

Article

Extractive Industries and Investor–State Arbitration: Enforcing Home Standards Abroad

Enrique Boone Barrera

Independent Researcher, Kitchener, ON N2G1T5, Canada; ebooneb@gmail.com

Received: 19 October 2019; Accepted: 29 November 2019; Published: 6 December 2019



Abstract: Extractive industries can bring much-needed jobs to remote locations in developing countries. At the same time, there are too many examples where extractive projects bring environmental degradation and human rights violations. Some research has pointed out that the difference between an extractive project that brings positive spillovers for communities and one that destroys communities and poisons the environment is a strong rule of law. However, developing countries often lack strong legal institutions and have high levels of corruption. Furthermore, remote locations are usually the last safe haven for vulnerable populations stricken by poverty. This essay argues that, given these circumstances, home states have a responsibility to do more to control their outward investors, particularly regarding extractive industries. The essay concentrates mostly on Canadian mining companies given the plurality of conflicts involving them and a developing country. The essay will also analyze current efforts at the home state level to rein-in the conduct of extractive industries abroad and advise where they may fall short.

Keywords: extractive industries; investor-state arbitration; human rights; home state regulations; sustainable development; Canadian mining companies; corporate social responsibility; investors' obligations

1. Introduction

Extractive industries pose particular risks to developing countries for three interrelated reasons: 1) the lack of capability in many countries to effectively regulate extractive industries; 2) the pervasive corruption in many developing countries, and 3) the presence of vulnerable populations who often lack access to justice when affected by the negative consequences of an extractive project. In addition to these circumstances, the treaty-based regime of foreign investment protection can potentially create additional incentives for host countries to ignore the complaints of local populations [1]. This problem is aggravated by the lack of international instruments that place concrete enforceable obligations on multinational corporations. Finally, the home countries of the extractive industries may lack the motivation to hold their own corporations accountable because the adverse effects are happening in a different country while potentially strengthening a domestic economic actor.

In this essay, I argue that while resolving deep inequalities and endemic corruption in developing countries may take many years, there are steps that the international community can take now to protect vulnerable populations close to extractive projects. Given the lack of capacity of developing countries and the underdeveloped international legal framework regarding multinational corporations, I argue that more can be done in two other legal regimes: 1) the treaty-based regime of foreign investors and 2) the home country legal institutions. In particular, given the significant number of cases, I will concentrate on the Canadian mining companies' use of investor-state arbitration (ISA). I will also discuss the steps that the Canadian government has taken to regulate their behaviour abroad. That being said, I will also discuss other cases when I consider them significant examples of holding multinational extractive industries accountable.

Canadian mining companies are frequent users of the system of investor-state arbitration. In fact, around half of all cases initiated by Canadian investors are from the extractive sector [2] (I used three filters to get these results: 1) cases involving Canada, 2) as the home state of the claimant, and 3) concerning the primary sector). The Canadian Centre for Policy Alternatives has estimated that “Canadian investors in the mining, oil and gas industries were behind 70% of Canadian ISDS cases outside North America even though the extractive sector accounts for only 9% of the domestic economy and 22% of Canadian investment abroad” [3] (p. 5). The challenges posed by extractive industries are particularly relevant since they can safely be identified as the catalyst for the regime of foreign investment protection. These challenges are multiple and can be clustered in three: 1) political risks, 2) environmental degradation, and 3) human rights.

In what follows, in parts 2, 3 and 4, I will analyze these three risk factors posed by the extractive industries and how they relate to particular ISA cases. In Part 5, I will concentrate on current efforts to make home state legal frameworks more receptive of claims against extractive industries for their behaviour in other countries. Finally, in part 6, I will analyze the challenges that home states face to persecute alleged abuses of human rights committed by multinational corporations outside of their jurisdiction. I will also describe an approach that may help tackle some of these challenges.

2. Political Risks

Political risks are the most closely associated with the origins of the regime of foreign investment protection. The period of colonization by European powers was, in large part, motivated by the desire to acquire minerals and other natural resources in other territories. Furthermore, the decolonization efforts, particularly by Latin American countries, were mainly directed at recovering control over their natural resources. These efforts were met, in turn, with developed countries attempts to create international rules to restrict the ability of the newly independent countries to regulate in these sectors adequately. The Hull formula was the most concrete expression of this tendency. The American Secretary of State, Cordell Hull, defined this rule the following way: “under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment” [4] (p. 478).

As a result, a constant risk for many mining and oil projects is resource nationalism, which is particularly relevant when the price of commodities rises [5]. However, direct expropriations are no longer the primary method by which countries regain control of their resources. States may issue regulations either to stop a project or to increase the state’s control over it. Often the state has to intervene when the investor’s activities have been the cause of social unrest around a project. This is what happened in the most recent cases between Canadian mining companies and Latin American countries.

For instance, in 2007, the Government of Peru authorized a mining project that was subsequently acquired by the Bear Creek Mining Company, which is a junior mining company with headquarters in Vancouver, Canada [6] (paras. 149, 150). The project was met with resistance from the indigenous communities affected by the project which caused social unrest in the region. After the Government and the investor failed to gain support for the project, the Government revoked the right of Bear Creek to continue with the project [6] (para. 417). An arbitral tribunal considered this action “an illegal taking of property” [6] (ibid) and awarded the investor more than 24 million dollars [6] (para. 738). It should be noted that this award was reached despite the fact that the tribunal found that the investor did not do enough obtain a social license from the communities affected [6] (para. 408).

The Copper Mesa v Ecuador case had a similar outcome since the tribunal found that Ecuador had unlawfully expropriated two of the concessions of the investor [7] (paras. 6.67, 6.123, 10.5). As in Bear Creek, several communities also resisted the mining project [7] (paras. 4.12, 4.33). In this case, however, the tribunal did consider that the claimant’s misbehaviour, involving armed men confronting members of the community, which opposed the mining project [7] (para. 6.99), amounted to contributory fault.

In spite of the severity of these findings, the tribunal considered that the investor had contributed only 30% to the damage [7] (para. 6.102).

