dlapiper.com/en/southafrica/insights/publications/2018/11/africa-connected-doing-business-in-africa/investment-projection-legislation-in-south-africa/> accessed 3 October 2019.
24 See for instance the 2015 Indian Model BIT.
25 UNCTAD, Reform of International Investment Agreements (Issue note, March 2016).

agreements with appropriate safeguard so as not to constrain domestic policies and regulation in the public interest.[26]

Therefore, BITs that accommodate the regulatory policy space of the host state have a positive effect of becoming more 'balanced'.[27] For example, the 2012 US Model BIT has been praised for its attempt to precisely define and clarify some of the grey issues in older BITs, especially with respect to indirect expropriation and expanding protection for the regulatory space of the state.

The Indian 2015 Model BIT was also a bold attempt to resolve the imbalance found in many BITs. First, the model significantly omits the principles of fair and equitable treatment and most-favoured nation treatment. The notion of non-compensable regulatory expropriation is incorporated, as well as the need to exhaust domestic judicial remedies before resorting to international arbitration. The draft BIT imposes further obligations on the foreign investor to respect the rights, local customs, and traditions of the people as well as contribute to the development of the host state.[28]

Perhaps the most remarkable departure from older BITs is the inclusion of a specific and express reference to human rights in the new Morocco–Nigeria BIT[29], which was signed on 3 December 2016. Article 18, section 2, provides that 'Investors and investments shall uphold human rights in the host state.' Upon entry into force, the Morocco-Nigeria BIT will be the first international investment agreement that establishes binding obligations on investors to uphold human rights, making it perhaps the most innovative agreement in modern treaty-making practise.[30]

Arguably, the legal provision in which the human rights obligations of the investors are found, Article 18, remains vaguely worded. The article does not provide sufficient criteria for determining what human rights obligations are to be respected by the investor because there are some rights which can be classified as human rights, but which realistically cannot fall under what can be termed 'investor responsibility.' For instance, holding an investor responsible for the protection of the right to vote, right to a fair hearing, inhuman and degrading treatment, torture, etc is not possible within the context of investment law. These rights fall within the sphere of the state.

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[26] Report of the third International Conference on Financing for Development, Addis Ababa 13-16 July 2015 (A/CONF 227/20). The United Nations General Assembly has endorsed the agenda in Resolution 69/313 of 27 July 2015 (Addis Ababa Action Agenda).
[27] A Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 American Journal of International Law 45.
[28] S Janshyala, 'Bringing the State Back In: India's 2015 Model BIT' *Columbia FDI Perspectives* no 154, 17 August 2015.
[29] Morocco – Nigeria BIT (2016).
[30] T Gazzini, 'The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties' (2017) 8 (3) Investment Treaty News, available at <www.iisd.org/sites/default/files/publications/iisd-itn-september-2017-english.pdf> accessed 26th April 2018.

Again, what human rights are to be respected? Is it all international human rights or only those rights provided for within the national constitutions of the parties, given that the two parties may have varying degrees of human rights which are justiciable within their respective domestic laws? In this situation of uncertainty, determining and differentiating between what should amount to human rights obligations of the investor is difficult.

Thus, the contention that this paper raises is that the mere inclusion of a human rights obligation in investment agreements is not a sufficient solution to the inequity between investment protection and human rights. Additionally, including such an obligation does not consider the relational issues between international and domestic law in determining what amounts to human rights obligations within the investment law context. If customary international human rights law come to form the benchmark, then the issue becomes to what extent those rights have been internalised within the national system of the state parties such that they form the gamut of laws to be respected by the investor. So, a proper integration level of human rights needs to be ascertained to formulate a proper benchmark for compliance. The benchmark should be sufficiently provided for in the BIT to give the investor a clear idea of the extent of its human rights obligations.

