Towards socially sustainable globalization: reflections on responsible contracting and the UN guiding principles on business and human rights

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Abstract The global governance style and prose of the United Nations system often mystifies the fact that what is enunciated as consensus of the peoples often the world is really what the community of states agrees to as a “soft” law that creates no state obligations excepting as the work of future time. Of course, a historian of international law fully recognizes the power of the exceptional when “soft” law becomes hardened (like the declaration in the right to development) and hard law is softened (as in times of “development” and the global war on “terror”). Oxymoron upon oxymoron continue stockpile the UN global governance prose.

Keywords UN · Human rights · Softlaw · Business

1 Introduction

The global governance style and prose of the United Nations system mystifies the fact that what is enunciated as consensus of the peoples often the world is really what the community of states agrees to as a “soft” law¹ that creates no state obligations excepting as the work of

¹ I use the expression “soft law” only because it is conventionally used. However, I reject the use of a sexist vocabulary in the language of law as a feminist. The vocabulary of the law’s language is often deeply patriarchal and complicit with its cruelties. For example, the expression “soft law” suggests that the reason is male as well as hard discounting non-calculative rationalities and emotional intelligence.

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future time. Of course, a historian of international law fully recognizes the power of the exceptional when “soft” law becomes hardened (like the declaration in the right to development) and hard law is softened (as in times of “development” and the global war on “terror”).² This dialectic is embedded in the rhetoric of global governance and it is time that we studied its social epistemologies of political rhetoric as performance.³

Oxymoron upon oxymoron continue stockpile the UN global governance prose and I do not think that Baxi-morons constitute quite an answer! For example, a Baxi-moron about the Brundtland Report coinage of the term “sustainable development”⁴ was that one may think of it only if one is capable of unsustainable thoughts. That there may be something unsustainable about sustainable globalization is now fully exposed to view by the Anthropocene.⁵

“Responsible contracting” may be a new term of discourse now introduced as a “soft” international law standard, but it has been a normative feature of the law of contracts as we know it, at least in the common-law orbit. The law enshrines that contracts against public policy are void or voidable; of course, it remains a matter for courts to decide when a given contract is so offensive and equally important, if not decisive, what that policy may be. Yet, it generally recognized that contracts made under duress or misrepresentation are void as

² Upendra Baxi, *Human Rights in a Posthuman World: Critical Essays* (OUP, Delhi, 2007).

³ See, Shirin M Rai & Janelle Reinelt (eds) *The Grammar of Politics and Performance* (Routledge, London, 2015) and Baxi, Book Review: Shirin M. Rai and Janelle Reinelt (eds) *The Grammar of Politics and Performance*, 46 *Social Change* (2016) 135–140.

⁴ Undoubtedly, the Brundtland Report pioneered this conception well. And combining sustainably with development is hard task, even when international environmental justice is confined to a single generation. The Brundtland Report extended the notion to entire economy and society; its notion of development is that it ‘meets the needs of the present without compromising the ability of future generations to meet their own needs.’ See, the United Nations, *Our Common Future: World Commission on Environment and Development* (1991) <<http://www.un-documents.net/our-common-future.pdf>>. See, for some critical perspectives, Dinah Shelton, Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk, 6(2) *J Human Rights & the Environment* (2015) 139–155; Andreas Philipopoulos-Mihalopoulos, *Absent Environments: Theorising Environmental Law and the City* (London, Routledge-Cavendish, 2007). But see, for celebrationist perspective, Voula Meg, *Sustainable Development, Energy and the City: A Civilisation of Visions and Actions* (Springer, Germany, 2005). See also, David Schlosberg, Reconceiving Environmental Justice: Global Movements and Political Theories 13(3) *Environmental Politics* (2004) 517–540; NC Carre, Environmental Justice and Hydraulic Fracturing: The Ascendancy of Grassroots Populism in Policy Determination, 4(1) *J Social Change* (2012) 1–13; Dale Miansom, Duties to the Distant: Aid, Assistance, and Intervention in the Developing World, 9 *J Ethics* (2005) 151–170. See as to the realities of war/conflict displaced people and what happens in the process to sustainable development, Helen Young & Lisa Goldman (eds) *Livelihoods, Natural Resources, and Post-Conflict Peacebuilding* (Routledge, New York, 2015).