These cases demonstrate that not all political risks are related to “nationalism,” and in many instances, social unrest is provoked by a combination of missteps by both government officials and investors. In this regard, the regime of foreign investor protection as currently constituted is not conducive to proper incentives. In both the Bear Creek and Copper Mesa cases, the state was penalized after intervening to reduce social unrest and improve environmental conditions and consultations mechanisms. The intervention by an international investment tribunal could disincentivize states from taking such steps. On the other hand, in both instances, Ecuador and Peru could have proceeded with more transparency and taken steps from the beginning to take into account the interests of the communities affected by the mining projects. If foreign investors were to bear the costs of mistakes made by public officials, this could disincentivize public officials from properly implementing and enforcing environmental and human rights impact assessments.

The problem with political risks for both the state and the investor is one of sequence. That is, in some instances, countries might not be aware of the inadequacies of their legal framework until after a conflict has occurred. As two commentators have observed:

“... investors follow the resources and investments are often made before a state’s regulations are up to date. An asymmetry in information and expertise, between the state and investor negotiating the terms of the investment can often result in bad deals, under which the state receives an inadequate share of the benefits of the extraction.” [8] (p. 359).

This description is a slightly different approach to the classical “obsolescing bargaining” concept in which foreign investors lose their bargaining power once the investment is made and is under the sovereignty of the host country [9]. However, in some cases, it may be the case that the state is not taking advantage of an investor losing bargaining power so much as the state realising that the initial agreement is unsustainable. The question that remains, however, is how the costs of rectifying such situations should be distributed.

3. Environmental Risks

Environmental risks are present with all extractive projects. In fact, UN Environment has determined that extractives industries “are responsible for half of the world’s carbon emissions and more than 80% of biodiversity loss ...” [10]. While foreign investments are not the sole drivers of extractive projects, a 2015 study found that the extractive industries are “the second most disputed in international investment arbitration ...” [11]. Further, while it has been pointed out that foreign investment also has positive impacts on the environment, particularly because of the transfer of clean technologies [12], it should be noted that this does not negate that international investment law emerged initially precisely to protect extractive industries and it is not entirely clear the extent to which the transference of clean technology is actually happening.

The quintessential case, although by no means the only one, regarding environmental degradation and foreign investment is the Texaco/Chevron and Ecuador saga. The history of this case is too long to cover here in much detail. However, it is important to briefly cover some of the background to show the challenges in enforcing environmental regulations in developing countries. For 28 years (1964–1992) Texaco operated in Ecuador, producing around 1.5 billion barrels of crude oil [13] (p. 60). As Professor Kimerling has noted, during this time, Ecuadorian officials “relied on Texaco to design, procure, install, and operate the infrastructure that turned Ecuador into an oil exporter” [13] (p. 58). In the process, in addition to displacing indigenous communities from their ancestral lands [13] (p. 53), Texaco “spilled nearly twice as much oil as the Exxon Valdez from the main pipeline alone, mostly in the Amazon basin” [13] (p. 61).

U.S. based lawyers initiated a class action suit in 1993 in a New York court against Texaco for having harmed indigenous populations and other people with pollution [13] (p. 63). In *Aguinda v. Texaco Inc.* [14], as the case was known, Texaco argued that the proper place for this lawsuit was

Ecuador. Based on a previous decision by a Texan court [15], Judge Rakoff dismissed the lawsuit on the grounds of international comity and forum non conveniens even though Texaco was headquartered in New York at the time [14]. The decision was ultimately confirmed by the United States Courts of Appeals for the Second Circuit [16]. International comity in American law is generally poorly defined, but one author developed what he considered a functional definition: “International comity is deference to foreign government actors that is not required by international law but is incorporated in domestic law” [17] (p. 2078).

According to the Legal Information Institute, forum non conveniens “is a discretionary power that allows courts to dismiss a case where another court, or forum, is much better suited to hear the case” [18]. However, as Professor Erichson pointed out: “... the judge must predict how the matter would be handled if it were refiled in the foreign jurisdiction. When a court grants a motion to dismiss on grounds of forum non conveniens, it must find that there is an adequate alternative forum” [19] (p. 421). When the claim was eventually decided by an Ecuadorian court, finding Texaco liable for \$18 billion dollars (later reduced to \$8.64 billion), the judgment could not be enforced in the United States because the forum was considered too corrupt [20]. Erichson points out that these developments raise questions about the appropriateness of forum non conveniens as grounds for sending the claim back to Ecuador in the first place [19] (p.422). Ecuador has not been able to enforce the judgment in Argentina, Canada and Brazil either [21] (p. 449).

In stark contrast to how difficult it has been to enforce the judgment by Ecuador, the Dutch Supreme Court recently sided with Chevron in upholding several awards against Ecuador issued by an ISA tribunal [22]. Including in these awards was an order to “the Respondent (whether by its judicial, legislative or executive branches) to take all measures necessary to suspend or cause to be suspended the enforcement and recognition” of the Lago Agrio judgment [23] (para. 3 [i]). It would be difficult to find a clearer example of how sovereign countries have lost the ability to hold multinational corporations accountable in both domestic and international legal forums.

This case is paradigmatic of the environmental risks when foreign extractive industries move into developing countries but far from the only one. In 2016, the Colombian Supreme Court stopped mining projects in the paramos region, which are the largest in the world and provide 70% of Colombians with water [24]. This led to three different claims from Canadian mining companies that are now pending before arbitral tribunals: *Eco Oro v. Colombia*, *Red Eagle v. Colombia*, and *Galway v. Colombia* [25–27]. Like in the Texaco saga, these cases are complicated by the actions of different state organs. In a 2015 law, Colombia had banned mining in the paramos but then exempted “mining operations which have contracts and environmental licenses dating to before 9 February 2010, or oil and gas operations with contracts and licenses dating to before 16 June 2011 ... ” [24]. The courts reversed these exemptions, but it gave way to ISA claims.

In *Gold Reserve v. Venezuela*, an arbitral tribunal awarded a Canadian mining company \$718 million, plus interest, for considering that Venezuela had violated the fair and equitable treatment standard clause [28] (para 863). In revoking a mining concession the Government of Venezuela claimed to be doing so to protect the environment and indigenous communities in the area [28] (paras. 593–594). While the tribunal recognized that it was within the state’s power to do so, it also found evidence that the decision to revoke the concession was political given President Hugo Chavez and other public officials’ statements [28] (paras. 595, 599–601). In 2017, a French court rejected an effort by Venezuela to annul the award [29]. These conflicts, notwithstanding, the company still planned to do business in Venezuela [29].

What all these cases demonstrate is that the regime of foreign investment protection is not capable of handling complex situations. The narrow goals of investment agreements are not conducive to creating the proper incentives for both investors and states to conduct sustainable business.

