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ARTICLE

The Relationality of Community Development Agreements towards a Human Rights Due Diligence Good Faith Requirement

La relationnalité des accords de développement communautaire: vers une exigence de bonne foi de diligence raisonnable en matière de droits de l'homme

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Abstract

Human rights due diligence (HRDD) is a buzzword in business and human rights (BHR) activities. However, multinational corporations (MNCs) often conduct it as a tick-box exercise without transparency. Using a relational contract theory, this article argues that when MNCs contract with local communities through community development agreements (CDAs) to perform HRDD, such contracts are internationalized relational contracts that attract a level of good faith. An established principle in international economic law, good faith serves as a standard for assessing conduct designed to discharge obligations in international contracts between states and MNCs (investor-state contracts). Similar to how investor-state arbitration tribunals use good faith jurisprudence in regulating the relationship between states and MNCs, this article proposes a BHR good faith jurisprudence to prescribe how HRDD obligations should be discharged. The article concludes that a good faith interpretational exercise in BHR would (1) reduce MNCs' cosmetic compliance with HRDD principles; (2) increase transparency in the HRDD exercise; and (3) become a source of rights for local communities to enforce corporate accountability.

Keywords: Good faith; international law; human rights due diligence; community development agreements; multinational corporations; relational contracts; business and human rights

Résumé

La diligence raisonnable en matière de droits de l'homme (DRDH) est un terme souvent utilisé dans les activités de commerce et des droits de l'homme (CDH). Cependant, les sociétés multinationales (SM) l'applique souvent comme un exercice de case à cocher sans transparence. En s'appuyant sur une théorie des contrats relationnels, cet article soutient que

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lorsque les SM concluent des contrats avec des communautés locales par le biais d'accords de développement communautaire (ADC) pour exécuter leur DRDH, ces contrats sont des contrats relationnels internationalisés qui attirent un niveau de bonne foi. Principe établi en droit économique international, la bonne foi sert de norme pour évaluer la conduite conçue pour s'acquitter des obligations dans les contrats internationaux entre États et SM (contrats investisseur-État). De la même manière que les tribunaux d'arbitrage investisseur-État utilisent la jurisprudence de bonne foi pour réglementer la relation entre États et SM, cet article propose une jurisprudence de bonne foi en matière de CDH pour prescrire la manière dont les obligations en matière de DRDH doivent être exécutées. L'article conclut qu'un exercice d'interprétation de bonne foi en matière de CDH (1) réduirait la conformité simulée des SM aux principes de DRDH; (2) accroîtrait la transparence dans l'exercice de la diligence raisonnable en matière de droits de l'homme; et (3) deviendrait une source de droits pour les communautés locales afin de faire respecter la responsabilité des entreprises.

Mots-clés: Bonne foi; droit international; diligence raisonnable en matière de droits de l'homme; accords de développement communautaire; sociétés multinationales; contrats relationnels; entreprises et droits de l'homme

1. Introduction

The United Nations (UN) Human Rights Council adopted the UN *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (*UNGPs*) in 2011.[1] Pillar II of the *UNGPs* prescribes that multinational corporations (MNCs) should respect human rights. It urges corporations to discharge their "responsibility to respect" through a human rights due diligence (HRDD) framework. However, scholars argue that the HRDD framework is vague, ambiguous, and discretionary — characteristics that MNCs exploit to evade corporate accountability.[2] In July 2024, the World Benchmark Alliance reported that 80 percent of the two thousand most influential companies in the world scored zero in terms of implementing HRDD in their businesses.[3] The challenge has been to ensure that MNCs conduct HRDD in compliance with the spirit of the *UNGPs*.

Since adopting the *UNGPs*, scholars have turned to various mechanisms to hold MNCs accountable, including public international law (international treaty) and domestic legislation (HRDD legislation).[4] This article contributes to scholarship that

[1]Office of the United Nations High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, annexed to the *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/HRC/17/31 (2011), online: <www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> [*UNGPs*].

[2]Ingrid Landau, "Human Rights Due Diligence and the Risk of Cosmetic Compliance" (2019) 20 Melbourne J Intl L 221; Surya Deva, "Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013) 78 [Deva, "Treating Human Rights Lightly"].

[3]World Benchmarking Alliance, "Social Benchmark 2024 Insight Report" (July 2024), online: *World Benchmark Alliance* <assets.worldbenchmarkingalliance.org/app/uploads/2024/06/SB-2024-Insights-Report_28June2024.pdf>.

[4]Surya Deva & David Bilchitz, eds, *Building a Treaty on Business and Human Rights Context and Contours* (Cambridge: Cambridge University Press, 2017); Markus Krajewski, Kristel Tonstad & Franziska Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?" (2021) 6:3 Business & Human Rights J 550.

investigates how contract law can promote corporate accountability in relationships between MNCs and local communities.[5] For example, James Gathii and Ibironke Odumosu-Ayanu identify different types of contracts in the extractive industry — community development agreements, investor-community contracts, environmental contracts, human rights deeds, and investor-state-local community contracts (tripartite contracts).[6] They reject the nineteenth-century laissez-faire view of contracts as purely private agreements (individualism) and argue that external or extrinsic criteria, such as international human rights, notions of justice, fairness, or environmental norms, influence contracts in the twenty-first century. Gathii and Odumosu-Ayanu conclude that these new forms of contracts, although private, have legal implications in international law — they serve as sources of obligation, enabling local communities to hold MNCs accountable for their activities in the extractive industry.

Using a relational contract theory, this article characterizes Gathii and Odumosu-Ayanu's notion of community development agreements (CDAs) as internationalized relational contracts that impose a duty on MNCs to discharge HRDD obligations in good faith. It argues that good faith is an established principle in international law that serves as a standard of conduct in relational contracts between states and MNCs (investor-state contracts). Since CDAs are also internationalized contracts like investor-state contracts, this article proposes a similar good faith interpretation in the business and human rights (BHR) context, especially when MNCs contract with local communities to conduct HRDD. A good faith interpretational exercise would (1) reduce MNCs' cosmetic compliance with HRDD principles; (2) increase transparency in the HRDD exercise; and (3) become a source of rights for local communities by which to enforce corporate accountability.

The seven sections of this article are set out as follows: section 2 discusses the relational theory of contract and its judicial recognition in domestic courts. It notes that courts increasingly hold parties to a good faith standard in negotiating and performing relational contracts. Section 3 transposes the relational theory to an international context. It argues that MNCs are international actors who enter relational contracts with states and local communities and that this relationship attracts a duty or good faith obligation. The nature of good faith in international law, particularly in international investment law, and its role in maintaining a relational equilibrium between states and MNCs is taken up in section 4. Section 5 discusses the relational character of CDAs, especially those characterized by HRDD, averring that HRDD adds a relational dimension to the negotiation and performance of MNC agreements with local communities. Section 6 then examines good faith's role in interpreting and enforcing HRDD. It argues that, similar to investor-state contracts, MNCs must comply with good faith obligations in the discharge of their HRDD

[5]See Cameron Gunton & Sean Markey, "The Role of Community Benefit Agreements in Natural Resource Governance and Community Development: Issues and Prospects" (2021) 73 Resources Policy 1; Ibironke Odumosu-Ayanu, "Indigenous Peoples, International Law, and Extractive Industry Contracts" (2015) 109 Am J Intl L Unbound 220; Raphael Heffron et al, "The Emergence of the 'Social License to Operate' in the Extractive Industries?" (2021) 74 Resources Policy 1; Emmanuel Laryea, "Contractual Arrangements for Resource Investment" in Francis N Botchway, *Natural Resource Investment and Africa's Development* (Cheltenham, UK: Edward Elgar, 2011) 107.

[6]James Gathii & Ibironke Odumosu-Ayanu, "The Turn to Contractual Responsibility in the Global Extractive Industry" (2016) 1:1 Business and Human Rights J 69.

duties. This point is particularly reaffirmed in section 7, which argues that the recognition and interpretive infusion of a duty of good faith in all analyses and examinations of the performance of the CDAs would benefit both MNCs and the local communities materially as well as in the functional trustworthiness of their legal relations under the CDAs.