⁵ Naomi Klein, *This Changes Everything: Capitalism versus Climate* (Allen Lane/Penguin, London, 2014); Upendra Baxi, Towards a Climate Change Justice Theory? 7(1) *J Human Rights & the Environment* (2016) 7–31.

offending against public policy ordaining the promises made in good faith must be honoured. Contracts for a manifestly unlawful consideration are also invalid. Standard form or adhesion contracts have been modified to make the doctrine of *caveat emptor* difficult of application in these halcyon days of consumer sovereignty. Rescinding of contract is a judicial rarity but it does occur; judicial retroactivity and the whole new sphere of environmental clearances provide a necessary discipline of responsibility though not a sufficient condition for the long-term investor conduct.

The question whether we need a “soft” international law standard beyond the domestic law or whether we should clearly reinforce the domestic law is an important concern; this sort of work was precisely envisaged and entailed in the United Nations’ “Protect, Respect and Remedy” Framework.⁶ But the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie, identified in 2007 State–investor contracts as important independent instruments through which States and businesses can manage human rights risks arising from an investment; and the principles for responsible contracts (RC) emerged as an addendum to the Guiding Principles. What is relatively less known is that the SRSG invested four years of multi-stakeholder consultations in establishing the ten principles for negotiating responsible contracts, which would in State–investor contracts ‘integrate the management of human rights risks into contract negotiations more effectively.’⁷

It was probably felt that international law soft standards concerning responsible contracting conduct promotes better the *ex-ante*, rather than *post-facto*, response to these risks. And, of course, the shift from the paradigm of private law to public international law standard setting is welcome. All the same, some explicit consideration of postures even of investment contracts in municipal law remains a necessary task. In what follows, we explore some of these principles.

⁶ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011. The principles for responsible contracts have, of course, to be read in the context of the Guiding Principles and implemented as an aspect of state obligations enunciated in international human rights law.

⁷ Since 2011 the Office of the United Nations High Commissioner for Human Rights (OHCHR) has promoted the principles for responsible contracts as an important and hands on instrument addressing some of the human rights concerns relating to State–investor contracts and has offered some training materials.

2 Human rights gains and risks in RC

RC principles are based on the foundational principle that investment poses both human rights gains as well as costs, and minimization of human rights costs should be the desideratum both for the state and the foreign investor. If investment contracts improve ‘basic services, employment opportunities and revenue generation that can help States to provide and maintain services,’ the potential human rights risk stands constituted by ‘the temporary or permanent displacement of people without proper consultation and compensation; environmental damage or disturbance that can adversely impact food and water supplies, livelihoods or culturally significant locations or resources.’⁸ Put another way, business and state planning of investment contracts are not performed or enunciated as providing a *tablua rasa* for investor-state conduct; human rights risks impinge on state sovereignty and corporate might. Characteristically, the spectre is highlighted by the Report. Its “logic” is expressed in the following statement:

States and business investors alike have learned from experience that unaddressed adverse human rights impacts present significant risks for commercial projects, and reduce the potential for such ventures to be a positive benefit to society. In some cases, negative human rights impacts from projects have resulted in costly civil and criminal law suits; financial liabilities, such as delays in design, siting, permitting, construction, operation and expected revenues; problematic relations with local labour markets; higher costs for financing, insurance and security; as well as damage stemming from loss of trust, reputational deterioration and cancellation of the projects⁹

Demonstrating the probability and possibility of not addressing human rights costs stands well highlighted in the Report. What it, in effect, says is that business and state sovereign conduct ought to pay some heed to project related costs—“negative impacts”—for their own good. Corporations, even when state-like and state-transcendent, are not regarded as states with core human rights responsibilities. If voluntarism is taken to signify that no human rights obligations govern corporations excepting those that corporations may in fact and from time to time accept, the

⁸ See, Human Rights Council Seventeenth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: A/HRC/17/31/Add.3, General Assembly, 25 May 2011 [9]. The document was published by the OHRC in 2015 in a monograph (*Hereinafter* “Report”).

⁹ Report, *ibid* [10].

Report reeks of voluntarism. It does not even pause to ask how far this position is tenable.