4. Human Rights Risks

Human rights risks are varied and can go from poor labour conditions to loss of life. As commentators have pointed out, extractive industries projects:

“... often relocate populations relying on the land for agricultural purposes, cause significant environmental impacts with the potential for environmental disasters, redirect local water supplies, attract large influxes of workers and their dependents, and employ security forces that may clash with local populations and workers” [8] (p. 348).

A study by the Justice and Corporate Accountability Project (JCAP) has found many instances of violence involving Canadian mining companies in Latin America [30] (p. 4) (it should be noted that the author of the report, Professor Imai, has also argued in a legal proceeding on behalf of some of the people affected by the mining company Blackfire [31]). These incidents involve 28 Canadian companies, 44 deaths, 403 injuries and “a widespread geographical distribution of documented violence” [30] (p. 4). The study is careful in not establishing a causal link between Canadian mining companies and the specific acts of violence. However, the author argues that there is enough proximity between Canadian investments and violence that demands action at both the international and domestic levels [30] (p. 28).

Investor-state arbitral tribunals, however, are not equipped to resolve human rights claims properly [32] (p. 214). In the *Urbaser v. Argentina* case, the tribunal took much space analyzing a counterclaim by Argentina, which was arguing that the failure by the investor to comply with the water concession violated the human rights of Argentina citizens [33] (paras. 1110–1211). Ultimately, however, the claim failed when the tribunal found that there is no international obligation on private corporations to provide water and, furthermore, it noted the “the lack of any legal ground based on international law that would entitle a group of individuals to raise a claim for performance for delivery of water and sewage services directed against a company or any other private party” [33] (pp. 1212, 1220–1221).

The difficulty in holding extractives industries accountable for human rights violations is related to the more general problem of regulating multinational corporations, given the lack of enforceable international instruments [34] (p. 317–318). As demonstrated by the cases described above, it is far easier for a multinational corporation to recoup economic losses from states than states holding multinational corporations accountable for human rights violations. Human rights violations are particularly worrisome since they may involve immediate threats to the life and integrity of members of vulnerable populations.

As an example of a violation of human rights in the “vicinity” of a Canadian mining company is the case of Blackfire and the severe incidents that surrounded its operations in the State of Chiapas in Mexico. In 2009, an activist who was protesting the activities of Blackfire was shot dead [35]. Protestors considered that Blackfire was hurting the environment and the communities close to its operations [35]. The Mexican activist was the leader of the Mexican Network of People Affected by Mining, which was “speaking out against the environmental impacts of the mine and the failure to acknowledge the rights of Indigenous groups” [31]. The mine was eventually shut down in December of 2009, and Blackfire dissolved after that [31].

There have also been questions regarding whether the Canadian Embassy in Mexico City acted appropriately during these events [36]. In April of 2018, the Public Sector Integrity Commissioner of Canada decided that there were no elements to start an investigation regarding probable wrongdoing by the Embassy. The Commissioner determined that the Canadian Embassy had not ignored potential human rights violations and that no further action was to be reasonably expected from the Embassy, given that the Mexican authorities had convicted a person [37] (para. 37). In July 2019, a Canadian federal judge dismissed an application for judicial review to reverse the Commissioner’s decision by determining that the Commissioner had reviewed all the proper material and that the decision not to investigate was reasonable [37] (paras. 65–66). Non-governmental organizations (NGOs) have criticized this decision [38]. It should be noted that Blackfire also indicated that in no way was involved the activist’s death [39].

It is not possible to determine the truth of what happened in Chiapas in these pages. However, it is safe to assume that no one wants to be in this type of situation. The challenge is in devising mechanisms to make sure these kinds of events are rare. As it is probably clear by now, achieving this goal is a rather complex task that involves the socio-economic circumstances present where extractives industries move, the quality of domestic legal institutions, and international mechanisms.

Commentators have noted that extractive industries are going deeper into areas that previously have been considered politically risky [8] (p. 345). It is precisely in these regions were “governments typically lack the capacity, institutions, legal frameworks, and in some cases political will, to effectively regulate the sector for sustainable development, although it is in these countries that human rights are most at risk, requiring robust regulation” [8] (p. 346). Vulnerable populations are thus victims of the state’s inability or unwillingness to protect them, in addition to bearing serious risks associated with extractive projects.

In Guinea, for instance, bauxite mining is booming, putting the country on track of being the largest global producer of this rock [40] (p. 1). While this economic activity produces tax revenues for the state and profits for the corporations, the population see fewer benefits and high costs from these mining projects. Human Rights Watch (HRW) studied these costs for the Guinean population and found substantial harms in terms of loss of ancestral lands, reduced access to water, lower air quality, and risks to the health of the population.

In terms of loss of ancestral land, HRW found instances of mining companies appropriating the lands of villagers that are usually governed by customary rules without compensation or even the consent of the affected [40] (p. 3). When compensation is paid, sometimes it is less than the value of the land, and the payment tends to go to men when women are also affected by the loss of land for agriculture [40] (ibid). The government of Guinea has failed to introduce adequate legal protections to prevent this from happening [40] (ibid). In terms of access to water, HRW collected interviews from villagers that reported that the water was dirty and that expropriations for mining projects have limited access to water, forcing mostly women, who tend to be primarily responsible for collecting water, to walk long distances to find water [40] (p. 5). Finally, in terms of air quality and health, villagers reported that the dust from the mining projects “gets everywhere” and affects the health of the people close the mines [40] (p. 8).

In early 2019, 13 villages filed a complaint against the International Finance Corporation (IFC), a part of the World Bank, for funding the bauxite mining projects [41]. According to Inclusive Development International (IDI), “The 540 complainants allege that the IFC-financed project, Compagnie des Bauxites de Guinée, has grabbed their land, destroyed their livelihoods and damaged the local environment” [41]. It further stated that: “In 2016, the IFC provided a \$200 million loan to expand the venture’s mining operations . . . ” (It should be noted, however, that the IFC was not the only financier) [41]. The NGO BankTrack has also asked banks not to finance Compagnie des Bauxites de Guinée because of the way that it takes land from communities [42].

