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BRINGING BITs BACK FROM THE BRINK

INCORPORATING PROGRESSIVE TREATMENT PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS TO MAINTAIN POLICY SPACE FOR STATE REGULATION OF HUMAN RIGHTS

**Jeremy S Goldstein*

I. INTRODUCTION

In 2011, the United Nations (UN), and as proposed by John Ruggie, Special Representative of the Secretary General, published the Guiding Principles on Business and Human Rights (UNGP's), with the objective of "enhancing standards and practices with regard to business and human rights."[1] The UNGP's offer "guidance and recommendations to states and companies"[2] in implementing the Special Representative of the Secretary General's (SRSG) 2008 Report, the UN 'Protect, Respect, and Remedy' Framework for Business and Human Rights.[3] UNGP Article 9 recommends that states "maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other states or business enterprises, for instance through *investment treaties*[.]"[4] Article 9 recognizes the impact that investment treaties, primarily international investment agreements (IIAs) and bilateral investment treaties (BITs), have on human rights in the modern global economy.[5] It also posits that IIAs need not be inherently detrimental to the furtherance of human rights protections when drafting is guided by policy aimed at maintaining adequate domestic policy space.[6]

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1. U.N. Office of the High Commissioner of Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "*Protect, Respect and Remedy*" Framework, U.N. Doc. HR/PUB/11/04, at 1 (2011) [hereinafter UNGP].

2. Andrea Shemberg (legal advisor to the U.N. Special Representative to the Secretary General for Business & Human Rights), *Stabilization Clauses and Human Rights A Research Project Conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights* 1 (May 27, 2009).

3. John Ruggie (Special Representative of the Secretary General), *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

4. UNGP, *supra* note 1, art. 9, at 11 (emphasis added).

5. UNGP, *supra* note 1, art. 9, at 11.

6. UNGP, *supra* note 1, art. 9, at 11.

IIAs are agreements between and among states, which "are designed to protect foreign investment[s] from one country from interference by the government of the country in which the investment is located."[7] IIAs are typically embodied as either a BIT between two states or a multilateral investment agreement among more than two states, and are designed to increase foreign direct investment (FDI) inflows.[8] Each BIT is a unique instrument, but all investment agreements contain fundamental provisions protecting distinct categories of investor interests.[9] These categories include the treatment of investment, nationalization/expropriation, general exceptions, and dispute resolution.[10] When

7. JONATHAN BONNITCHA, IISD REPORT: MYANMAR'S INVESTMENT TREATIES: A REVIEW OF LEGAL ISSUES IN LIGHT OF RECENT TRENDS 1 (Int'l Inst. for Sustainable Dev. ed., 2014).

8. Rational theorists disagree on whether IIAs actually increase FDI. This author believes that IIAs are crucial to attracting investment in order to compete with other nations which also engage in IIAs. This is discussed in section II herein. *See generally* MARC JACOB, INTERNATIONAL INVESTMENT AGREEMENTS AND HUMAN RIGHTS, (Inst. for Dev. & Peace ed., 2010); Mary Hallward-Dreimeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a bit...and They Could Bite* (World Bank Dev. Research Grp., Policy Research Working Paper No. 3121, 2003), https://openknowledge.worldbank.org/handle/10986/18118.

9. The language used to express treatment differs amongst agreements. Often these categories of interests are not defined in separate provisions and can be confusing, specifically in older treaties. *See generally, e.g.*, Agreement between the Government of the Peoples Republic of China and the Government of Jamaica Concerning the Encouragement and Reciprocal Protection of Investments, China-Jam., Oct. 26, 1994, http://investmentpolicyhub.unctad.org/IIA/country/104/treaty/917; Treaty between the Government of the United States of America and the Government of the Republic of Honduras Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Hond., July 1, 1995, T.I.A.S. No. 106-27; Agreement between The Republic of Turkey and The Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, Turk.-Spain, Feb. 15, 1995, http://investmentpolicyhub.unctad.org/IIA/country/214/treaty/2953. Alternately, some BITs separate each distinct interest and actor, and include category headings. *See generally, e.g.*, Agreement between the Republic of Turkey and the Transitional Islamic State of Afghanistan Concerning the Reciprocal Promotion and Protection of Investments, Turk.-Afg., July 10, 2004, http://investmentpolicyhub.unctad.org/IIA/country/214/treaty/3; Agreement between the Government of the Federal Republic of Ethiopia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, Eth.-Fr., June 25, 2003, http://investmentpolicyhub.unctad.org/IIA/country/72/treaty/1475; Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., Nov. 4, 2005, TIAS No. 06-1101.