3 What are human rights?

There have been, and are continuing, important debates as to the meaning of human rights,¹⁰ what may constitute core rights and *jus cogens*,¹¹ whether we have too many or too few human rights,¹² and the difference between moral idea of having human rights and human rights law and jurisprudence.¹³ These debates form the discursive terrain of contemporary human rights norms and standards and challenge the notion that judicial enforceability is a cardinal feature of having human rights.

However, the Report does not enter any of these discursive arenas and regards of human rights in a rather Spartan manner. It grasps human rights as ‘internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.’¹⁴ Surely, the concept of human rights harms in investment contracts is closely related to the nature, numbers, and justifications of human rights and human rights risks need to be

¹⁰ See, recently, Costas Douzinas and Connor Gearty, *The Meaning of Human Rights: The Philosophy and Social Theory of Human Rights* (CUP, Cambridge, 2014).

¹¹ See, Martin Scheinin, Core Rights, in, Dinah Shelton (ed) *The Oxford Handbook of Human Rights Law* 527–540 (OUP, Oxford, 2013), and generally Part IV of the *Handbook*.

¹² Upendra Baxi, *The Future of Human Rights*, Perennial edn (OUP, Delhi, 2013).

¹³ See, Upendra Baxi, Reinventing Human Rights in an Era of Hyper-globalisation: A Few Wayside Remarks, in, Connor Gearty and Costas Douzinas (eds) *The Cambridge Companion to Human Rights Law* (CUP, Cambridge, 2012) 150–170.

¹⁴ Report, Footnote 2 further directs attention to the ‘differentiated obligations and responsibilities for States and business enterprises,’ see Annex 1 to the UN Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, UN Doc. A/HRC/17/31 (21 March 2011). Professor Ruggie justifies these twin sources of human rights thus:

The answer is simple – in principle, all internationally recognized human rights ... because companies can affect the entire spectrum of rights ... [C]ompanies at a minimum should look to the International Bill of Human Rights – the Universal Declaration and the two Covenants – as well as the ILO Declaration on Fundamental Principles and Rights at Work. They should do so for two reasons. First, the principles these instruments embody are the most universally agreed upon by the international community. Second, they are the main benchmarks against which other social actors judge the human rights impacts of companies.

Business and human rights: “Towards operationalizing the ‘protect, respect and remedy’ framework,” A/HRC/11/13, 2009 [52–54].

addressed in a wider context: the types of harms also vary, especially across intra-generational, intergenerational, and planetary harms.¹⁵

All this does not gainsay that the first step is rightly taken by Principle 2 which requires that certain responsibilities for ‘preventing and mitigating human rights risks associated with the project and its activities’ to be ‘clarified and agreed before the contract is finalized,’ although there may be major disagreements between companies and human rightists about the human rights risks and responsibilities thus framed. Nor is questionable that the harm ‘foreseeable from feasibility studies, early impact assessments, due diligence assessments or other initial project preparation’ should be avoided. But it does point to an asymmetrical situation where many human rights obligations normatively bind the states while the corporations are, and remain, human rights free zones.

4 Stabilization clauses in investment contracts

Perhaps, the ways to handle the growing discontent against “stabilisation clauses” explains the clamour for principles. The Report considers it ‘legitimate for business investors to seek protection against arbitrary or discriminatory changes in law.’¹⁶ However, it makes quite clear that Principle 4 ‘deals solely with the human rights implications raised by such clauses and is not intended to provide guidance on any other issues related to stabilization.’¹⁷ Principle 4 defines stabilization clauses as those clauses which refer “to any clause that addresses the issue of changes in the law during the term of the contract, including those that seek to maintain the project’s “economic equilibrium” or those that freeze the applicable law to a project.” And the expression “economic equilibrium” refers only to those clauses that seek ‘indemnification or compensation in one form or another from the State for the costs of compliance with changes in law.’¹⁸

However, comparative research for the SPGS report showed that there was a tendency to ‘unduly constrict the policy space a State needs to meet its human rights obligations.’ The research found that ‘compared to contracts agreed with Governments in developed countries, those

¹⁵ See, Baxi, *supra* note 5, 19–31.

¹⁶ Report, *supra* note 8, 8.

¹⁷ *Ibid.* 10.

¹⁸ *Ibid.* 11.

negotiated with Governments in developing countries were: (a) typically much broader in their coverage; and (b) much more likely to include exemptions for or award compensation to business investors for compliance with future laws—even in areas that are directly related to human rights, such as health, environmental protection, labour and safety.’¹⁹ It was this finding that enabled the articulation of Principle 4 that subjects the stabilization clauses to some human rights discipline. It says:

Contractual stabilization clauses, ... if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State’s bona fide efforts to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations.