These events in Guinea are not isolated. A similar situation is happening in Ghana where communities complain that they have lost farming land and suffer from high levels of pollution because of the operation of a Canadian mining company, Golden Star Resources [8] (p. 381). There are also reports of violence that involve the mining company security personnel as well as police and military forces [8] (p. 381–382). As shown in these cases, international governance mechanisms are still insufficient to protect vulnerable populations affected by extractive projects in developing countries. A major obstacle is the plurality of jurisdictions that share the responsibility to hold multinational corporations accountable. The primary responsibility for protecting these populations are the host countries. However, if there is a recurrent theme in all the cases described above is that host countries failed to do so either because of corruption, weak legal institutions, deficient laws and regulations, and a general lack of knowledge about extractive industries.

In this regard, there is evidence to support the notion that “investments in extractive sectors are more likely to have negative effects for host states with little institutional and regulatory capacity” [43]

(p. 49). In addition, vulnerable populations usually do not have much political clout to lobby their interests before public officials. Finally, in many instances, multinational corporations have more resources—economic and otherwise—than the entire countries where they operate. Taking all these facts together, it is important to be mindful that meaningful reforms in many host states will probably take many years to be effective. In the next section, I will describe how home countries can aid in this process by subjecting their own outward investors to their higher standards of protection and regulation.

5. Home State Regulation of Outward Investors

The Texaco/Chevron vs Ecuador saga has shown that more needs to be done to enforce human rights internationally. The fact that arbitral awards—which mostly deal with protecting the economic interests of foreign investors—are more easily enforceable than rulings of sovereign nations is an indictment of the current state of affairs in international governance. As mentioned above, given the deep inequalities in developing countries, officials in these countries tend to represent the interests of the classes that benefit from foreign investment but suffer little or none of the negative repercussions. Developed countries, however, have started to implement more strict mechanisms to hold their own investors accountable for the damage done overseas.

Recent developments in the United States reveal tensions regarding whether and how to penalize a multinational corporation for crimes committed abroad. American courts have traditionally been successful in persecuting severe violations of human rights involving torture and genocide [44]. The Supreme Court, however, has started to reverse this trend by imposing limitations on the kind of claims that can be resolved using the Alien Torts Statute (ATS) [44]. The ATS, first adopted in 1789, states that: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States” [45].

In the case *Kiobel v. Royal Dutch*, however, the Supreme Court determined that: “there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms” [46] (p. 12). The court noted that there is a presumption against extraterritoriality and that the courts needed to be careful of not creating “serious foreign policy consequences” [46] (ibid). Finally, the decision established that: “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application” [46] (p. 13).

Kiobel did not involve any American citizen or corporation, and the events also happened entirely outside of the United States. The petitioners were inhabitants of Ogoniland in Nigeria in the Niger delta. The respondents were the Royal Dutch Petroleum Company, incorporated in the Netherlands, Shell Transport and Trading Company, incorporated in England, and, finally, their joint subsidiary, Shell Petroleum Development Company of Nigeria, Ltd. (SPDC), incorporated in Nigeria [46] (pp. 1–2). The petitioners claimed that when the communities affected protested the pollution caused by the operations of SPDC, the respondent obtained the support of the Government of Nigeria [46] (p. 2). Members of the communities were then subject to torture, rape, killings, looting, and destruction of property and arrests [46] (ibid). The claim alleges that the respondent supported these violent government acts by providing transportation, food, and compensation and a staging ground for the attacks [46] (ibid). The petitioners later moved to the United States where they obtained political asylum and are now legal residents [46] (ibid).

The future of the ATS is not entirely clear. Some have argued that this decision did not reject, or analyze in any detail, the issue of universal jurisdiction even if, as one commentator pointed out, when it comes to the ATS, the implication of *Kiobel* is that “the presumption against extraterritoriality applies regardless of the particular basis for jurisdiction under constitutional or international law” [47] (p. 29). In *Jesner et al. v. Arab Bank, PLC*. [48], the Supreme Court analyzed whether multinational corporations were liable under the ATS. In his opinion, Justice Kennedy showed concern for the potential consequences if this were the case: “If the Court were to hold that foreign corporations have liability for international-law violations, then plaintiffs may well ignore the human perpetrators and

concentrate instead on multinational corporate entities” [48] (p. 23). Furthermore, Justice Kennedy was concerned about opening the door for American corporations to be sued in foreign jurisdictions [48] (p. 24). Ultimately, the Supreme Court decided that “judicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government” [48] (p. 29).

However, there are still other forms to keep at least some accountability for the actions of extractive industries abroad. Section 1504 of the Dodd-Frank Wall Street and Consumer Protection Act requires “resource extraction issuers to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including:

- i. the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals; and
- ii. the type and total amount of such payments made to each government” [49] (sec. 1504 (02)).

This obligation covers any payment “made to further the commercial development of oil, natural gas, or minerals” and “includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits” [49] (sec. 1504(1)). This section of Dodd-Frank is meant to be consistent with the Extractive Industries Transparency Initiative (EITI), which is a global standard on transparency. While the EITI is a voluntary mechanism, once signed is mandatory and “the government must disclose any payments it receives and extractive companies operating in the country must disclose the payments that they make, reconciled by an independent audit” [8] (pp. 354–355). The fact that Dodd-Frank created a clear entry point for an international standard is a good example of states incorporating into their laws international standards to regulate their outward investors.

Canada, for its part, enacted the Extractive Sector Transparency Measures Act (ESTMA) in 2014. The government argued that the ESTMA “delivers on Canada’s international commitments to contribute to global efforts to increase transparency and deter corruption in the extractive sector by requiring extractive entities active in Canada to publicly disclose, on an annual basis, specific payments made to all governments in Canada and abroad” [50]. The ESTMA covers Canadian companies listed in a Canadian stock exchange or “Not listed on a Canadian stock exchange but have a place of business in Canada, do business in Canada or have assets in Canada and meet two (2) of the following thresholds in one of their two (2) most recent financial years:

Have at least C\$20 million in assets.

Generated at least C\$40 million in revenue.

Employ an average of at least 250 employees” [51].

The Government of Canada announced in January of 2018, a two-pronged approach to “strengthen Canada’s approach to responsible business conduct for Canadian companies doing business and operating abroad” [52]. First, the government named a Canadian Ombudsperson for Responsible Enterprises (CORE) who “has the mandate to review alleged human rights abuses arising from a Canadian company’s operations abroad, make recommendations, monitor those recommendations, recommend trade measures for companies that do not co-operate in good faith, and report publicly throughout the process” [53]. The CORE will concentrate on the mining, oil and garment sectors. Secondly the government created “a multi-stakeholder advisory body to advise the Government and the CORE on responsible business conduct abroad” [52].