2. Relational theory of contracts

The nineteenth-century classical theory of contracts was characterized by transactional exchanges (discrete contracts). In intermediating these, the courts focused primarily on market efficiency and competition rather than the relationship between the parties.[7] This type of transaction rested on market economy and laissez-faire principles — the market-regulated exchanges between seemingly equal and autonomous individuals acting by free will.[8] Scholarly criticisms of the laissez-faire principle pointed to its lack of sensitivity to differences in wealth, status, position, and power, all of which affect individual freedom of choice.[9] One of the critics, Ian MacNeil, developed a relational contract theory in response to the unfairness that a market economy perpetuates.[10] He defines contracts as "relations among people who have exchanged, are exchanging, or expect to be exchanging in the future."[11] In contrast to classical contracts theory, MacNeil conceives relational contracts as "contracting beyond law per se." To him, such contracts reflect complex interdependence and a continuous relationship between contracting parties that evokes strong commitment, collaboration, good faith, and trust.[12]

MacNeil explains that relational contracts are characterized and regulated by behavioural norms that provide a business infrastructure for collaborative exchanges.[13] The first norm is role integrity. This dictates that a contracting party maintain the character expected of a person occupying a particular position. For example, an employer is expected to provide work for their employees, as this aligns with societal expectations regarding their role as an employer. Second is the mutuality norm, which is an exchange in which contracting parties anticipate "a possible improvement from their pre-exchange position" — that is, a win-win outcome.[14] The third norm — effectuation of consent — enables parties to make continuous

[7]Melvin Eisenber, "Why There Is No Law of Relational Contracts" (2000) 94:3 Nw UL Rev 805 at 816 ("a contract that involves only an exchange, and not a relationship").

[8]Richard A Epstein, "Contracts Small and Contract Large: Contract Law through the Lens of Laissez-Faire" in FH Buckley, ed, *The Fall and Rise of Freedom of Contract* (Durham, NC: Duke University Press, 1999) 25.

[9]See generallyPatrick S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979).

[10]See Ian MacNeil, "The Many Futures of Contracts" (1974) 47 S Cal L Rev 691.

[11]Ian MacNeil, "Relational Contract Theory: Challenges and Queries" (2000) 94:3 Nw UL Rev 877 [MacNeil, "Relational Contract Theory"].

[12]Ian MacNeil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven, CT: Yale University Press, 1980) [MacNeil, *New Social Contract*]. See also Larry DiMatteo, "The Norms of Contract: The Fairness Inquiry and the 'Law of Satisfaction' — A Nonunified Theory" (1995) 24:2 Hofstra L Rev 349 at 422.

[13]Josetta McLaughlin, Jacqueline McLaughlin & Raed Elaydi, "Ian MacNeil and Relational Contract Theory: Evidence of Impact" (2014) 20:1 J Management History 44 at 51.

[14]MacNeil, *New Social Contract*, *supra* note 12 at 44.

choices as the relationship evolves.[15] These decisions are based on the initial agreement that future choices may be necessary to fulfill the parties' expectations.[16] The fourth norm — flexibility — refers to the parties' capacity to adapt, modify, or terminate a relationship as needed. Parties require flexibility because of the "limits of the human mind to focus on available information … and partly because the socioeconomic world is in a constant state of flux."[17] Contractual solidarity is the fifth norm, defined by MacNeil as parties' "belief in being able to depend on another."[18] This norm enables parties to work together to achieve desired outcomes, even in the face of adversity.[19] The solidarity norm requires trust and good faith between the parties. In contrast to discrete contracts, which are characterized by individualistic and neoclassical competition, relational contracts encourage joint problem-solving and mutual commitment to pursue a common goal.[20]

These non-exhaustive behavioural norms serve as a checklist for identifying and characterizing relational contracts.[21] Scholars have applied the relational theory to various relationships, including employment, corporate, marriage and family, construction, franchising, housing, insurance, and consumer regulation.[22] However, discussions about relational contracts have moved beyond academic rhetoric; courts now recognize and give judicial backing to relational contracts, a paradigm shift from the classical notion of discrete contracts.[23] This recognition has significantly influenced jurisprudence on good faith.

There is a growing convergence among common law countries, including the United Kingdom,[24] Canada,[25] and Australia,[26] that relational contracts impose a good faith obligation on parties. However, the scope of the duty of good faith doctrine and the criteria for identifying relational contracts vary from country to country.[27] For example, in the United Kingdom, not all contracts are relational contracts, which

[15]McLaughlin, McLaughlin & Elaydi, *supra* note 13 at 52; MacNeil, *New Social Contract*, *supra* note 12 at 50.

[16]Richard Austen-Baker, "A Relational Law of Contract?" (2004) 20 J Contract L 125 at 134–35.

[17]MacNeil, *New Social Contract*, *supra* note 12 at 50.

[18]Ian MacNeil, "Values in Contract: Internal and External" (1983) 78:2 Nw UL Rev 340 at 349 [MacNeil, "Values in Contract"].

[19]See Una Obiose Kriston Nwajei, "How Relational Contract Theory Influence Management Strategies and Project Outcomes: A Systematic Literature Review" (2021) 39:5 Construction Management & Economics 432 at 442.

[20]MacNeil, "Values in Contract," *supra* note 18 at 360.

[21]MacNeil, "Relational Contract Theory," *supra* note 11 at 893.

[22]See Zhong Xing Tan, "Disrupting Doctrine? Revisiting the Doctrinal Impact of Relational Contract Theory" (2019) 39 Legal Studies 98 at 99–100.

[23]Jessica Viven-Wilksch, "The Importance of Being Relational: Comparative Reflections on Relational Contracts in Australia and the United Kingdom" (2022) 73 N Ir Leg Q 94 at 123.

[24]*Bates v Post Office Limited*, 2019 EWHC 3408 (QB) [*Bates*]. Courts have earlier recognized relational contracts in *Yam Seng PTE v International Trade Corp Ltd*, 2013 EWHC 111 at paras 131–42, 145 (QB); *De&G Cars Ltd v Essex Police Authority*, 2015 EWHC 226 at paras 174–76 (QB); *Sheikh Al Nehayan v Kent*, 2018 EWCH 333 (Comm).

[25]*Bhasin v Hynew*, [2014] 3 SCR 494 [*Bhasin*]; *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, [2021] 1 SCR 32; *CM Callow Inc v Zollinger*, 2020 SCC 45.

[26]*GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*, 2003 FCA 50; *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd*, 2012 NSWCA 184 at para 145.

[27]Since identifying a relational contract is a contextual exercise, sometimes, judges have conflicting views on whether a contract is relational. See *Churchill Falls (Labrador) Corp v Hydro-Québec*, 2018 SCC 46.

attracts the duty of good faith.[28] In contrast, Canada recognizes an organizing principle of good faith that applies to all contracts. At first glance, it appears that there is no distinction between the duty of good faith required in discrete and relational contracts in Canada. However, the Supreme Court of Canada in *Bhasin v Hynew* noted that the degree of good faith required from parties in relational contracts may differ from discrete transactions where parties deal at arm's length.[29] Therefore, even in jurisdictions where courts recognize a generalizing duty of good faith, they acknowledge that relational contracts require higher good faith obligations. Courts have generally interpreted the duty to include notions of cooperation and honesty, especially when (1) there is a continuing relationship between the parties; (2) the contract results in a substantially unfair outcome; and (3) there is an asymmetry of information between parties or a power imbalance that affects contract formation or performance. In sum, the judicial exercise to interpret and enforce relational contracts is meant to fulfill contracting parties' reasonable expectations *via* the good faith doctrine.

Given this emergent reality that relational contract theory has been judicially recognized and that it continues to shape domestic jurisprudence on good faith, it is probably unarguable to extend the application of relational contracts to the international context. The subsequent discussion does this. It considers whether MNCs are subject to obligations arising internationally and then advances an internationalized relational contractual framework that attracts a duty of good faith as a principle of international law. It posits that, though courts may be reluctant to read a good faith doctrine into transnational agreements as a matter of private law, good faith is an essential and mandatory principle in international law that binds states and non-state actors.