Note that stabilization clauses that immunize investment contracts are not per se proscribed. They offend only when the State makes laws, regulations, and policies to ‘meet its human rights obligations.’ Even so, the attempt to impose a human rights obligation must be both bona fide and non-discriminatory. Foremost among the key obligations is the idea that future laws are unlikely to satisfy the objectives of this principle if they include areas such as labour, health, safety, the environment, or other legal measures that serve to meet the State’s human rights obligations. No “economic” or “other” penalties may be contemplated by the investment contracts when the State pursues ‘reflect international standards, benchmarks or recognized good practices in areas such as health, safety, labour, the environment, technical specifications or other areas that relate to the human rights impact of the project.’²⁰

The emphasis on human rights obligations and responsibilities is undoubtedly Important but it appears limited in the Report. First, a State is free to contest that any human rights obligations and responsibilities arise at customary law; even what constitutes custom as a source of international law may be contested.²¹ Second, the state may also be disinclined to ratify a human rights treaty undertaking or as is well known, lodge several reservations and statements of understanding to such treaties.²² Third, it may regard “soft” law standards as a merely comprising non-binding instruments of aspiration. Exceptionalism, if it

¹⁹ Report, *supra* note 8, 17.

²⁰ *Ibid.*, 15.

²¹ Upendra Baxi, Sources in the antiformalist tradition: ‘That Monster Custom, Who Doth All Sense Doth Eat’ in, Samantha Besson & Jean d’Aspermont (eds) *The Oxford Handbook of International Customary Law* (OUP, Oxford, 2017) 225.

²² The law of treaties allows plenty of room for unilateralism or exceptionalism. See Upendra Baxi, A Work in Progress?: United States’ Report to UN Human Rights Committee, 31(5) *EPW* (3 Feb 1996) 283–291.

may be so called in this context, adversely affects any human rights normativity on investor responsibility.

The SRSG finds a way out of these difficulties by appealing to the rhetorical force of human rights through the languages of responsible contracting and *lex lata* type obligations of States. The Report suggests some core human rights languages without foregrounding the intentional human rights obligations as binding corporations or investors. By so doing, it weakens the force of human rights persuasion in negotiations in very construction of responsible contracting.

5 Project operating standards

The idea that a project has a life cycle of its own is well known to those who manage international investment; however, the additional idea that they should be subject to human rights social audit is scarcely desirable to the “community” of corporate investors. The SRSG believes in the power of persuasion through the devise of responsible contracting conduct, which takes account of human rights standards.

Accordingly, Principle 3 prescribes: ‘The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remedy of any negative human rights impact throughout the life cycle of the project.’

Further, as Note 8 makes clear, the obligations follow regardless of what is contained in the national law or policy and extend to what are called external standards. These relate to three sets of discrete ‘standards...such as those set by lenders or international industry bodies or other good practice or internationally recognized guidelines or standards.’²³

Clearly, the last category has to be understood as referring to specialist bodies so diverse as UN specialized agencies (such as the FAO, UNESCO, ILO, WHO), other agencies such as the law of the seas authority), international dispute settling agencies whether international (such as the world court, the ICC and UN Ad Hoc criminal tribunals) or specialized treaty bodies (such as WTO dispute tribunals), UN treaty bodies, and other stand-setting authorities such as the UNCTAD, UNIDO, UNCITRAL, and ILC) and general standards setting framework agreements (the latest being the Paris agreement on climate

²³ Report, *supra* note 8, 12.

change). The Report does not mention any of these in its comments aggravating the range of external standards and the tasks of capacity-building in states and corporations; this problem area needs to be urgently clarified, if responsible contracting planning throughout the project's "life-cycle" is indeed to be promoted.

The Report smuggles in a reference to "successor companies and subcontractors."²⁴ This reference is essential to the principle which extends to life cycle of investment. However, the principle of state succession is not yet applicable to corporate investors, simply because international law as such is not regarded as binding on corporate performance or conduct. It is true that the life cycle of a project type consideration highlights the problem of succession in corporate law. There is perhaps a need to consider social cases like mass disasters, of which Bhopal constitutes a poignant archetype.²⁵ However, any *lex feranda* recommendation is likely to remain unproductive if cavalierly enunciated as seems the case here.