10. The language used to express treatment differs amongst agreements. Often these categories of interests are not defined in separate provisions and can be confusing, specifically in older treaties. *See generally, e.g.*, Agreement between the Government of the Peoples Republic of China and the Government of Jamaica Concerning the Encouragement and Reciprocal Protection of Investments, China-Jam., Oct. 26, 1994, http://investmentpolicyhub.unctad.org/IIA/country/104/treaty/917; Treaty between the Government of the United States of America and the Government of the Republic of Honduras Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Hond., July 1, 1995, T.I.A.S. No. 106-27; Agreement between The Republic of Turkey and The Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, Turk.-Spain, Feb. 15, 1995, http://investmentpolicyhub.unctad.org/IIA/country/214/treaty/2953. Alternately, some BITs separate each distinct interest and actor, and include category headings. *See generally, e.g.*, Agreement between the Republic of Turkey and the Transitional Islamic State of Afghanistan Concerning the Reciprocal Promotion and Protection of Investments, Turk.-Afg., July 10, 2004,

an unexpected harm occurs to an investment as a result of an action by a host state, dispute settlement clauses allow a foreign investor, operating under the protection of a BIT, to file an 'investor-state arbitration' against the host state.[11]

Most pertinent to the cause of their conflict with state-imposed human rights protections, BITs create only rights for investors without obligations, and only obligations for host states seemingly unaccompanied by any substantive rights.[12] Of principle concern are traditional treatment provisions.[13] These provisions create substantial rights for investors to file claims restricting host states[14] domestic policy space to legislate to meet its international human rights obligations.

This article analyzes methodology for drafting treatment provisions which reserve states domestic policy space to regulate human rights in-line with UNGP Article 9. This article examines: state practice in the form of existing treaties, model IIAs, draft IIAs, and policy statements; recommendations from civil society, international organizations, and intergovernmental organizations, including various Model IIA's and Model BIT's; and the work of popular academics and jurists.

Following this introduction, Section II provides background and context on the issue. Section III briefly presents the history and purpose of IIAs, and considers their efficacy. Section IV introduces the core principles of traditional BITs and explains how treatment provisions enshrined therein restrict government policy space regarding human rights regulation. Section V discusses conflicts between IIAs and international law. Section VI examines UNGP Article 9 and analyzes its recommendations in the context of the greater IIA regime. Section VII presents and analyzes the methodology available for drafting treatment provisions in IIAs in a manner which heeds the recommendations of UNGP Article 9, by examining existing and model IIAs and BITs. Section VIII concludes and provides the author's opinion.

II. BACKGROUND

John Ruggie, UN Secretary-General Special Representative for Business and Human Rights, included Article 9 in the UNGP's out of concern for the unequal distribution of rights and obligations IIAs create, particularly in private investment

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http://investmentpolicyhub.unctad.org/IIA/country/214/treaty/3; Agreement between the Government of the Federal Republic of Ethiopia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, Eth.-Fr., June 25, 2003, http://investmentpolicyhub.unctad.org/IIA/country/72/treaty/1475; Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., Nov. 4, 2005, TIAS No. 06-1101.

11. *See* BONNITCHA, *supra* note 7; Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L. J. 435, 436 (2009) ("There are sharp disagreements related to the legitimacy of investment treaty arbitration. The president of Bolivia asserts that developing countries in Latin America" never win any cases.).

12. BITs were not originally intended to create any obligations on investors. Investors are subject to the laws of the states in which they do business. *See, e.g.*, Stiglitz, *infra* note 24, at 5–11.

13. *See infra* Sections II & III.

14. *See infra* Section IV.

contracts[15] and traditional BITs.[16] The concern is that this unequal distribution impacts states' domestic policy space relating to human rights and the environment.[17] When a state regulates in a manner which seeks to protect or promote a human rights interest,[18] foreign investors operating under a BIT are more likely to successfully challenge the measure than those operating without investment protections.[19] Damage awards in investor-state arbitrations can reach into the billions of U.S. dollars.[20] In *Occidental v. Ecuador*, the International Center for Settlement of Investment Disputes (ICSID)[21] decided that Ecuador had been in breach of a BIT provision for conduct which was "tantamount to expropriation."[22] While the fairness of the ultimate decision on the issues is not under intense scrutiny, the tribunal awarded Occidental US $1.7 billion, even though Ecuador justified their actions with proof that the company had intentionally committed other serious regulatory violations.[23] As a result, states have become fearful of advancing domestic policies, particularly those relating to human rights and the environment, which may encourage claims.[24]

This 'regulatory chill' can affect a plethora of policy decisions not protected

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15. Private investment contracts frequently include stabilization clauses which can explicitly limit state's domestic policy space to a specific or unlimited degree. Ruggie, *supra* note 3, at 3, ¶ 2-4.