3. MNCs as international actors: internationalizing contractual obligations

Recent academic commentaries highlight the changing nature of the roles of MNCs in international economic law. Barnali Choudhury argues that MNCs are active participants in international economic law and global governance frameworks.[30] In her view, MNCs can be considered lawmakers when they perform functions that have real or potential effects on international law. These functions include lobbying states in the treaty-making process, setting industry practices that influence the scope of international norms, and enforcing compliance with international rules relating to the World Trade Organization (WTO) and international investment law (IIL). Choudhury concludes that the focus should be on the effects of corporate actors' actions as legal persons in international law.

One of the incidents of corporate legal personality is the capacity to enter into contracts in international law.[31] Julian Arato argues that, through contract clauses like fair and equitable treatment (FET), umbrella clauses, guarantees against expropriation, and non-arbitrariness, MNCs transform private legal agreements with states into internationalized contracts that engage with public international

[28] *Bates*, *supra* note 24.

[29] *Bhasin*, *supra* note 25 at 69.

[30] Barnali Choudhury, "Corporations as International Economic Law Actors" in Krista Schefer & Thomas Cottier, eds, *Encyclopedia of International Economic Law* (Cheltenham, UK: Edward Elgar, forthcoming).

[31] Julian Arato, "Corporations as Lawmakers" (2015) 56:2 Harv Intl LJ 229.

law rules.[32] He describes these contracts as "involving a long-term relationship between the putative investor and the state."[33] These contracts derive powers from bilateral investment treaties (BITs) concluded between states. BITs are international legal instruments that take precedence over domestic legal orders as a matter of international law.[34] Therefore, investment contracts derive their powers from international law, notwithstanding that they are private contracts between states and investors.

Although Arato limited his analysis to investor-state contracts, Odumosu-Ayanu extends the concept of internationalized contracts to those involving multiple actors — states, investors, and local communities. Odumusu-Ayanu defines multi-actor state contracts as "agreements among local communities hosting or impacted by a particular investment project, foreign investors involved in project development, and host government(s)."[35] She argues for a shift from a state-centric contractual framing in IIL to one that recognizes the importance of local communities during the contractual stage. She notes that contracts with local communities begin with a consultation, proceed to sustained interaction, and ultimately culminate in contractual rights.[36] Odumosu-Ayanu cites global memorandum of understandings (GMOUs) and impact benefit agreements (IBAs), which are often concluded between industry actors and local communities, as multi-actor agreements.[37] She defines an IBA as a "privately negotiated agreement[s], typically between extractive industries and community organisations, in which government is relegated to an external observational role."[38]

Applying Odumosu-Ayanu and Arato's concept of contracts, it is safe to conclude that MNCs and local communities are not invisible in international law.[39] They are active participants within legal frameworks that regulate transnational relationships.[40] As international actors, MNCs negotiate and perform long-term relational contracts with state and non-state actors. These internationalized contracts are relational because they are long term and require interdependence, flexibility, cooperation, and trust.[41] The UN Conference on Trade and Development (UNCTAD) confirms that "[i]nvestments are not one-off transactions; they typically involve

[32] *Ibid* at 237.

[33] *Ibid* at 250.

[34] *Ibid* at 231.

[35] Ibironke Odumosu-Ayanu, "Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework Governments, Investors and Local Communities" (2014) 15 Melbourne J Intl L 1 at 4 [Odumosu-Ayanu, "Governments"].

[36] *Ibid* at 10.

[37] Stephen A Faleti, "Challenges of Chevron's GMOU Implementation in Itsekiri Communities of Western Niger Delta" (Paper, Peace & Conflict Studies Programme, University of Ibadan, 28 December 2010) at 11–12, online: <www.ifranigeria.org/IMG/pdf/Stephen_FALETI__Challenges_of_Chevron_GMOU_Implementation_in_Itsekiri_Communities_of_Western_Niger_Delta.pdf>.

[38] Odumosu-Ayanu, "Governments," *supra* note 35 at 17, citing Ken J Caine & Naomi Krogman, "Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North" (2010) 23 Organization & Environment 76 at 79.

[39] Penelope Simons, "International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights" (2012) 3:1 J Human Rights & the Environment 5; Nicolás Perrone, "The International Investment Regime and Local Communities: Are the Weakest Voices Unheard?" (2016) 7 Transnational Legal Theory 383.

[40] See Beth Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights" (2002) 20 BJIL 45.

[41] See Hamid Reza Younesi, "The Implementation of Relational Contract Theory in International Investment Contracts" (2021) 27:4 Intl Trade L Reg 256.

economic projects of significant duration, such as business concessions, and many do not have any time limitation at all."[42] Given this, scholars like Nicolas Perrone think that international investment law must be applied relationally because it polices long-term cooperative relationships between states, MNCs, and local communities.[43] That this reality contextualizes international contracts necessitates introducing international gap-filling principles, like good faith, that provide a standard of obligation and conduct by which to intermediate the functioning of complex but flexible long-term investor-state contracts.[44]

We now turn to the nature of good faith in international law to illustrate how this principle applies to both state and non-state actors. The discussion argues that, similar to the interpretation of good faith in investor-state contracts, MNCs are obligated to negotiate and perform HRDD in good faith in CDAs.

4. Good faith in international economic law

Good faith is one of the fundamental pillars of relationships among international legal actors.[45] Some commentators describe it as a general principle of international law and a principle of customary international law arising from Article 38(1)(c) of the *Statute of the International Court of Justice*,[46] the *UN Charter*,[47] the *Vienna Convention on the Law of Treaties* (*VCLT*),[48] and the UN General Assembly's *Declaration of Principles Concerning Friendly Relations and Cooperation among States*.[49] For example, Articles 26 and 31(1) of the *VCLT* urge state parties to perform and interpret treaty obligations in good faith.

International courts and tribunals have repeatedly invoked and acknowledged good faith as included in these treaties. For example, in the *Nuclear Test Cases*, the International Court of Justice (ICJ) proclaimed: "One of the basic principles governing the creation and performance of legal obligations, *whatever* their source, is the

[42]See United Nations Conference on Trade and Development (UNCTAD), *Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II* (New York: UNCTAD, 2012) at 63 [*UNCTAD Report*].

[43]Nicolás M Perrone, "The 'Invisible' Local Communities" (2019) 113 Am J Intl L Unbound 16 [Perrone, "Invisible Local Communities"].

[44]See Aikaterini Florou, "Contractual Renegotiations and International Investment Arbitration: A Relational Contract Theory Interpretation of Investment Treaties" (PhD dissertation, Institut d'études politiques de Paris, 2017) at 47.

[45]Michel Virally, "Good Faith in Public International Law" (1983) 77:1 Am J Intl L 130 at 131.

[46]Maurice Mendelson, "The International Court of Justice and the Sources of International Law" in Vaughan Lowe & Malgosia Fitzmaurice, eds, *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge: Cambridge University Press, 1996) 63 at 79; Alain Pellet, "Article 38" in Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm, eds, *The Statute of the International Court of Justice: A Commentary*, 2nd ed (Oxford: Oxford University Press, 2012) 731 at 836–37; *Statute of the International Court of Justice*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945).

[47]*Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945) [*UN Charter*].

[48]*Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Can TS 1980 No 37 (entered into force 27 January 1980).

[49]See *UN Charter*, *supra* note 47, section 2(2) (duty of member states to perform their obligations in good faith); *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN Doc A/RES/2625(XXV) (1970).

principle of good faith."[50] The court noted that even unilateral promises by state parties must be enforced. Similarly, the Court of Justice of the European Union characterizes good faith as "a rule of customary international law" and a "corollary in public international law of the principle of protection of legitimate expectations."[51] Although good faith is an amorphous concept that is not easy to apply, it has some interconnected functions. First, it plays an interpretative or gap-filling role in cases of ambiguity in the discharge of an obligation.[52] Second, it protects the parties' legitimate expectations, which is the cornerstone of confidence and faith in their relationships.[53] Third, it protects certain common interests against excessive individualistic claims (protects against abuse of rights especially in cases where parties have discretion in performing an obligation).[54] Fourth, good faith prevents parties from benefiting from uncooperative conduct and infringing on norms of reciprocity and equality because no one should profit from their wrong.[55] These functions emphasize notions of trust, justice, and cooperation.