While the Ombudsperson is not operational yet, it has already come under intense criticism for lacking the power to investigate abuses. This omission led to the dissolution of the corporate responsibility panel, which included members of civil society and labour organizations [54,55]. For now, any complaints are to be directed to the national contact point (NCP) which has a mission “to promote

awareness of the Organisation for Economic Co-operation and Development Guidelines (OECD) for Multinational Enterprises” and “also offers a forum for discussion and assists the business community, employee organisations and other concerned parties, to contribute to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances through dialogue-facilitation” [56].

The NCP, as suggested above, does not really have any judicial-like capabilities and in case that any person, community or organization considers that there has been a violation of the OECD Guidelines for Multinational Enterprises, the NCP offers “a forum for constructive dialogue between parties, aimed at helping them discuss concerns and work towards reaching a mutual agreement . . . ” [56]. Non-compliance or bad faith on the part of corporations can lead to losing the Government of Canada trade advocacy support abroad and, if the problems persist, potentially losing financing and other support from Export Development Canada [56]. As mentioned above, the hope was that the new Ombudsperson would actually have some more judicial-like capabilities; it seems that it will not be the case.

In the United Kingdom, there is also a mixed bag of legal developments regarding the possibility of holding multinational corporations accountable in domestic courts. In 2015, Zambian citizens brought proceedings against KCM, a mining company incorporated in Zambia and Vedanta, a holding company for various mining companies, including KCM, which was incorporated in the UK [57]. The claimants were “alleging personal injury, damage to property and loss of income, amenity and enjoyment of land, due to alleged pollution and environmental damage caused by discharges from the Nchanga copper mine . . . ” [57] (p. 1). The respondents unsuccessfully asked the court to declare that it did not have jurisdiction to decide the case and later appealed the decision [57] (pp. 4–6). In *Lungowe and others v. Vedanta and KCM*, the Court of Appeals upheld the previous judgment by noting, *inter alia*, that the previous judge was correct in concluding that England and Wales was the proper forum given that Vedanta was one of the defendants and because “ . . . the claimants will almost certainly not get access to justice if these claims were pursued in Zambia” [57] (pp. 105, 136).

In the cases of *HRH Emere Godwin Bebe Okpabi and others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd.* and *Lucky Alame and others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd.*, the claimants were citizens of Nigeria and living in proximity of oil spills. RDS, the first respondent, was a company incorporated in the United Kingdom and SPDC was a subsidiary of RDS, an exploration and production company incorporated in Nigeria [58]. The Court of Appeal considered that a previous judgment where a judge determined that RDS did not owe the claimants a duty of care was correct [58] (pp. 207–209). The main difference between these couple of cases and the *Lungowe* case was that there was not enough “proximity” which in practical terms means that RDC did not have enough control over SPDC operations to justify England to exercise jurisdiction [58] (pp. 197, 202, 205).

In spite of these last couple of cases, it should be noted that the requirements to submit a claim in the United Kingdom seem more straightforward than in the United States. The American Supreme Court seems reluctant to hold multinational corporations accountable without an explicit mandate from Congress [48] (p. 16).

6. Improving International Governance: Fixing Investor-State Arbitration and Extraterritorial Enforcement of Home Standards

A major obstacle to enforcing home standards on multinational extractive industries is the fact that, frequently, the parent company is not considered to be owing anything to local populations where its subsidiary operates. While the courts have put forward several arguments to avoid holding multinational corporations accountable, here, I will analyze three main concepts: 1) proximity 2) control and 3) applicable law. “Proximity” is one of the three elements that have been established in Canadian courts to determine whether a parent company can be considered responsible for its subsidiary (the other two being “reasonable foreseeability (. . .) and the absence of policy reasons to offset or otherwise restrict that duty”) [59] (pp. 264–265) (discussing the *Choc v Hudbay Minerals Inc.* case). Professor Lhuillier, explains the concept of “proximity” or “neighborhood” as a duty “to take all appropriate

measures with a view to respecting the human rights of persons who are so closely and directly affected by the acts of the MNC" [59] (p. 267).

The issue of "control" refers to how much of the decisions and procedures of a subsidiary can be attributed or are the responsibility of the parent company. Dr. Sanger has identified two main mechanisms that courts tend to look for when determining whether there is enough control: 1) when the parent company "controls or shares control of the material operations of the subsidiary" and 2) "where a parent has given advice to a subsidiary about how it should manage a specific risk" [60] (p. 7). Proximity and control can be related. For instance, in the Okpabi case, the court did not find that the parent company had enough control of its subsidiary and, as a result, there was also not enough "proximity" to the events.

The issue of applicable law is more relevant in ISA cases than in domestic courts; however, it was a factor in the *Jesner* case as well. In this context, applicable law refers to the lack of adequate domestic and international laws or regulations that impose obligations on multinational corporations and bestows effective rights for individuals. Indeed, in the *Urbaser* case, while the tribunal admitted on the merits Argentina's counterclaim which alleged that the investor had violated human rights, it also pointed out the absence of any international document or principle establishing an "obligation of performance" on a private corporation to provide access to water [33] (paras. 1155, 1205–1208). As for creating rights for people affected by multinational corporations in other territories, Justice Kennedy fretted in *Jesner* about "separation-of-powers concerns that counsel against courts creating private rights of action [which] apply with particular force in the context of the ATS" [48] (p. 19) (word in brackets added for clarity).

As a result, these three elements—proximity, control, and the applicable law—would seem like—and have been—major impediments to holding multinational extractive industries accountable. And the purpose here is not to argue that strengthening home state regulations on outward investors is a silver bullet. Furthermore, in the absence of more specific instruments regarding the obligations of multinational corporations, this approach does have important limitations depending on the type of claim being made. In the *Urbaser* case, for example, the tribunal recognized that the state had an obligation to provide access to water. The state later transferred that responsibility to a private corporation, but that did not carry with it a transference of a human rights obligation. This approach still does not change that, and it would be dangerous to create performance obligations based on inferences. That being said, if home states created more efficient mechanisms to monitor their multinational corporations abroad as well as a more sophisticated reporting system, it could go a long way to diminish the instances of loopholes.