In recognising the shortfall caused by the absence of a benchmark, this seemingly bold and innovative step towards a BIT–human rights paradigm merely scratches the surface. The unfolding events in the international investment protection regime no doubt foretell a paradigm shift both in the treaty-making context and for the overall international investment regime. I concede that the emerging trend provides a fertile ground for rebalancing investor human right responsibility, but it is still far from reaching that objective.

3. Mapping the new Contours for Investor Human rights responsibility

As stated by the South African ambassador to the WTO, 'Rebalancing the relationship between investor protection and government's right to regulate in public interest has moved to the centre of the debate on the future.'[31] The efforts remain works in progress and the vital role that investment arbitrations play in dealing with these issues raised so far remains a fundamental factor in measuring the success of this emerging paradigm.

From a procedural viewpoint, arbitral bodies play a vital role in redefining this obligatory contour. What happened in *Urbaser v Argentina* offers a hope for redefinition. The tribunal, after determining that the claim clearly fell within its jurisdiction, held that international human rights law forms part of the applicable laws because of the Spain-Argentina BIT's reference to general principles of international law.[32] By giving regard to the growing importance of corporate social responsibility as well as Article 30 of the UDHR and Article 5 of ICCPR, the tribunal found that private parties could have human rights obligations that

[31] X Carim, 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa', *Investment Policy Brief*, no 4, August 2015.
[32] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partuergoa v The Argentine Republic*, ICSID case no ARB/07/26, para 1192.

were enforceable under the BIT. However, in this case, the obligation at issue - the provision of water to citizens - clearly fell within the obligation of the state and not the private party and the tribunal dismissed the state's counterclaim stating: 'the human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on part of any company providing the contractually required service. Such obligation would have to be distinct from the State's responsibility to serve its population with drinking water and sewage services.'[33]

Despite the fact that this decision was first seen optimistically as a historic step towards corporate human rights obligations, the standard established by the case clearly falls short of changing the status quo for corporations under international law.[34] Regardless, recognising that the jurisprudential foundation has been laid in not only acknowledging 'the right of a host State to bring counterclaims not anticipated by the investor – thus implying a symmetrical nature to BITs – but also affirm(ing) the existence of obligations for investors in an unprecedented fashion' is vital.[35] While several other arbitral tribunals in the past have dealt with human rights considerations, *Urbaser* furthers the narrative in a bold fashion by attempting to define the human right obligations of host-states and private actors and the conditionalities under which they are imposed under international law.

What is required within the broader context of redefining the international investment law and human rights asymmetry is the possibility of pushing towards a middle ground that narrows and balances the relationship. This possibility can be achieved through enriching the substantive provisions of the BIT by determining and defining the obligatory contours of human rights and the conditional requirements under which they are imposed against the host-state and the investor under national and international laws. In order to truly campaign for operationalising human rights, human rights advocates must be willing to clarify and accept the limits of an investor's responsibility for human rights and what those responsibilities entail. For instance, the United Nations General Assembly recognises the right to safe and clean drinking water and sanitation as a human right and the inextricable relation of such right with the right to health, life, and human dignity is recognised.[36] The primary responsibility of States is to promote and protect human rights and to ensure full realisation of all human rights. States are encouraged to ensure that non-State service providers:

> (a) fulfil their human rights responsibilities throughout their work processes, including by engaging proactively with the State and stakeholders to detect potential human rights abuses and find solutions to address them; (b) Contribute to the provision of a regular supply of safe, acceptable, accessible and affordable drinking water and sanitation services of good quality and sufficient quantity; (c) Integrate human rights into impact assessments as appropriate, in order to identify and help

[33] ibid para 1208.
[34] Kevin Crow; Lina Lorenzoni Escobar, 'International Corporate Obligations, Human Rights, and the Urbaser Standard: Breaking New Ground' (2018) 36 BU Int'l LJ 87.
[35] ibid.
[36] Human Rights Council Res. 15/9, UN Doc A/HRC/RES/15/9, p 3 (6 October 2010).