As a general principle of international law, good faith is a mandatory norm that underlines the performance of obligations.[56] Although it seems uncertain whether good faith is a free-standing rule, courts have held that it is a non-derogable norm that is an accessory to substantive provisions.[57] One commentator eloquently describes it as follows:

> Good faith plays … a role in international law comparable to that of a catalyst in a chemical reaction. Alone, the catalyst is completely passive. It must be added to other elements for a reaction to occur; without it, nothing will happen, even if all the necessary components are present in sufficient quantities. It is a bit the same with good faith. … It is always related to specific behavior or declarations and it invests them with legal significance and legal effects.[58]

A good faith obligation extends beyond state-to-state relations[59] to international economic contexts involving states and non-state actors.[60] In internationalized

[50]*Australia v France*, [1974] ICJ Rep 253 at 268.

[51]Case T-115/94, *Opel Austria GmbH v Council of the European Union*, [1997] ECR II-43, para 2.

[52]See Yilin Wang, "The Origins and Operation of the General Principles of Law as Gap Fillers" (2022) 13 J Intl Dispute Settlement 560.

[53]Robert Kolb, *Good Faith in International Law* (Oxford: Hart Publishing, 2017) at 23.

[54]*Ibid.*

[55]*Ibid.*

[56]Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2009) at 45.

[57]*Ibid.* See *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)*, Judgment, 5 December 2011, [2011] ICJ Rep 644 at paras 131–32, online: <www.icj-cij.org/sites/default/files/case-related/142/142-20111205-JUD-01-00-EN.pdf>.

[58]Virally, *supra* note 45 at 133.

[59]See Neil Craik, "The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect" (2019) 30:1 YB Intl Env L 22; Edwin Van Der Bruggen, "Good Faith in the Application and Interpretation of Double Taxation Conventions" (2003) 1:1 British Tax Rev 25; Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Oxford: Oxford University Press, 2006).

[60]See Andrew Mitchell, M Sornarajah & Tania Voon, eds, *Good Faith and International Economic Law* (Oxford: Oxford University Press, 2015). See also Sanja Djajić, "Good Faith in International Investment Law and Policy" in Julian Chaisse, Leïla Choukroune & Sufian Jusoh, eds, *Handbook of International Investment Law and Policy* (Singapore: Springer, 2021) 121 at 121; Emily Sipiorski "Interpretation in Good Faith and Its Relevance in International Investment Law Additions to Justice or Ensuring Justice?" (2015) 23 Intl Community L Rev 57.

contracts, as discussed above, good faith performs the gap-filling function of clarifying ambiguities regarding states' obligations to protect MNCs' investments. Through the good faith principle, investor-state arbitration (ISA) tribunals shape the standard of conduct expected from states and MNCs in an investment relationship. They do this because, for every relational contract, "trust and confidence are of the essence in investment and commerce."[61]

One of the workings of good faith in internationalized contracts is demonstrated through its influence in interpreting a FET standard.[62] The FET clause, included in most BITs and contracts, benefits MNCs by ensuring that states treat them fairly and equitably throughout the investment process; it prevents states from expropriating MNC properties. But it is still under debate whether the FET standard is a norm of customary international law or part of a minimum standard of treatment.[63] As well, since concepts like fairness and equity remain vague, there is, altogether, some palpable confusion about the scope and application of the FET standard.[64] In light of this ambiguity, good faith informs the structure of reasoning and interpretation of the FET standard.[65] Good faith is often located "at the heart of the concept of fair and equitable treatment,"[66] serving as a "guiding beacon … to the obligation[s]."[67] Arbitral tribunals have broadly relied on the good faith principle in interpreting FET to (1) prohibit states' arbitrariness and prejudice towards MNCs without a legitimate purpose; (2) protect MNCs' legitimate expectations arising from host states' specific representations or investment-inducing measures; and (3) shield MNCs from host states' coercion, duress, and harassment to ensure fundamental principles of due process.[68] In fulfilling these functions, good faith has become a source of rights that parties rely on to support their claims.[69]

Given the relational character of internationalized contracts, good faith informs the nature of the obligations arising from states' representations or conduct through a legitimate expectation doctrine.[70] This doctrine is crucial because, as stated in the UNCTAD report, "[w]ith the long duration of a project, there comes a risk that the conditions of the investment's operation will change, producing a negative impact on the investment concerned."[71] The legitimate expectation doctrine operates as an estoppel, preventing states from reneging on their promises of investment protection as governments change and the parties' relationship evolves.[72] In *Gold Reserve Inc. v*

[61]Kolb, *supra* note 53 at 243.

[62]Djajić, *supra* note 60 at 121.

[63]See Patrick Dumberry, "The Practice of States as Evidence of Custom: An Analysis of Fair and Equitable Treatment Standard Clauses in States' Foreign Investment Laws" (2015) 2 McGill J Dispute Resolution 66.

[64]See Peter Muchlinski, *Multinational Enterprises and the Law*, 3rd ed (Oxford: Oxford University Press, 2021) at 625.

[65]Martins Paparinskis, "Good Faith and Fair and Equitable Treatment in International Investment Law" in Mitchell, Sornarajah & Voon, *supra* note 60, 143 at 171.

[66]*Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award (28 September 2007) at para 298, online: <italaw.com/sites/default/files/case-documents/ita0770.pdf>.

[67]*Ibid* at 297.

[68]See *UNCTAD Report*, *supra* note 42 at xvi.

[69]See Kolb, *supra* note 53 at 246. See also Roland Klager, "*Fair and Equitable Treatment" in International Investment Law* (Cambridge: Cambridge University Press, 2011).

[70]Younesi, *supra* note 41 at 266.

[71]*UNCTAD Report*, *supra* note 42 at 63.

[72]Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contours" (2014) 12:1 Santa Clara J Intl L 7 at 17.

Bolivarian Republic of Venezuela,[73] the tribunal recognized that common and civil law systems have established doctrines on estoppel and good faith that protect parties' reasonable expectations. These domestic doctrines can be adopted as general principles of law to inform reasonable interpretations of the FET standard.[74] Thus, where MNCs rely on states' specific representation or conduct, good faith protects their legitimate expectations regarding return on investment, impartial treatment, and transparent dealings by host states.[75]

Conversely, good faith protects states by introducing another facet to interpreting the FET standard — the abuse of rights doctrine.[76] This doctrine shields states from frivolous claims and fictitious legal constructions aimed at artificially bringing claims under ISA clauses. The doctrine "pierces the veil" of such constructions and denies MNCs the protection they seek through artificially created entities.[77] For example, in *Phoenix Action Ltd. v Czech Republic*,[78] the Czech Republic objected to the MNCs' claim before the tribunal because the investment was not made in good faith — the MNC was a sham entity incorporated by an Israeli national to exploit treaty advantages through what is commonly known as "treaty shopping." The tribunal upheld this objection, noting that "[t]he protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance."[79] Similarly, in *Inceysa v El Salvador*, the tribunal held that investments not performed in good faith could not benefit from the protection of the international rules provided in BITs.[80]

Essentially, good faith serves as a standard of conduct against which the actions of international actors are assessed. This standard is instrumental in maintaining the equilibrium of rights between parties in relational contracts.[81] In the realm of IIL, MNCs wield good faith as a sword (claim) to limit state powers to unilaterally modify applicable regulatory frameworks. Conversely, states use it as a shield (defence) to avoid liability or mitigate damages in arbitration proceedings.[82] As an investment tribunal concluded, "[i]t is indisputable, and this Arbitral Tribunal can do no more than confirm it, that the safeguarding of good faith is one of the fundamental principles of international law and the law of investments."[83] That the relational nature of investment contracts is undergirded by the duty to deal in good faith now allows us to examine contracts concluded within a multi-actor framework. These

[73]*Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award (22 September 2014).

[74]Nitish M Onebhurrun, "Enshrining Legitimate Expectations as a General Principle of International Law?" (2015) 32:5 J Intl Arb 551 at 556.