6 Community engagement

This notion is as central to the Report as is the idea of a life-cycle. It is elaborated variously. Principle 7 declares that the project 'should have an effective community engagement plan through its life cycle, starting at the earliest stages of the project.' Principle 9 insists that individuals and communities 'that are affected by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism.' And as per Principle 10 the contract's 'terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.'

Normative progress is made when the Report describes community engagement quite comprehensively. It has to be 'effective and ongoing': and "from the initial stages" to final fruition of the contract project. Considered as 'the best way to identify and understand potential negative human rights impact and identify effective prevention and mitigation measures,' it is also 'now widely recognized as minimum good practice for successful investment projects' as vehicle 'to manage expectations and foster the trust of local communities—both of which

²⁴ Ibid. 14.

²⁵ See, Upendra Baxi, Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus? 1 *Business & Human Rights J* (2016) 21–40.

are particularly important in the context of long-term investments.’ Moreover, it is ‘inclusive and designed to facilitate the involvement of all relevant individuals and groups.’ Such inclusive engagement will foster considerate attention to ‘gender differences and to those at heightened risk of vulnerability or marginalization.’ Further: ‘Specialized approaches should be developed to understand such risks and they should be explored from the earliest stages of project execution.’²⁶

The Report underscores a difficulty of threshold exclusion of affected parties in accomplishing the investment contract.²⁷ To some extent reforms in land acquisition and eminent domain doctrines²⁸ and the need for environmental and other clearances²⁹ serve the need of community engagement. However, governmental policies and laws often make clear the areas (as in the case with special economic investment zones) where the state’s human rights obligations do not extend. Not merely is a tax holiday offered for several years but also laws protecting human rights of the labour or environment are specifically rendered non-applicable in such areas. Is responsible contracting at all possible for such zones, which remain abundant in the Global South? More generally, the theoretical question is: if we were to postulate certain core human rights, should these be, and remain, waivable?

The other question relates to Principle 9 which provides for non-judicial access. It must be recalled at the outset that in certain jurisdictions, the doctrine of the essential features of the basic structure of the Constitution holds and the power and the process of judicial

²⁶ Report, *supra* note 8, at 25.

²⁷ ‘It may not be possible to include detailed plans for engagement in the contract because these will be developed in part with entities and people that may not be party to the negotiation’. Ibid. 26.

²⁸ For example, as the Indian case the debates are still ongoing about The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. See, G Raghuram and Simi Sunny, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Ordinance 2014: A Process Perspective, IIM, W.P. No. 2015-07-03 (Ahmedabad, 2015); Binod Mishra, Right to Fair Compensation and Transparency in Land Acquisition and Rehabilitation & Resettlement Amendment Ordinance No. 9 of 2014 – A Critical Review (2015) <<http://ssrn.com/abstract=2554903>>; Subhas C Ray, From Detroit to Singur: On the Question of Land Acquisition for Private Development, <<http://web2.uconn.edu/economics/working/2010-09.pdf>>.

²⁹ At last one former Minister in India candidly acknowledges the non-conversation between legal academics and political/policy actors in his autobiography: see, Jairam Ramesh, *Green Signals: Ecology, Growth, and Democracy in India* (OUP, Delhi, 2015) 186–188. Ramesh there bemoans, refreshingly, the “institutional monocultures” of policy and political actors.

review are upheld even against Parliamentary amendments, which are sometimes invalidated by courts.³⁰ Of course, the Report says that ‘such mechanisms should not impede access to remedy through judicial or other, non-judicial processes’³¹ but this saying is in passing and does not fully take account of constitutional dynamics and dialectic.