Additionally, the outcome of some of the cases discussed here was hardly necessary. *Jesner* was a five to four decision, and it has become controversial [61]. In her dissent, Justice Sonia Sotomayor pointed out to a serious flaw in the plurality's assumptions: "Although international law determines what substantive conduct violates the law of nations, it leaves the specific rules of how to enforce international-law norms and remedy their violation to states, which may act to impose liability collectively through treaties or independently via their domestic legal systems" [48] (p. 3, dissenting opinion). Furthermore, Justice Sotomayor argued that the test to determine whether a claim was admissible under the ATS was a simple one: "The statutory text thus requires only that the alleged conduct be specifically and universally condemned under international law, not that the civil action be of a type that the international community specifically and universally practices or endorses" [48] (pp. 5–6, dissenting opinion).

Likewise, it was not necessary for Canada to setup its Ombudsperson with limited investigative powers. Once the Canadian government has voluntarily decided that there is a need to exert more control over the extractive industries, it has an obligation to so in a way that respects its international human rights obligations. In the particular case of the Ombudsperson, it means that Canada should empower this institution so that it can properly carry out its responsibilities in a manner that is consistent with international law.

Finally, in terms of ISA proceedings, stronger home state regulations could increase the duty of care of foreign investors. In the Copper Mesa and Bear Creek cases, the tribunals found that the host states failed to bring human rights concerns to the investor in a timely manner [7] (paras. 5.63, 5.64) [6] (para. 411). If home states were more specific about the proper behaviour of extractive industries abroad, it could limit how much ignorance corporations can claim regarding the right way to operate.

7. Conclusions

Home states have a responsibility to do more to control the behaviour of their extractive industries operating abroad for three main reasons: 1) they reside within their jurisdictions 2) often home states have more resources and capabilities to regulate the behaviour of extractive industries effectively and 3) doing so can complement initiatives at the host state level aimed at regulating extractive industries or, absent those efforts, home states can provide vital support to vulnerable populations who can be subject to human rights abuses.

This approach is not a panacea, and there are multiple challenges still ahead. Multinational corporations have successfully limited their liability by hiding behind subsidiaries, and more needs to be done to restrict this practice. Furthermore, the absence of an international treaty addressing the obligations of multinational corporations also imposes limitations. That being said, incremental changes can still make a difference in particular cases, and home states can do more in this regard.

So far, recent developments in the United States' policies regarding holding outward investment accountable for violations committed abroad are problematic and a step in the wrong direction. Given the pro-corporate tilt of the current composition of the American Supreme Court, it is not safe to assume that there will be a reversal any time soon [62]. As a result, the emphasis should be on legislating concrete regulations regarding extractive industries moving abroad. The Dodd-Frank Act and the Canadian initiative for a business ombudsperson are both positive developments but insufficient. In particular, there is a need for more explicit inclusions in domestic pieces of legislation of concrete obligations for multinational corporations in general, and for extractive industries in particular, to respect human rights. Secondly, an ombudsperson must have investigative powers and the ability to impose significant penalties. Extractive industries are not as concerned with bad publicity as other industries since they do not deal with the public directly. As a result, home states should empower their domestic courts or administrative organs to impose penalties that could deter future misbehaviour.

It is expected that these reforms in home states will have an impact on ISA proceedings. Such reforms would deprive extractive industries of reasons to claim ignorance of their human rights obligations. Secondly, home-state obligations can be considered by arbitral tribunals when assessing what are the "legitimate expectations" of foreign investors. The concept of "legitimate expectations" is considered by some as an element to determine whether there has been a violation of the fair and equitable treatment standard contained in many international investment agreements [63] (p. 265). Finally, home state obligations can supplement the lack of concrete obligations on multinational corporations in IIAs and in any other international instrument.

Some of these proposals may lead to concerns regarding improper extraterritorial application of laws. This is a legitimate concern which this author shares as well. More research is needed regarding how to avoid this potential problem. It is important to clarify here that these proposals are regarding home states regulating their own outward investors. Thus, this paper is not taking a position on whether states should exercise universal jurisdiction for abuses by extractive industries. In fact, it is suggested that a multilateral investment agreement or a multilateral instrument regarding the obligations of foreign investors can prevent the problem of extraterritoriality and overcome the issues of proximity, control, and applicable law discussed in the previous section. More research is needed in this area as well.

Funding: This research received no external funding.

Acknowledgments: I wish to thank the organizers of the conference on “Corporate Sustainability Reforms: Securing Market Actors’ Contribution to Global Sustainability” held in Oslo the 24 of October 2019. I first presented the ideas contained in this essay at that conference, and I am thankful for the feedback. I would also like to thank four anonymous reviewers for their comments and suggestions. Finally, I would also like to acknowledge the editors of the journal of *Sustainability* for their work on this essay.

Conflicts of Interest: The author declares no conflicts of interest.