[75]See *International Thunderbird Gaming v Mexico*, Award, UNCITRAL (26 January 2006); *Tecnicas Medioambientales TECMED SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003).

[76]Kolb, *supra* note 53 at 244.

[77]*Ibid.*

[78]*Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/6, Award (15 April 2009).

[79]*Ibid* at para 106.

[80]*Inceysa Vallisoletana, SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006).

[81]Younesi, *supra* note 41 at 261.

[82]Djajić, *supra* note 60 at 123.

[83]*Malicorp Limited v Arab Republic of Egypt*, ICSID Case No ARB/08/18, Award (7 February 2011) at para 116.

contracts inherently involve elements of investment. As well, that they include HRDD clauses or elements also identifies them as international relational contracts obligated under good faith.

5. CDAs as international relational contracts

The *UNGPs* on business and human rights serve as the authoritative normative framework for guiding responsible business conduct and addressing human rights abuses in business operations. Pillar II of the *UNGPs* emphasizes the corporate responsibility to respect human rights (CR2R); it urges corporations to respect international human rights standards wherever they operate. This means that corporations "should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[84] Pillar II does not stem from any legal obligation. Rather, it embodies a social norm to which corporations are expected to adhere. Principle 13 of the *UNGPs* emphasizes the importance of fulfilling the CR2R norm through HRDD. John Ruggie defined HRDD as a "comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, to avoid and mitigate those risks."[85] HRDD involves four key components: (1) identifying and assessing any actual or potential adverse human rights impacts; (2) taking appropriate action by integrating the findings from impact assessments; (3) tracking the effectiveness of their response; and (4) communicating externally how adverse impacts are being addressed.[86]

Traditionally, MNCs employ due diligence in business transactions, such as mergers and acquisitions or securities transactions to assess risks associated with the company itself.[87] In contrast, MNCs are expected to conduct HRDD to evaluate risks to third parties, including employees and local communities.[88] Another difference is that, while due diligence in transactions is typically a one-time activity (a discrete contract), HRDD is an ongoing process spanning the entire lifecycle of a project (relational contract).[89] Consequently, HRDD entails a continuous endeavour to identify, prevent, mitigate, and address business risks affecting third parties.

Instead of conceptualizing HRDD as a process, it should be thought of as an outcome-oriented exercise that yields a social licence to operate (SLO).[90] A SLO represents an agreement — a *quid pro quo* — between local communities and MNCs; communities grant MNCs a social license in exchange for preventing, mitigating, and

[84] *UNGPs*, *supra* note 1, Principle 11.

[85] OHCHR, *Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN DOC A/HRC/11/13 (22 April 2009) at para 71, online: <www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>.

[86] See Surya Deva, "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?" (2023) 36 Leiden J Intl L 389 at 394 [Deva, "Mandatory Human Rights"].

[87] Jonathan Bonnitcha & Robert McCorquodale, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights" (2017) 28:3 Eur J Intl L 899 at 901–02.

[88] *Ibid* at 908.

[89] *UNGPs*, *supra* note 1, Principle 17(c) provides that "HRDD [human rights due diligence] should be 'ongoing' and that the nature of human rights risks changes and evolves with time to warrant re-evaluation."

[90] See Heffron et al, *supra* note 5 at 3.

remedying business risks to the environment, climate, and human rights.[91] Initially viewed as an intangible construct,[92] the SLO has evolved into a legal construct epitomized in CDAs.[93] CDAs, recognized as "legally enforceable contract[s]," are signed by community groups and corporations, delineating the community's SLO terms and conditions alongside the benefits that corporations derive from undertaking developmental projects.[94] The execution of these contracts by local communities symbolizes their endorsement of the project.

A CDA is an umbrella term for community-investor contracts, including community joint venture agreements, community benefit agreements, empowerment agreements, exploration agreements, investment agreements, and impact benefit agreements.[95] These contracts may be bilateral or tripartite, forming what Odumosu-Ayanu refers to as a multi-actor framework.[96] CDAs have been used in arrangements between local communities and MNCs in several countries, including Nigeria, Australia, Canada, the United States, Kenya, and Mozambique.[97] While the names of these contracts may vary across countries, they typically include clauses about HRDD, covering aspects like risk assessment, stakeholder engagement, risk prevention, risk mitigation, remediation, review and monitoring, and grievance mechanisms.[98] In some cases, these contracts are supported by (mining) legislation and are enforced by the state.[99] For example, bauxite mining communities in Sierra Leone entered into a CDA with Sierra Minerals Holdings Limited pursuant to section 140 of the *Mines and Mineral Act, 2009*,[100] to promote sustainable development in the community. Provisions in the CDA include stakeholder consultation under the Extractive Industry Transparency Initiative.

When assessed against MacNeil's behavioural norms checklist (role integrity, mutuality, consent, flexibility, and contractual solidarity), discussed in section 2, it becomes evident that CDAs exhibit a relational nature because, primarily, they

[91]John Ruggie, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale" (2017) 28:3 Eur J Intl L 921 at 923–24.

[92]R Parsons et al, "Maintaining Legitimacy of a Contested Practice: How the Minerals Industry Understands Its 'Social Licence to Operate" (2014) 41 Resources Policy 83 at 84. See also David Bursey, "Rethinking Social Licence to Operate: A Concept in Search of Definition and Boundaries" (2015) 7:2 Environment & Energy Bulletin 1.

[93]See Chilenye Nwapi, "Can the Concept of Social Licence to Operate Find Its Way into the Formal Legal System" (2016) 18:2 Flinders LJ 349.

[94]Julian Gross et al, *Community Benefits Agreements Making Development Projects Accountable* (Washington, DC: Good Jobs First, 2005) at 1.

[95]See Heffron et al, *supra* note 5 at 6.

[96]Odumosu-Ayanu, "Governments," *supra* note 35.

[97]Nwapi, *supra* note 93 at 361.

[98]See International Council on Mining and Metals, "Community Development Toolkit," online: <www.icmm.com/website/publications/pdfs/social-performance/2012/guidance_community-development-toolkit.pdf>. See also "IISD Model Contract Clauses for Responsible Investment in Agriculture: Customizable Legal Provisions to Help Implement International Best Practices, Principles, and Guidance on Responsible Agricultural Investment," online: *International Institute for Sustainable Development* <www.iisd.org/toolkits/responsible-investment-agriculture/annexes/community-development/>.

[99]See Kendra E Dupuy, "Community Development Requirements in Mining Laws" (2014) 1 Extractive Industries & Society 200.

[100]*Mines and Mineral Act, 2009*, N 12 of 2009); See "Community Development Agreement between Bauxite Mining Communities and Sierra Minerals Holdings Limited," online: <vimetcobauxite.com/wp-content/uploads/2018/03/Signed-SMHL-Community-Development-Agreement-June-2017-CDA.pdf>

incorporate HRDD clauses or elements. The first norm that CDAs satisfy is the integrity criterion for the defined expectations that they establish between MNCs and local communities. MNCs meet societal expectations through HRDD and are rewarded with a SLO. If a MNC does not conduct a HRDD in the process leading up to contract execution and performance, it will not act in the integrity of its role and, therefore, will not receive a SLO from the local community. In effect, MNCs must continuously seek an SLO throughout the project's lifecycle, a characteristic that further points to the relationality of CDAs.

With respect to the second norm — mutual expectations — CDAs are expected to produce a win-win outcome for local communities and MNCs. Local communities desire CDAs to improve their socio-economic lives without negatively impacting human rights and the environment. They also seek a form of self-actualization through meaningful participation and consultation in matters that concern them.[101] Conversely, MNCs wish to maximize profit through a stable and peaceful political economy, enhance corporate reputation, and reduce the risk of doing business.[102]

The third norm — the effectuation of consent — is expressed in the continuous nature of a HRDD-informed CDA.[103] Stakeholder engagement at the project's inception implies that MNCs would seek and receive consent from local communities throughout the project's lifecycle. For example, during an initial risk assessment, local communities must be informed and approve the project.[104] However, this agreement comes with the mutual understanding that as the project unfolds and harm occurs, local communities will be consulted on issues relating to remediation and company-led grievance mechanism processes.[105] These are matters that may not be determined at the outset. The relational nature of a CDA ensures that parties can fill in the gap as the project unfolds.