No doubt as an in-house management device, it is a good policy to support the ‘identification of adverse human rights impact as part of the business investor’s ongoing human rights due diligence’: hopefully these also ‘make it possible for grievances to be addressed and for adverse impact to be remedied early and directly by the business investor.’ However, this only amounts in the Report to a good policy advice, and not as a human rights imperative.³²

Principle 10 is based on the notion that ‘the disclosure of information related to the project throughout its life cycle allows people to have information that is pertinent to them and their human rights.’ And initiatives ‘like the Extractive Industries Transparency Initiative and some lending standards offer additional benchmarks on disclosure that can be useful.’³³ This is indeed innovative till we come across the formulation in the Report that making contractual terms accessible may require some resources, which should be considered an integral part of

³⁰ The literature here is immense. But consult I at least: Granville Austin, *Working a Democratic Constitution—The Indian Experience* (OUP, Delhi, 1999); P. Ishwara Bhatt, *Law & Social Transformation in India* (Eastern Book Co, Lucknow, 2009); Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Co, Lucknow, 1980); Ibid, “The Little Done, The Vast Undone”: Reflections on Reading Granville Austin’s *The Indian Constitution*, 9 *JILI* (1967) 323–430; Id, *The Avatars of Judicial Activism: Explorations in the Geography of (in) Justice*, in, Verma and Kusum (eds) *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (OUP/Indian Law Institute, Delhi, 2001) 156–209; Sandra Freedman, *Human Rights Transformed: Human Rights and Duties* (OUP, Oxford, 2008); Gary Jacobsohn, *The Wheel of Law: Indian Secularism in a Comparative Context* (OUP, Delhi, 2003); Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (Harvard University Press, Massachusetts, 2013); Madhav Khosla, *The Indian Constitution*, Oxford India Short Editions (OUP, Delhi, 2012); Sudhir Krishnaswamy, *Democracy and Constitutionalism* (OUP, Delhi, 2009); Anupama Rao, *The Caste Question: Dalits and the Politics of Modern Asia* (University of California Press, Berkeley, 2009); SP Sathe *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (OUP, Delhi, 2002); Ronojoy Sen, *Legalizing Religion (with Commentary by Upendra Baxi)*, Policy Studies 30, (East West Centre, Washington DC, 2007); Ujjwal Kumar Singh, *The State, Democracy, and Anti-Terror Laws in India* (Sage, New Delhi, 2007); Anirudh Prasad and Chandrasen Pratap Singh, *Judicial Power and Judicial Review* (Eastern Book Co, Lucknow, 2012); Parmanand Singh, *Enforcing Socio-Economic Rights through Public Interest Litigation: An Overview of the Indian Experience*, in, Surya Deva (ed) *Socio-Economic Rights in Emerging Free Markets: Comparative Insights from India and China* (Routledge, New York, 2015) 101–122; Arun Thiruvengadam, “Swallowing a Bitter PIL”: Brief reflections on Public Interest Litigation in India, in, Mayur Suresh and Siddharth Narrain (eds) *The Sliding Scales of Justice: The Supreme Court in Neo-Liberal India* (Orient Blackswan, Delhi, 2014) 121–140; Uday Raj Rai, *Fundamental Rights and Their Enforcement* (PHI learning Pvt Ltd, Delhi, 2011); Anupama Roy, *Gendered Citizenship: Historical and Conceptual Explorations* (Orient Blackswan, Delhi, 2013).

³¹ Report, *supra* note 8, at 30.

³² For what constitutes non-judicial recourse, see Guiding Principles of Business and Human Rights 17–21.

³³ Report, *supra* note 21, 32.

project costs” and that prior to ‘contract closure, the parties should agree on how the contractual terms will be released in an accessible manner.’³⁴

This would mean that disclosure and access are contractual rights, not necessarily positive international law human rights. Best practices of corporate governance, howsoever derived widely, would necessarily result in this respect for human rights. A difficulty with the “social pillar” is that it does not raise fully the questions about how corporation acquire “human rights responsibilities.”

Considered as human rights the State would have an obligation to provide access and disclosure in public interest (always of course limited by justified and justifiable exceptions). But the Report suggests that human rights can be reinforced by responsible contracting conduct. Although the report does not connect transparency explicitly with a human right of access to the Internet, (and whether there is or ought to be such a human right) this reading is justified by the remark that this right to transparency ‘would not be appropriate without ensuring that people without access to the Internet also have an opportunity to obtain the information.’³⁵

Despite some evidence of corporate behaviour to the contrary, investment contracting conduct continues to be irresponsible.³⁶ The overall framework of corporate respect for human rights responsibilities is sculpted by Professor Ruggie as comprising a duty to respect: ‘the corporate responsibility to respect human rights, which means that

³⁴ Ibid. 34.

³⁵ Ibid.