References

- Perrone, N.M. The “Invisible” Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime. *AJIL Unbound* **2019**, *113*, 16–21. [CrossRef]
- UNCTAD, Investment Policy Forum. Available online: <https://investmentpolicy.unctad.org/> (accessed on 19 November 2019).
- Mertins-Kirkwood, H.; Smith, B. Digging for Dividends: The Use and Abuse of Investor-State Dispute Settlement by Canadian Investors Abroad (April 2019). Available online: <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2019/04/Digging%20for%20dividends.pdf> (accessed on 19 November 2019).
- Lowenfeld, A.F. *International Economic Law*, 2nd ed.; Oxford University Press: Oxford, UK, 2008; ISBN 9780199226931.
- Thomas, J. Political Risk in the Mining Sector: Understanding and Mitigating the Perils. Available online: <https://www.zurichcanada.com> (accessed on 19 November 2019).
- Bear Creek Mining Corporation v. Republic of Perú (Award, 30 November 2017). ICSID Case No ARB/14/21. Available online: <https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf> (accessed on 2 December 2019).
- Copper Mesa Mining Corporation v. Republic of Ecuador, (Award, 15 March 2016) PCA No. 2012-2. Available online: <https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf> (accessed on 2 December 2019).
- Mandelbaum, J.; Loutit, J. Extractive Industry Investments and Human Rights. In *Research Handbook on Human Rights and Investment*; Radi, Y., Ed.; Edward Elgar: Cheltenham, UK, 2018; pp. 345–408. ISBN 9781782549116.
- Salacuse, J.W. Investment Treaties Through a Different Lens: A New Global Regime? In *Yearbook on International Investment Policy 2009–2010*; Sauvant, K.P., Ed.; Oxford University Press: New York, NY, USA, 2010; pp. 575–594. ISBN 9780199767014.
- Watts, J. Resource extraction responsible for half world’s carbon emissions. *The Guardian*. 12 March 2019. Available online: <https://www.theguardian.com/environment/2019/mar/12/resource-extraction-carbon-emissions-biodiversity-loss> (accessed on 19 November 2019).
- Johnson, L.; Coleman, J. *International Investment Law and the Extractive Industries Sector*; Columbia Center on Sustainable Investment: New York, NY, USA, 2016; Available online: http://ccsi.columbia.edu/files/2016/01/2016-01-12_Investment-Law-and-Extractives_Briefing-Note_1.pdf (accessed on 19 November 2019).
- Di Benedetto, S. *International Investment Law and the Environment*; Edward Elgar: Cheltenham, UK, 2013; ISBN 9780857936646.
- Kimerling, J. Oil, Contact, and Conservation in the Amazon: Indigenous Huaorani, Chevron, and Yasuni. *Colo. J. Int’l Envtl. L. Pol’y* **2013**, *24*, 43–115.
- Aquinda v. Texaco, Inc. (S.D.N.Y. 1996). Available online: <https://www.casemine.com/judgement/us/5914827cadd7b04934496d95#> (accessed on 2 December 2019).
- Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994). Available online: <https://law.justia.com/cases/federal/district-courts/FSupp/847/61/1403195/> (accessed on 2 December 2019).
- Aguinda v. Texaco, Inc. 303 F (3d) 470 (2nd Cir 2002). Available online: <https://law.resource.org/pub/us/case/reporter/F3/303/303.F3d.470.01-7758.01-7756.html> (accessed on 2 December 2019).
- Dodge, S.W. International Comity in American Law. *Colum L. Rev.* **2015**, *115*, 2071–2141. [CrossRef]
- Legal Information Institute, “Forum Non Conveniens”. Available online: https://www.law.cornell.edu/wex/forum_non_conveniens (accessed on 19 November 2019).
- Erichson, H. The Chevron-Ecuador Dispute, Forum Non Conveniens, and the Problem of Ex Ante Inadequacy. *Stan. J. Complex Litig.* **2013**, *1*, 417–428. [CrossRef]

20. Chevron Corp. v. Donziger, No. 14-0826 (2d Cir. 2016). Available online: http://www.ca2.uscourts.gov/decisions/isysquery/90e9c17f-d5c6-458c-b03b-592faa744d3b/1/doc/14-826_OPN.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/90e9c17f-d5c6-458c-b03b-592faa744d3b/1/hilite/ (accessed on 2 December 2019).
21. Gómez, M.A. The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador. *Stan. J. Complex Litig.* **2013**, *1*, 429–466.
22. Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23. Available online: <https://www.italaw.com/cases/257> (accessed on 2 December 2019).
23. Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23, Second Interim Award on Interim Measures (16 February 2012). Available online: https://www.italaw.com/sites/default/files/case-documents/ita0174_0.pdf (accessed on 2 December 2019).
24. Hill, D. Colombian court bans oil, gas and mining operations in paramos. *The Guardian*. 21 February 2016. Available online: <https://www.theguardian.com/environment/andes-to-the-amazon/2016/feb/21/colombia-bans-oil-gas-mining-paramos> (accessed on 19 November 2019).
25. Eco Oro Minerals Corp. v. Republic of Colombia (ICSID Case No. ARB/16/41). Available online: <https://www.italaw.com/cases/6320> (accessed on 2 December 2019).
26. Red Eagle Exploration Limited v. Republic of Colombia (ICSID Case No. ARB/18/12). Available online: <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/874/red-eagle-v-colombia> (accessed on 2 December 2019).
27. Galway Gold Inc. v. Republic of Colombia (ICSID Case No. ARB/18/13). Available online: <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/873/galway-gold-v-colombia> (accessed on 2 December 2019).
28. Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1. Available online: <https://www.italaw.com/cases/2727> (accessed on 2 December 2019).
29. Gold Reserve Inc. The Paris Court of Appeal Decides in Favor of Gold Reserve Inc. *News Release*. 7 February 2017. Available online: <https://www.goldreserveinc.com/the-paris-court-of-appeal-decides-in-favor-of-gold-reserve-inc-17-3/> (accessed on 19 November 2019).
30. Imai, S. *The Canada Brand: Violence and Canadian Mining Companies in Latin America*; Osgoode Legal Studies Research Paper No. 17; Osgoode Hall Law School, York University: Toronto, Canada, 2017; Volume 13, pp. 1–129.
31. Wells, J. Murder of Mexican mining protester throws spotlight on role of Canada’s embassies. *The Toronto Star*. 24 March 2019. Available online: <https://www.thestar.com/business/opinion/2019/03/24/osgoode-hall-professor-will-argue-canada-should-investigate-assassination-of-mexican-activist.html> (accessed on 19 November 2019).
32. Boone Barrera, E. Human Rights Obligations in Investor-State Contracts: Reconciling Investors’ Legitimate Expectations with the Public Interest. In *Sustainable Trade, Investment and Finance: Toward Responsible and Coherent Regulatory Frameworks*; Gammage, C., Novitz, T., Eds.; Edward Elgar: Cheltenham, UK, 2019; pp. 197–220.
33. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic (Award, 8 December 2016) ICSID Case No ARB/07/26. Available online: https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf (accessed on 2 December 2019).
34. Ruggie, J.G. Multinationals as Global Institution: Power, Authority and Relative Autonomy. *Regul. Gov.* **2017**, *12*, 317–333. [CrossRef]
35. Sabados, K. Mining, Murder, and Impunity. Protests in Mexico against Canadian Mining Company. Available online: <https://www.globalresearch.ca/mining-murder-impunity/5688705> (accessed on 19 November 2019).
36. Mining Watch. Ground-Breaking Federal Court Hearing over Canadian Mining Diplomacy and Assassination of Mexican Community Leader. *News Release*. 26 March 2019. Available online: <https://miningwatch.ca/news/2019/3/26/ground-breaking-federal-court-hearing-over-canadian-mining-diplomacy-and> (accessed on 19 November 2019).
37. Mirna Montejo Gordillo et al v Canada (Attorney General), 2019 FC 950. Available online: <https://www.canlii.org/en/ca/fct/doc/2019/2019fc950/2019fc950.html?autocompleteStr=2019%20FC%20950&autocompletePos=1> (accessed on 2 December 2019).
38. Peña, C. Mining, murder and Canadian impunity in Mexico. *Now Toronto*. 3 September 2019. Available online: <https://nowtoronto.com/news/canadian-mining-murder-mexico/> (accessed on 19 November 2019).