The fourth norm of relational contracts is flexibility. Principle 17(c) of the *UNGPs* recognizes that human rights risks may change as MNC operations evolve, requiring flexibility for the parties to redesign their relationship. Commentary to Principle 31 also encourages MNCs to be flexible. A HRDD-informed CDA involves continuous risk assessment, requiring parties to adapt to dynamic human rights risks.[106] Therefore, rightsholders' engagement, based on MNCs' preventive, mitigation, or remediation efforts, must be adjusted according to the nature and size of the MNCs at a given time.[107] For example, a party initially involved in a low-risk venture must be flexible and ready to redesign its HRDD procedures when undertaking a high-risk

[101]See Akinwumi Ogunranti, "Voices from Below: Africa's Contribution to the Development of the Norm of Corporate Responsibility to Respect Human Rights" (PhD dissertation, Dalhousie University, 2022) at 68 [unpublished].

[102]See John F Sherman III & Amy Lehr, "Human Rights Due Diligence: Is It Too Risky?" (2010) Corporate Social Responsibility Initiative Working Paper No 55.

[103]See OHCHR, "Human Rights Due Diligence: An Interpretive Guide," online: *UN Development Programme* <https://www.undp.org/thailand/publications/human-rights-due-diligence-interpretive-guide>.

[104]See Jennifer Loutit, Jacqueline Mandelbaum & Sam Szoke-Burke, "Emerging Practices in Community Development Agreements" (2016) 7:1 J Sustainable Development Law & Policy 64.

[105]See *UNGPs*, *supra* note 1, Principle 31(h). It provides that operational-level mechanisms should be based on engagement and dialogue.

[106]See *UNGPs*, *supra* note 1, commentary to Principle 18.

[107]*Ibid*, Principle 17(b).

mining project. This aligns with Principle 18 of the *UNGPs*, which mandates periodic reviews of HRDD policies.

The last behavioural norm — contractual solidarity — is connected to concepts like cooperation, transparency, and accountability to rights holders during stakeholder engagement in the *UNGPs*.[108] Principles 22 and 23 of the *UNGPs* stipulate that MNCs should cooperate and be transparent with rights holders when designing company-level grievance mechanisms. Principle 18 also provides that MNCs should engage in meaningful consultation with affected parties. The International Council on Mining and Metals's model template for CDAs specifically states that, in the pursuit of "the goals and objectives of the CDA," the parties must be committed "to the principles of cooperation, mutual respect, and good faith." In effect, CDAs are negotiated and performed in an atmosphere of trust and transparency.[109] In effect, HRDD contributes to the relational character of CDAs. When viewed through the prism of the relational theory discussed in section 2 and reconceptualized as an internationalized contract, the process leading to the execution and performance of CDAs carries a notion of good faith — an obligation of honesty and cooperation in negotiation and contract performance.[110] However, compared to the role of good faith in investor-state contracts, the utility of good faith in CDAs remains unexplored.

The next section argues for a duty of good faith in CDAs, especially to inform the obligatory contours of HRDD. It compares HRDD and the FET standard as important elements of internationalized contracts. It contends that the role good faith plays in investor contracts should be transposed to CDAs, particularly to define how MNCs should discharge HRDD obligations.

6. Making a case for good faith in CDA contracts

It is important to draw similarities between the purpose of HRDD and a FET standard. Both concepts are designed to protect the weaker party in investment relationships. While a FET standard protects MNCs' property and contractual rights in investor-state contracts, HRDD protects local communities' human and environmental rights. HRDD and a FET standard ensure parties adhere to due process when contracting. Therefore, when a party's conduct deviates from the legitimate expectation of the other party, an arbitral tribunal intervenes to enforce the contract.

Like the FET standard, HRDD is a vague contract term in most CDAs, allowing MNCs room for cosmetic compliance.[111] One factor contributing to HRDD cosmetic compliance is the ambiguity surrounding HRDD itself.[112] The language used to prescribe HRDD creates considerable scope for corporate discretion, especially when the process is not mandated to produce any specific human rights-related outcome.[113] It is unclear what "meaningful" rights-holder engagement entails. Who

[108]*Ibid*, Commentary to Principle 21.

[109]See Troy Sternberg, Ariell Ahearn & Fiona McConnell, "From Conflict to a Community Development Agreement: A South Gobi Solution" (2020) 55:3 Community Development J 533.

[110]See Lorenzo Cotula, "Reconsidering Sovereignty, Ownership and Consent in Natural Resource Contracts: From Concepts to Practice" (2019) 9 Eur YB Intl Economic L 143.

[111]Ingrid Landau, "Human Rights Due Diligence and the Risk of Cosmetic Compliance" (2019) 20 Melbourne J Intl L 221 at 234–35.

[112]*Ibid.*

[113]Deva, "Treating Human Rights Lightly," *supra* note 2 at 101–02.

defines what is meaningful — the local community, the state, or the MNC? Since the HRDD exercise is context specific and depends on the size and nature of the business conducted, it grants MNCs discretion in how they conduct HRDD.[114] This raises the question of determining an appropriate level of conduct that satisfies the HRDD requirement — how do MNCs know when they have done enough? The discretion in discharging a HRDD obligation results in opportunistic behaviour that MNCs exploit.[115] Gabriela Quijano and Carlos Lopez conclude that "cosmetic compliance with HRDD at the internal company level replicates the high-level political uptake of the *UNGPs* with very little substantial action and verification of actual results."[116]

Another factor contributing to corporate cosmetic compliance is the lack of transparency in the HRDD exercise.[117] Although the *UNGPs* stipulate that MNCs should communicate how they address human rights impacts, this is only an "expected" voluntary conduct,[118] not a binding obligation. This lack of mandated transparency incentivizes MNCs to superficially conduct HRDD and to selectively disclose information to create an appearance of corporate responsibility.[119] Consequently, "the lack of transparency renders it very difficult, if not impossible, for external stakeholders and/or quasi-regulators to verify whether the information provided is accurate, let alone to assess whether a business is implementing processes that are capable of effecting real change."[120] In sum, the ambiguity surrounding HRDD easily makes the process susceptible to corporate capture.

The foregoing discloses an apparent gap in the interpretation of HRDD obligations created by the ambiguity in the scope and application of the concept. To close this gap, it is necessary to clarify how MNCs should discharge their obligation. By this, I mean to create a standard of expected conduct against which MNCs' HRDD exercise should be measured to determine compliance with the spirit and intent of the *UNGPs*. Since the *UNGPs* offer little guidance, good faith would help fill this gap. It would help to clarify the manner in which HRDD obligations should be discharged because "the principle of good faith can make valuable contributions to clarifying and refining the content of specific obligations under international law."[121]

Similar to how good faith influenced the contour and scope of the FET standard, good faith should influence the contours of the HRDD exercise in international relational contracts. If MNCs can take advantage of the good faith principle in investor-state contracts, why should they avoid it in CDAs? It could be argued that good faith is justified in relationships between states and investors because of the unequal power balance between the parties. However, this argument undermines MNCs' economic and political power, which often outweigh those of many countries,

[114]See Deva, "Mandatory Human Rights," *supra* note 86 at 400.

[115]See Kimberly D Krawiec, "Cosmetic Compliance and the Failure of Negotiated Governance" (2003) 81:2 Wash ULQ 487 at 494. See also Caroline Omari Lichuma, "Mandatory Human Rights Due Diligence (mHRDD) Laws Caught between Rituals and Ritualism: The Forms and Limits of Business Authority in the Global Governance of Business and Human Rights" (2023) Business & Human Rights J 1 at 10–13.

[116]Gabriela Quijano & Carlos Lopez, "Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?" (2021) 6:2 Business & Human Rights J 241 at 250.

[117]Landau, *supra* note 111 at 237.

[118]*Ibid.*

[119]See Quijano & Lopez, *supra* note 116 at 254.