³⁶ For a recent paper, see John Ruggie, Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization, Regulatory Policy Program Working Paper RPP-2015-04, Mossavar-Rahmani Center for Business and Government, Harvard Kennedy School, Harvard University (2015) <http://www.hks.harvard.edu/index.php/content/download/74032/1678739/version/1/file/RPP_2015_04_Ruggie.pdf> (accessed 2 August 2015). Ruggie precisely identifies three governance systems: “The first is the system of public law and governance, domestic and international. The second is a civil governance system involving stakeholders affected by business enterprises and employing various social compliance mechanisms such as advocacy campaigns and other forms of pressure. The third is corporate governance, which internalizes elements of the other two (unevenly, to be sure). Lacking was an authoritative basis whereby these governance systems become better aligned in relation to business and human rights, compensate for one another’s weaknesses, and play mutually reinforcing roles—out of which cumulative change can evolve over time.” But the difficult question is how much more time would it take for multinationals to learn to take human rights responsibility for catastrophes they cause, and aid and abet? On this, see also, Upendra Baxi, Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus? 1(1) *Business & Human Rights J* (2016) 21–40. See also, Upendra Baxi, Market Fundamentalisms: Business Ethics at the Altar of Human Rights, 1(1) *Human Rights L Rev* (2005); see also, David Weissbrodt and Muria Kruger, Norms on Responsibility of Transnational Corporations and Other Business Entities, 97(901) *American J Intl L* (2003); Surya Deva & Radu Mare, Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress <<http://ssrn.com/abstract=2389344>>.

business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.³⁷ This is an admirably sage and sound advice: the question remains whether it imposes any legal obligations to avoid hurt and harm and concrete obligations of prevention and mitigation. Is there a new “global corporate law” with some compelling human rights duties in the making? The plea for an international people’s treaty is certainly an alternative way of realizing obligations of responsible contracting conduct.³⁸

7 Toward a conclusion

Responsible contracting norms and standards framework and fairness in investment treaties are treated separately and these do raise distinctive concerns, each in its own sphere. But I believe that the novel normative regime of responsible contracting ought to encompass both these domains, and further perhaps be subsumed under the newly enunciated global social policy of sustainable development goals and targets.³⁹

³⁷ Report, *supra* note 8, [6].

³⁸ Juan Hernández Zubizarreta, The New Global Corporate Law <www.tni.org/stateofplay2015>.

³⁹ The eight Millennium Development Goals (MDGs) were established following the Millennium Summit of the United Nations in 2000, following the adoption of the United Nations Millennium Declaration. All 189 United Nations member states (there are 193 presently), and at least 22 international organizations, committed to help achieve the following MDGs by 2015. The Goals and the accompanying Targets were geared specifically to: eradicate extreme poverty and hunger, achieve universal primary education, promote gender equality and empower women, reduce child mortality, improve maternal health, combat HIV/AIDS, malaria and other diseases, ensure environmental sustainability, and develop a global partnership for development. Annual Reports were published by the UN concerning the various states of achievement of the Goals and Targets. The Goals were welcomed as setting an international development paradigm, especially privileging vulnerable humans and entities in nature. Expectations were high (and the Goals frequently met with an extended timeline) and attainments incommensurate. Many found the enunciation of goals unclear and ambivalent; many simply found the goals to be unrealistic setting a “legitimacy” trap. Others questioned methods of measurement and reportage. Still some others raised the question of efficacy of international action and collaboration. See, for example, Naila Kabeer, Gender Equality and Women’s Empowerment: A Critical Analysis of the Third Millennium Development Goal 13 *Gender and Development* (2005) 13–24; Allan Rosenfield, Deborah Maine, and Lynn Freedman, Meeting MDG-5: an Impossible Dream? 368(9542) *The Lancet* (2006) 1133–1135; Amir Attaran, An Immeasurable Crisis? A Criticism of the Millennium Development Goals and Why They Cannot Be Measured, 2(10) *PLOS Medicine* (2005) e318. See for an introduction to SGD, *Transforming Our World: The 2030 Agenda for Sustainable Development*, (United Nations, New York, 2015). The SDGs have attracted some comments: see, Bruce Jenks, From an MDG World to an SDG/GPG World: Why the United Nations Should Embrace the Concept of Global Public Goods, Development Dialogue Paper no 15 (September, 2015); Markus Loewe, Post 2015: How to Reconcile the Millennium Development Goals (MDGs) and the Sustainable Development Goals (SDGs)? The German Development Institute(DIE) Briefing Paper 18/2012; Derek Osborn, Amy Cutter and Farooq Ullah, Universal Sustainable Development Goals: Understanding The Transformational Challenge for Developed Countries: Report of a Study by Stakeholder Forum (2015).