address human rights challenges; (d) Develop effective organizational-level grievance mechanisms for users, and refrain from obstructing access to State-based accountability mechanisms.[37]

Given the above provision, from the perspective of UN bodies at least, the human right to water would appear to place some degree of responsibility on the part of non-State actors, specifically service providers; however, no clarifications are made as to what this responsibility entails. In my view, this contributory or complementary responsibility, no matter how positive, cannot replace the role of the state. The irreplaceability simply suggests that an investor's human rights obligation has limits – and that limit must be properly defined within a national and international context and within the narrower context of international investment law. Clarifying those limits may give birth to a new principle of complementarity of human rights in investment law that is operational and measurable.

How can investor be brought under this obligatory regime?

First, human rights in BITs need to be redefined and operationalised to properly ascertain what constitutes human rights responsibility between the investor and the host-state, both in the national and international law context and within the narrower context of investment law. Given that investors/corporations are not parties to human rights treaties, one must recognise the limits of their human rights responsibility. Within the context of investment law, the following criteria are suggested to define investors' human rights responsibility:

a) *Investor whose activities constitute or have the potential to constitute human rights violations.* Where the action of the investor constitutes a violation of or poses a danger to the enjoyment of human rights, any legislative or policy measure adopted by host-states to further the human rights objective or ensure an investor's human rights compliance should be deemed legitimate, justified and non-compensable, provided the measure is non-discriminatory. Here, an investor's human rights responsibility is essentially total. First, an investor is under an obligation to respect human rights protected by domestic law and must conduct business ethically with the utmost respect for the rights of the people. Second, any violation should constitute a ground for a claim by the host-state. The BIT should make these stipulations clear through inclusion of a clause to limit the investor's right to arbitration.
b) *Investor whose investment implicates a human right*. Since the investment is a subject for the promotion and protection of human rights, a legislative or policy measure adopted by a state to further the realisation of this human right should be legitimate provided it is done in good faith. What amounts to good faith can be inferred from the policy objective and must not be seen to pose undue hardship on the investor. An investor's human rights responsibility will be limited provided that its investment interest does

[37] ibid.

not override the public interest with respect to state actions which are intended to promote human rights. An investor's responsibility should be complementary and not total. Therefore, arbitral bodies should apply the proportionality principle in determining the extent of the complimentary responsibility of the investor vis-a-vis the state measures.

c) *Investor whose activities do not constitute human rights violations*. Where a human right's due diligence assessment does not reveal any potential human rights risk, an investor's human rights responsibility should be remote. State actions which are intended to promote human rights must be applied in a manner to ensure minimal impact on investment. For example, policies made by periodic and incremental introduction or enforcement should be applied to show good faith on the part of the state. An innocent investor should not be made to suffer unduly from a state measure. Again, arbitral bodies, in accommodating the right of the state to regulate, must do so by considering the nature, motive and procedure adopted and its impact on the investment.

Second, both home and host-states have a major role to play in ensuring corporate human rights responsibility. Given that both are parties to human rights treaties, nothing is stopping them from importing their human rights obligations into a BIT obligation. If they agree to import these obligations into the BIT, they should operate under the *mutual human rights obligation* principle, with extraterritorial application. More specifically, parties to a BIT should have mutual human rights obligations regarding the actions of their corporate citizens who invest in foreign countries. Inserting such a principle into BITs will promote corporate human rights responsibility of TNCs around the world, given the proliferation of BITs.

Conclusion

This paper has discussed in brief the human rights obligation dilemma between the host-state and the investor under the current investment protection regime. The seeming one-sidedness of the regime and the challenges and efforts to balance investor-human rights responsibility has been brought to the fore. This paper relies on the progress made in this regard to make a case for investor human rights responsibility. By going beyond the conventional practice, the paper formulates principles that should guide arbitral bodies in measuring investor human rights responsibility in BITs. These principles should then help to properly delineate the boundaries of investor human rights responsibility within the context of investment law.