[120]Landau, *supra* note 111 at 237.

[121]Andreas Ziegler & Jorun Baumgartner, "Good Faith as a General Principle of (International) Law" in Mitchell, Sornarajah & Voon, *supra* note 60, 9 at 36.

especially developing ones.[122] Even if one assumes that MNCs are weaker than states, the same argument applies to the relationship between local communities and MNCs — local communities are typically weaker than MNCs. Therefore, local communities require legal protection against MNCs who act in bad faith — what is good for the goose is also good for the gander.

Using good faith as an interpretative tool and a standard of conduct in discharging HRDD obligations bridges the BHR and IIL worlds.[123] As Nicolás Perrone noted, "the strong separation of investor rights and obligations into two distinct fields that rarely communicate with each other remains puzzling."[124] Similar to investors' "legitimate expectation" claims before ISA tribunals, and due to the relationality of the BHR and IIL fields, local communities should be able to rely on good faith to give specific contours to HRDD obligations in negotiating and performing CDAs.[125] Local communities can make good faith claims in national courts. Considering that some national courts, including Canada and the United States, acknowledge that obligatory international law norms bind MNCs,[126] it is arguable that good faith, as an international law norm, should inform the interpretation and enforcement of HRDD. Also, when CDAs are conducted pursuant to state legislation, including mandatory human rights due diligence laws, good faith as a matter of domestic law can influence the interpretation of the HRDD standard. Beyond domestic litigation, ISA may be another avenue to make a good faith claim, given that investors rely on this principle to enforce their rights against states in the same forum.

Even so, transnational litigation is often procedurally complex and unsuccessful due to jurisdictional barriers such as forum non-convenience, *locus standi*, and extraterritoriality.[127] Similarly, ISA tribunals may be reluctant to hear local communities' good faith arguments because they do not have *locus standi* to bring claims against foreign investors.[128] This is because "[ISA] as we know it today provides preferences to foreign investors in comparison to local stakeholders including domestic investors as well as third parties impacted by the foreign investment."[129] Perrone concludes that "ISDS … may not be the right forum in which to decide on

[122]See Joseph Stiglitz, "Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities" (2007) 23:3 Am U Intl L Rev 451 at 476.

[123]See Nicolás M Perrone, "Bridging the Gap between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment" (2022) 7 Business & Human Rights J 375.

[124]*Ibid* at 395.

[125]Andreas R Ziegler and Jorun Baumgartner acknowledge that good faith has a certain law-making effect. Ziegler & Baumgartner, *supra* note 121.

[126]See *Nevsun Resources Ltd v Araya*, [2020] 1 SCR 166 (Canada); *Nestle, US Inc v John Doe*, 93 US ____ (2021) (United States).

[127]See Peer Zumbansen, "Beyond Territoriality: The Case of Transnational Human Rights Litigation" (2005) [unpublished, archived in the Osgoode Hall Law School Digital Commons]. See also Axel Marx et al, "Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries" (2019), online: *European Parliament, Policy Department for External Relations* <www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf>.

[128]See Akinwumi Ogunranti, "Between the Devil and the Deep Blue Sea: Towards Access to Justice for Local Communities in Investor-state Arbitration or Justice for Local Communities in Investor-state Arbitration or Business and Human Rights Arbitration" (2022) 59:3 Osgoode Hall LJ 707 at 758.

[129]Kinda Mohamadieh, "The Future of Investor-State Dispute Settlement Deliberated at UNCITRAL: Unveiling a Dichotomy between Reforming and Consolidating the Current Regime" (March 2019) at 2, online: *South Centre* <www.southcentre.int/wp-content/uploads/2019/03/IPB16_Te-Future-of-ISDS-Deliberated-at-UNCITRAL_EN.pdf>.

both foreign investor rights and obligations. The challenge is to find (or create) the appropriate institutional mechanism."[130]

Considering the launch of the *Hague Rules on Business and Human Rights* (*Hague Rules*) in 2019, local communities may have more forum options to make a good faith argument.[131] The *Hague Rules* implement Pillar III of the *UNGPs*, which enjoins states to provide an effective remedy to victims of human rights violations.[132] It is a special international arbitration (BHR arbitration) where local communities can claim pecuniary and non-pecuniary damages for climate change, environmental harm, and human rights abuses arising from business activities in host states. Parties to the arbitration agreement may include "business entities, individuals, labor unions and organizations, States, State entities, international organizations, and civil society organizations, as well as any other parties of any kind."[133] In effect, local communities and MNCs can incorporate a BHR arbitration agreement into CDAs as part of the dispute resolution mechanism.

The *Hague Rules* specifically address the unique requirements of human rights issues in business (including contractual) disputes.[134] Essentially, it is the adoption of the *Hague Rules* that classifies an arbitration proceeding as a BHR arbitration.[135] BHR arbitration offers (1) a potentially neutral forum for BHR dispute resolution, independent of both parties and their states; (2) a specialized dispute resolution process in which parties can select competent and expert adjudicators on BHR; (3) the possibility of obtaining binding awards with limited judicial intervention and enforceability across borders; and (4) the autonomy to choose both procedural and substantive laws governing the proceedings.[136] BHR arbitral awards are enforced under the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* in contracting states.[137]

Unlike ISA, local communities can access BHR tribunals for contractual remedies.[138] When CDAs incorporate a BHR arbitration clause, arbitration tribunals have jurisdiction to arbitrate such claims.[139] In these cases, BHR arbitrators must

[130]Perrone, "Invisible Local Communities," *supra* note 43 at 21.

[131]See "Hague Rules on Business and Human Rights Arbitration," online: *Center for International Legal Cooperation* <www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/> [*Hague Rules*].

[132]See Jonathan Drimmer & Lisa J Laplante, "The Third Pillar: Remedies, Reparation, and the Ruggie Principles" in Jena Martin & Karen E Bravo, eds, *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge: Cambridge University Press, 2015) 316 at 323.

[133]*Hague Rules*, supra note 131 at 3.

[134]See Judge Bruno Simma et al, "The Hague Rules on Business and Human Rights Arbitration" (2019), online: *Center for International Legal Cooperation* <www.cilc.nl/cms/wp-content/uploads/2019/12/Te-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf>.

[135]Ogunranti, *supra* note 128 at 734.

[136]*Ibid* at 736.

[137]*Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959). See Andi Baaij, "The Potential of Arbitration as Effective Remedy in Business and Human Rights: Will the Hague Rules Be Enough?" (2022) 7 Business & Human Rights J 271 at 289.

[138]See Bruno Simma & Giorgia Sangiuolo "The Hague Rules on Business and Human Rights Arbitration: Some Challenges and Responses" (2022) 28:2 Sw J Intl L 402.

[139]See Anne Van Aaken et al, "The Human Rights Remedy Gap in ISDS: The Potential of the Hague Rules on Business and Human Rights Arbitration" (paper prepared for the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 46th session, Side Event Academic Forum, 11 October 2023).

recognize that a general principle of good faith guides the negotiation and discharge of HRDD exercises. Therefore, when MNCs conduct HRDD as a sham to shield them from liability, local communities could defeat such claims by invoking the good faith principle and highlighting the arbitrary nature of the exercise. Conversely, when MNCs do not meet the reasonable expectations of local communities and there are several human rights abuses, local communities should be able to ground a cause of action in good faith. In effect, local communities can use good faith as a sword when MNCs' actions fall below the expected standard of conduct.