39. Business & Human Rights Resource Centre. Blackfire Exploration Response re Allegations of Human Rights Abuses in Connection with Its Mine in CHIAPAS, Mexico. Available online: <https://www.business-humanrights.org/en/blackfire-exploration-response-re-allegations-of-human-rights-abuses-in-connection-with-its-mine-in-chiapas-mexico> (accessed on 19 November 2019).
40. Human Rights Watch. “What Do We Get Out of It?”: The Human Rights Impact of Bauxite Mining in Guinea. Available online: <https://www.hrw.org/report/2018/10/04/what-do-we-get-out-it/human-rights-impact-bauxite-mining-guinea> (accessed on 19 November 2019).
41. Inclusive Development International, Press Room. Thirteen Guinean Villages Lodge Complaint against World Bank for Financing Destructive Bauxite Mine. Available online: <https://www.inclusivedevelopment.net/thirteen-guinean-villages-lodge-complaint-against-world-bank-for-financing-destructive-bauxite-mine/> (accessed on 19 November 2019).
42. BankTrack. Compagnie des Bauxites de Guinée (CBG). Available online: https://www.banktrack.org/project/compagnie_des_bauxites_de_guinee (accessed on 19 November 2019).
43. Bonnitcha, J.; Poulsen, L.N.S.; Waibel, M. *The Political Economy of the Investment Treaty Regime*; Oxford University Press: New York, UK, USA, 2017.
44. Teitel, R. On Corporate Responsibility, Human Rights, and Transnational Justice: Quo Vadis? In Proceedings of the Annual Meeting of the American Society of International Law, Washington, DC, USA, 7 April 2018; Volume 112. [CrossRef]
45. Alien Torts Claim Act 28 U. S. C. §1350. Available online: <https://www.law.cornell.edu/uscode/text/28/1350> (accessed on 2 December 2019).
46. Kiobel v. Royal Dutch Petroleum Company, 569 U. S. pg. 1 (2013). Available online: <https://supreme.justia.com/cases/federal/us/569/10-1491/case.pdf> (accessed on 2 December 2019).
47. Swaine, E.T. Kiobel and Extraterritoriality: Here, (Not) There, (Not Even) Everywhere. *Okla. Law Rev.* **2016**, *69*, 23–51. [CrossRef]
48. Jesner et al. v. Arab Bank, PLC., 584 U. S. pg. 1 (2018). Available online: https://www.supremecourt.gov/opinions/17pdf/16-499_1a7d.pdf (accessed on 2 December 2019).
49. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L No 111-203, 124 Stat 1376 (2010). Available online: <https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf> (accessed on 19 November 2019).
50. Natural Resources Canada. Extractive Sector Transparency Measures Act (ESTMA). Available online: <https://www.nrcan.gc.ca/mining-materials/resources/extractive-sector-transparency-measures-act-estma/18180> (accessed on 19 November 2019).
51. Natural Resources Canada. Information on the ESTMA. Available online: <https://www.nrcan.gc.ca/mining-materials/resources/extractive-sector-transparency-measures-act-estma/information-estma/18184> (accessed on 19 November 2019).
52. Global Affairs Canada, News Release. The Government of Canada Brings Leadership to Responsible Business Conduct Abroad. Available online: https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringsleadershiptoresponsiblebusinesscond.html (accessed on 19 November 2019).
53. Global Affairs Canada. Canada’s Ombudsperson for Responsible Enterprise. Available online: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse-ombudsperson.aspx?lang=eng> (accessed on 19 November 2019).
54. Wells, J. Canada’s new business watchdog is already a failure. *The Toronto Star*. 16 July 2019. Available online: <https://www.thestar.com/business/opinion/2019/07/16/canadas-new-business-watchdog-is-already-a-failure.html> (accessed on 19 November 2019).
55. The Canadian Press. Panelists quit corporate responsibility panel citing erosion of trust. *CBC News*. 12 July 2019. Available online: <https://www.cbc.ca/news/business/corporate-responsibility-panellist-quit-1.5210363> (accessed on 19 November 2019).
56. Global Affairs Canada. Canada’s National Contact Point for the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises. Available online: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng> (accessed on 19 November 2019).

57. Lungowe and others v. Vedanta Resources Plc and Konkola Copper Mines Plc, (2017) EWCA Civ 1528 (UK). Available online: https://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Herdegen/de_Wet/WiSe_2018-19/Lungowe_Ors_v_Vedanta_Resources_Plc_Anor_2017_EWCA_Civ_1528_13_October_2017_.pdf (accessed on 2 December 2019).
58. HRH Emere Godwin Bebe Okpabi and others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd and Lucky Alame and others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd, (2018) EWCA Civ 191 (UK). Available online: <https://www.business-humanrights.org/sites/default/files/documents/Shell%20Approved%20Judgment.pdf> (accessed on 2 December 2019).
59. Lhuillier, G. MNCs' Obligations in their sphere of influence. In *Research Handbook on Human Rights and Investment*; Radi, Y., Ed.; Edward Elgar: Cheltenham, UK, 2018; ISBN 978178254.
60. Sanger, A. Transnational Corporate Responsibility in Domestic Courts: Still Out of Reach? *AJIL Unbound* **2019**, *113*, 4–9. [CrossRef]
61. Aceves, W.J. Correcting an Evident Error: A Plea to Revise *Jesner v. Arab Bank, PLC*. *Geo LJ Online* **2018**, *107*, 63–80.
62. The Editorial Board. Brett Kavanaugh Will Fit Right in at the Pro-Corporate Roberts Court. The Opinion Pages of the New York Times. *The New York Times*. 22 July 2018. Available online: <https://www.nytimes.com/2018/07/22/opinion/brett-kavanaugh-supreme-court.html> (accessed on 21 November 2019).
63. Dumberry, P. *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105*; Kluwer Law International: Alphen aan den Rijn, The Netherlands, 2013; ISBN 9789041132888.



© 2019 by the author. Licensee MDPI, Basel, Switzerland. This article is an open access article distributed under the terms and conditions of the Creative Commons Attribution (CC BY) license (<http://creativecommons.org/licenses/by/4.0/>).