16. Traditional BITs are loosely defined as those developed prior to the advent of modern IIA model agreements and/or those which include unqualified terms of art, lack of domestic policy space, and few additional exceptions provisions. These are to be described more in detail herein in Section II. *See, e.g.*, Agreement between the Government of the People's Republic of China and the Government of the Union of Myanmar on the Promotion and Protection of Investments, China-Myan., Dec. 12, 2001, http://investmentpolicyhub.unctad.org/Download/TreatyFile/762.

17. George K. Foster, *Investors, States and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties, Business Law Forum – Balancing Investor Protections, the Environment, and Human Rights*, 17 LEWIS & CLARK L. REV. 361, 368 (2013).

18. Examples include a state seeking to use police powers to protect citizens from having their rights violated by a foreign investor, a policy measure designed to encourage basic rights codified in an International treaty, and an interpretive decision on an environmental and human safety regulation intended to remedy a legal-loophole under which an investor operates. PETERSON & GRAY, *infra* note 29, at 5.

19. *Id.*

20. *E.g.*, Franck, *supra* note 11, at 435 ("a typical claim might involve an investor demanding over US$300 million from a host state").

21. ICSID is the largest, and most commonly utilized, International investment arbitration panel. For more on the Occidental v. Ecuador ruling *see*, Tai-Heng Cheng & Lucas Bento, *ICSID's Largest Award in History: An Overview of Occidental Petroleum Corporation v the Republic of Ecuador*, KLUWER ARBITRATION BLOG (Dec. 19, 2012), http://kluwerarbitrationblog.com/blog/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador.

22. Occidental Petrol. Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 416 (Oct. 5, 2012), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C80/DC2672_En.pdf.

23. *Id.* ¶ 876.

24. Joseph E. Stiglitz, *Multinational Corporations: Balancing Rights and Responsibilities*, 101 AM. SOC'Y INT'L L. PROC. 3, 10 (2007).

under the traditional BIT regime.[25] This includes domestic measures that are advanced to achieve legitimate non-investment related policy objectives, such the strengthening of labor laws, and the introduction human rights or environmental protections.[26] States with traditional BIT regimes are most susceptible to policy space restrictions. The chilling effect weighs heaviest on developing nations because they have the greatest need to continue advancing their regulatory regimes as compared to states with developed regulatory environments.[27] Developing states also more frequently engage in traditional BITs relative to developed nations, making them significantly more susceptible to investor claims.[28]

The regulatory chill largely escaped concern until recently because foreign investors only first began to invoke dispute settlement mechanisms in BITs in the mid-1980's.[29] With the long term consequences of engaging in IIA's now readily apparent, some states are rapidly moving to denounce their traditional BITs;[30] both Venezuela and Ecuador have terminated agreements.[31] Other nations have selected to renegotiate agreements; South Africa and Indonesia have begun this process.[32] However, only so much renegotiation is possible. Basic investor protections that establish discipline on host state measures, generally obliging them to provide compensation for expropriation, and to treat foreign investors fairly, equitably, and in a non-discriminatory manner, are intrinsically necessary in any IIA.[33] For capitol-importing nations, FDI is crucial to development and the advancement of social and economic rights.[34] Investor-protective provisions in agreements which

25. Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13(4) J. OF INT'L ECON. L. 1037, 1039 (2010).

26. *Id.*

27. Howard Mann, *Reconceptualizing International Investment Law: Its Role in Sustainable Development*, 17 LEWIS & CLARK L. REV. 521, 532–33 (2013); United Nations Conference of Trade & Development, *Fair and Equitable Treatment: A Sequel, UNCTAD series on Issues in International Investment Agreements II* (2012), 2 UNCTAD/DIAE/IA/2011/5, http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf ("this approach poses special challenges for developing countries where the State may be required to intervene in the economy and introduce legislative or regulatory changes more frequently or of a greater magnitude.").

28. Howard Mann, *Reconceptualizing International Investment Law: Its Role in Sustainable Development*, 17 LEWIS & CLARK L. REV. 521, 532–33 (2013); United Nations Conference of Trade & Development, *Fair and Equitable Treatment: A Sequel, UNCTAD series on Issues in International Investment Agreements II* (2012), 2 UNCTAD/DIAE/IA/2011/5, http://unctad.org/en/Docs/ unctaddiaeia2011d5_en.pdf.