It remains to be decided what a good faith standard looks like in the BHR field. Since the application of good faith is a contextual exercise, existing soft law provides a context for the obligatory contours of good faith in this area. For example, John Ruggie prescribes principles for responsible contracting in the context of investor-state contracts.[140] Principle 2 states that MNCs must make provisions to prevent and mitigate human rights risks through HRDD before the contract is finalized.[141] It further states that investment contracts should reflect the parties' responsibility to negotiate in good faith and participate in grievance mechanism procedures.[142] These principles can be extrapolated into a multi-actor investment framework to influence the negotiation and performance of CDAs. This is particularly relevant as the UN BHR Working Group on HRDD confirmed to the UN General Assembly in 2018 that corporations have a duty of good faith to collaborate and consult with local communities.[143] Indeed, it has been noted that "primarily, due diligence implies the obligation to act in good faith."[144]

Although Ruggie did not clarify good faith, other guidelines give context to it. The Organisation for Economic Co-operation and Development (OECD) *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* require parties to negotiate in good faith.[145] It defines good faith engagement as "the genuine intention to understand how stakeholder interests are affected by enterprise activities."[146] This speaks to a duty of honesty. It also defines meaningful stakeholder engagement as an "ongoing engagement with stakeholders that is two-way, conducted in good faith and responsive."[147] This definition is reiterated in the 2023

[140]See John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidance for Negotiators*, UN Doc. A/HRC/17/31/Add.3 (25 May 2011).

[141]*Ibid*, Principle 2. See also OHCHR, "Self-Study Principles for Responsible Contracts Integrating the Management of Human Rights Risks into State–Investor Contract Negotiations: Guidance for Negotiators," online: *OHCHR* <www.ohchr.org/sites/default/files/training/business/5_UN_easyaccessPDF.pdf>.

[142]*Ibid* at paras 38, 57.

[143]Working Group on Business and Human Rights, *Companion Note II to the Working Group's 2018 Report to the General Assembly (A/73/163): "Corporate Human Rights Due Diligence – Getting Started, Emerging Practices, Tools and Resources* (16 October 2018), online: <www.ohchr.org/sites/default/files/Documents/Issues/Business/Session18/CompanionNote2DiligenceReport.pdf>.

[144]Joanna Kulesza, "Human Rights Due Diligence" (2021) 30:2 Wm & Mary Bill Rts J 265 at 270.

[145]Organisation for Economic Co-operation and Development (OECD), *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (Paris: OECD Publishing, 2017).

[146]*Ibid* at 18.

[147]*Ibid.*

OECD *Guidelines for Multinational Enterprises on Responsible Business Conduct*, a meaningful engagement with rights holders that requires good faith.[148] Although these guidelines are not binding, they provide an authoritative source for interpreting good faith in the BHR context.

The World Bank's International Finance Corporation's (IFC) *Guidebook on Stakeholder Engagement in Emerging Markets* expressly provides for good faith in MNCs' negotiations with Indigenous peoples. Drawing from the International Labour Organization's *Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, the IFC imposes a duty to negotiate in good faith during stakeholder engagements.[149] It further elaborates that "[g]ood faith negotiations are transparent, considerate of the available time of the negotiating parties, and deploy negotiation procedures and language readily understood and agreed to by all parties."[150] Therefore, good faith engagement, especially with Indigenous peoples, requires consultation in the spirit of international guidance instruments, including the *UN Declaration on the Rights of Indigenous Peoples* and the *UN Declaration on the Rights of Peasants and Other People Working in Rural Areas.*[151]

To complement and build a good faith interpretative framework for HRDD obligations, resort should be made to the arbitral practice of good faith interpretation in ISAs. Good faith in the BHR context should be interpreted as a source of rights that protects the relational nature of HRDD. First, good faith should prohibit MNCs' arbitrariness and prejudice towards local communities without a legitimate purpose during contract negotiation and performance.[152] For example, when MNCs arbitrarily dispossess local communities of their lands or use state power to suppress dissenting voices in local communities during contract negotiation, this conduct would be prejudicial to the community's interest.[153] Therefore, good faith in this context would prohibit using rights-holder engagement inappropriately to gather information from local communities to suppress resistance. Furthermore, similar to how arbitral tribunals use good faith to pierce the veil of artificial legal constructs aimed at securing investment protection, courts and BHR arbitral tribunals should scrutinize the HRDD process to identify abuses of the process when HRDD is not conducted transparently and is solely intended to enhance corporate reputation or serve as a shield against potential lawsuits. Good faith should prevent MNCs from using HRDD as a marketing strategy or to create an appearance of regulatory compliance. Such conduct should be considered as falling below a good faith standard.

[148]See OECD, *Guidelines for Multinational Enterprises on Responsible Business Conduct* (Paris: OECD Publishing, 2023) at 20.

[149]*Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).

[150]International Finance Corporation (IFC), *Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets* (Washington, DC: IFC, 2017) at 64.

[151]See *UN Declaration on the Rights of Indigenous Peoples*, UNGA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (13 September 2007); *UN Declaration on the Rights of Peasants and Other People Working in Rural Areas*, UNGA Res 73/165, UNGAOR, 73rd Sess (21 January 2019).

[152]See Alvaro Cuervo-Cazurra et al, "Multinationals' Misbehavior" (2021) 56:5 J World Business 1.

[153]See Lorenzo Cotula & Sonja Vermeulen, "Land Grabs' in Africa: Pathways, Trends and the Role of Legal Contracts" (2010) 21:1 Rural Focus 15, online: <www.rural21.com/fileadmin/_migrated/content_uploads/R21__Land_grabs__in_Africa_0110.pdf>.

Good faith should also protect local communities' legitimate expectations from MNCs' representations or investment-inducing measures. For example, Biofuel Norway, a MNC, promised residents of a village near Kusagwu in northern Ghana, food, electricity, and job opportunities for leasing their land to the company.[154] However, these promises were never fulfilled, echoing a common narrative in many community projects, particularly in developing countries. Therefore, when MNCs make representations that the HRDD process will be adhered to, or that local communities will significantly benefit from a project, they should be estopped from reneging on these commitments.

In effect, good faith in the BHR context should be interpreted as a source of rights to shield local communities from MNCs' abuse of power during the HRDD process. Given that the application of good faith hinges on the dynamics of the relationship between the parties involved, it is challenging to outline exhaustive scenarios that would fall under its purview. Consequently, arbitrators and courts must adjudicate each case contextually. While this approach may introduce some level of uncertainty, its efficacy cannot be discounted, considering "good faith has been used so often in the law that it cannot be wished away on the basis that subjectivity needs to be eliminated."[155] Tribunals and courts must rely on relational principles of trust and cooperation to determine when MNCs' conduct deviates from the expected standard.

7. Conclusion

Arguing that CDAs are relational, this article has pinpointed that MNCs engage in relational contracts with states and local communities as international actors. It asserts, too, that the efficacy of relational contracts is situated in cooperation, trust, and good faith and that arbitral tribunals uphold these values in internationalized contracts involving states and MNCs through the FET standard. However, the concept of good faith in CDAs — particularly, in the context of conducting HRDD — has not received significant attention from courts and tribunals. This article, therefore, contends that, like its application in investor-state arbitration practice, BHR arbitral tribunals and courts should impose good faith obligations on MNCs to discharge their HRDD responsibilities. As an interpretive framework, this approach would serve to (1) curb MNCs' superficial compliance with HRDD principles; (2) enhance transparency in the HRDD process; and (3) provide local communities with a basis for holding corporations accountable for violations of their international relational contract obligations.

It is obvious that interpreting good faith in BHR is a contextual endeavour. It demands of tribunals and courts to account for the juridical implications and consequences for MNCs of the relational principles that underpin interactions between local communities and MNCs within the obligatory context of the agreements that institute those interactions. As argued, this exercise would pay for itself by ensuring that fair and equitable outcomes are assured not only for MNCs but also for

[154]See Aniedi Okure, "Multinational Corporations' Land Grabbing in Africa" (16 November 2010), online: *Africa Faith and Justice Network* <afjn.org/multi-national-corporations-land-grabbing-in-africa/>.

[155]Muthucumaraswamy Sornarajah, "Introduction" in Mitchell, Sornarajah & Voon, *supra* note 60, 1 at 1.

the local communities the beneficial exploitation of whose real property resources is the *raison d'etre* of the relational contracts they commonly enter into with the MNCs. Although this article has focused on good faith in international law, future research may consider contractual good faith expressions in local and Indigenous norms, such as Ubuntu in Africa.[156] A congruent good faith interpretation between international and local norms will further impel corporate accountability.

[156]See Akinwumi Ogunranti, "Localizing the UNGPs: An Afrocentric Approach to Interpreting Pillar II" (2023) 8:3 Business & Human Rights J 66.

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