Given “authoritarian statism,”⁴⁰ market-fundamentalism, and increasing privatization of governance,⁴¹ the distinction between non-state and state actors must be challenged at least as this relates to responsible contracting.

Lively “national” and “international contestation” has indeed occurred in relation to bilateral investment treaties (BITs).⁴² The multivocality and polycentricism of human rights norms and standards, and underlying conceptions like the “rule of law” have been frequently adduced, for opposing ends of policy, directed to the abrogation and rewriting of BITs.⁴³ Further, the by the BITs permissive provisions for investor-state dispute settlement (ISDS) mechanisms: the invocation of these provisions has raised concerns about responsible investment behaviour by corporations. Indeed, a ‘growing number of investor claims against sovereign states challenging a wide array of public policy decisions and regulatory measures has evoked deep concerns about the potential costs associated with such treaties.’⁴⁴ Aside from the remedy of amending the BIT provisions or regulations as an integral aspect of sovereignty (the power of the host country to regulate),⁴⁵ a “world investment court” has been suggested for an impartial and independent adjudication of investor-state disputes.⁴⁶

Whether the extension of norms and standards of responsible contracting will abate or stop the ‘perverse shift in bargaining power to

⁴⁰ George Steinmetz, *The State of Emergency and the Revival of American Imperialism: Toward an Authoritarian Post-Fordism*, 15(2) *Public Culture* (2003) 323–345; Robert Paul Resch, *Althusser and the Renewal of Marxist Social Theory* (University of California Press, Berkeley, 1992).

⁴¹ See, e.g., Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (CUP, Cambridge, 2002); Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (CUP, Cambridge, 1996); Anne-Marie Slaughter, *A New World Order* (Princeton University Press, Princeton, 2004); A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (CUP, Cambridge, 2003).

⁴² See, especially, Prabhash Ranjan, *National Contestation of International Investment Law and the International Rule of Law*, in, M Kanetake and A Nollkaemper (ed), *Rule of Law at National and International Levels: Contestations and Deference* (Hart Publishing, Oxford, 2016) 115–142; Kavaljit Singh and Burghard Ilge (ed), *Connecting People: Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (BOTH ENDS, Amsterdam, 2016).

⁴³ Ranjan, *ibid.* 14. He rightly demonstrates the strengths of a critical perspective where the ‘argument is that since investment treaty arbitration replaces domestic courts when it comes to protecting the interests of foreign investors, it disincentives the reform of institutions at the domestic level and weakens the capacity of domestic institutions. Some also see this replacement as an onslaught on the domestic judicial mechanism of the host state where the foreign investor bypasses domestic legal system and uses investment treaty arbitration’.

⁴⁴ See, Singh and Ilge, *supra* note 42.

⁴⁵ Rajan, *supra* note 42; Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, in, S Schill (ed) *International Investment Law and Comparative Public Law* (OUP, Oxford, 2010) 627.

⁴⁶ Ranjan, *supra* note 42, 22–24.

the most powerful private economic actors on the planet at the expense of the institutions and processes that represent everyone else⁴⁷ is perhaps no longer an open question. What decisively matters are the questionings about the future of human rights. While it would be egregious error to deny interpretive plurality, there ought to be no space for sheer denialism which says that human rights do not matter at all or that they have no future. From the perspectives of those violated the question is how to make their images of responsible contracting less trade/investment-related and market-friendly and more human rights friendly.⁴⁸

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⁴⁷ Gus van Harten, A Critique of Investment Treaties, in, Singh & Ilge, *supra* note 42, 50. While this critique is valid, see for a different perspective, Xavier Carim, International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa, in, Kavaljit Singh and Burghard Ilge, *supra* note 39.

⁴⁸ See, as to this distinction, as well as for the distinction between politics *of* and *for* human rights, Upendra Baxi, *The Future of Human Rights*, 3rd edn (OUP, Delhi, 2013).