29. LUKE ERIC PETERSON & KEVIN R. GRAY, INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND IN INVESTMENT TREATY ARBITRATION 5 (Int'l Inst. for Sustainable Dev. ed., 2003).

30. Spears, *supra* note 25, at 1043.

31. BONNITCHA, *supra* note 7, at 7.

32. BONNITCHA, *supra* note 7, at 7.

33. Spears, *supra* note 25, at 1037.

34. These rights considered are defined by the International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR]. Sustainable development requires both FDI and human rights protections, but when done properly can advance ICESCR rights. FDI is therefore crucial to developing nations' ability to advance economic rights. *See* Megan Wells Sheffer,

provide the basis for investor-state claims cannot be entirely eliminated.

Most states concerned about the consequences of engaging in IIAs are not abandoning their agreements in whole. Many recognize that IIA's need not be inherently detrimental to human rights when drafted in a manner which does not restrict domestic policy space. These states are now developing model agreements to guide future IIA drafting in line with UNGP recommendations. Guided by the UNGP, states, specifically developing nations, should be able to take full advantage of the positive benefits that IIAs have on advancing development without succumbing to a restriction on their ability to regulate human rights abuses. This is especially true when those abuses are prohibited by conventions comprising the International Bill of Human Rights,[35] and those enshrined in ILO conventions enumerating protections for children, minorities, and laborers.[36]

III. WHAT ARE IIAS?

a. *The History of IIAs*

Over the past quarter-century, the number of BITs that comprise the patchwork of the international investment policy regime has skyrocketed;[37] UNCTAD reports less than 500 agreements before 1980, 1,322 in 1995, 2,495 in 2005, and over 3,000 today.[38] More than 450 investor-state arbitrations claiming provisions in BITs have been filed,[39] but formal investment treaties had their start with humble beginnings. The first formal BITs were intended to guarantee foreign investors protections easily justified as necessary to establish business; such as the right to freedom from unjustified appropriation by the state,[40] the right to pay only the market tax rate,[41] and the right to operate free of discrimination on the basis of

Bilateral Investment Treaties: A Friend or Foe to Human Rights?, 39 DENV. J. INT'L L. & POL'Y 483, 483 (2011).

35. International Covenant on Civil and Political Rights (ICCPR), Mar. 23, 1976, 999 U.N.T.S. 171 (1966); International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

36. Freedom of Association and Right to Organise Convention; Right to Organise and Collective Bargaining Convention; Forced Labour Convention; Abolition of Forced Labour Convention; Minimum Age Convention; Worst Forms of Child Labour Convention; Equal Remuneration Convention; Discrimination (Employment and Occupation) Convention.

37. PETERSON & GRAY, *supra* note 29, at 7.

38. United Nations Conference on Trade & Development, International Investment Agreements Navigator (2013), http://investmentpolicyhub.unctad.org/IIA; Stiglitz, *supra* note 24.

39. Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423, 426 (2013).

40. The guarantee of protection from undue appropriation or nationalization without compensation exists in all BITs and recommended by all models, albeit with slightly varying language. *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty, https://www.state.gov/documents/organization/188371.pdf (2012) [hereinafter U.S. Model].

41. National Treatment is guaranteed by all BITs and recommended by all Models. *See, e.g.*, Norway Draft Agreement for the Promotion and Protection of Investment,

nationality. Some scholars argue that BITs are a form of human rights protection in that they typically guarantee freedom from discrimination due to nationality.[42] Other scholars highlight the use of treatment provisions during colonial times as evidence of their sinister roots in catalyzing the exploitation of Africa, the Americas, and Asia.[43]

b. Do IIAs Increase FDI?

What impact, if any, do IIAs have on FDI? In the commentary to the UNGP, the SRSG expressly acknowledges that "[e]conomic agreements concluded by states...such as [BITs]...create economic opportunities for States[,]"[44] but does this opportunity correlate directly to increasing FDI? Numerous quantitative studies have measured changes in FDI inflows relative to IIA proliferation, and the findings are mixed.[45] The prevailing view amongst them is that the relationship between IIAs and FDI is either unclear,[46] or a stalemate.[47] Other studies have found a positive relationship between IIAs and FDI, but only when the study takes into account other specific factors.[48] Some argue that, even in a vacuum, a nation who executes more IIAs will see a resulting gross increase in FDI.[49]

As is often true, questioning whether IIAs directly stimulate FDI 'when all other things are equal' is irrelevant, because all things are not equal in this case; the global economy and political system does not exist in vacuum. Capital-importing countries, frequently developing nations with weak to moderate domestic human rights protections, can be effectively trapped in a 'prisoner's dilemma'.[50] Conceptually, it would be better for all developing nations with 'evolving' human rights and labor standards to collectively refrain from engaging

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http://investmentpolicyhub.unctad.org/Download/TreatyFile/2873 (2007) [hereinafter Norway Model].

42. *See* Nicholas Klein, *Human Rights and International Investment Protection: Investment protection as Human Right?*, 4(1) GOETTINGEN J. OF INT'L L. 199, 204–09 (2012).

43. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 1-2, (2d ed. 2012).

44. UNGP, *supra* note 1, art. 9.

45. BECKY CARTER, HELPDESK RESEARCH REPORT: THE INFLUENCE OF INTERNATIONAL COMMERCIAL AND INVESTMENT LAW AND PROCEDURE ON FOREIGN INVESTMENT AND ECONOMIC DEVELOPMENT/GROWTH 2 (Governance & Social Development Resource Centre 2013).

46. Jonathan Bonnitcha, *Outline of a Normative Framework for Evaluating Interpretations of Investment Treaty Provisions*, EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION (Chester Brown & Kate Miles eds., 2011).

47. NATHALIE BERNASCONI-OSTERWALDER ET. AL., INVESTMENT TREATIES AND WHY THEY MATTER TO SUSTAINABLE DEVELOPMENT: QUESTIONS & ANSWERS (2012).

48. *See* CARTER, *supra* note 45, § 2.1.

49. *See* Hallward-Dreimeier, *supra* note 8.

50. 'Prisoners dilemma' describes a decision-making scenario wherein a group of actors would be collectively better off if they *ALL* choose 'box a'. However, if any one actor chooses 'box b' that actor will have an advantage over all other actors. The scenario adds a caveat that while collectively all actors are better with 'box a,' IF all actors choose 'box b,' then all actors lose their competitive advantage gained through collective selection of 'box a,' AND it nullifies the individual advantage gained by the singular actor in breaking rank and choosing 'box b'.

in IIAs to avoid the 'chill'. However, if one state breaks this collective agreement it would gain a competitive advantage compared to the rest. Similarly, any nation lacking near equal investor protections relative to its regional counterparts would be perceived by investors as relatively more risky to invest in, and hence could receive less investment.[51] The prisoners' dilemma reality of IIAs extends to other parts of the decision making process as well, and is a concern in regards to the 'downward regulatory spiral.'[52] It is admitted that the relevance of IIAs to this analysis does not rest wholly on their efficacy; IIAs exist and will continued to be proliferated.

IV. FUNDAMENTAL PROVISIONS IN TRADITIONAL BITS

The core principles of any BIT are codified in provisions offering protections to investors relating to the treatment of their investment in the host state. These provisions are the most frequently cited by investors in arbitration claims,[53] and are the most controversial.[54] Most agree that the unqualified terms of art[55] in these provisions, such as favorable treatment and fair and equitable treatment (FET), lead to inconsistent interpretations by tribunals and contribute to the restrictions on policy space that states with traditional BITs face. Other scholars disagree that regulatory space in treatment provisions has any impact on how investors select a location.[56]

a. National Treatment and Most Favored Nation

National treatment provisions guarantee investors treatment equal-to, or better than, local investors, and include both pre-investment and post-investment protections. MFN provisions guarantee investors' treatment equal to any non-party third-state investors. These two provisions can be included in an IIA separately, or together as shown here: "[e]ach Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favorable than that accorded either to investments of its *own investors* or *investors*

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51. *See* JACOB, *supra* note 8.

52. 'Downward regulatory spiral' describes the condition of states dismantling domestic reforms in order to attract FDI and is discussed in Section III herein.

53. BONNITCHA, *supra* note 7, at 1.

54. *See* South African Development Council Model Bilateral Investment Treaty, art. 4 (2012), http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf (recommending the non-inclusion of an MFN provision and the adoption of a different standard to FET for minimum treatment) [hereinafter SADC MODEL BIT or SADC MODEL].

55. 'Terms of art' are ambiguous phrases which do not clearly infer intent of the drafters to arbitral panels, including 'Fair and Equitable Treatment' and 'Full Protection and Security.' Thomas Innes, Stepoe & Johnson LLP, The Adoption of Terms of Art in Bilateral Investment Treaties, Panel Address at Sutton Colloquium at the University of Denver Sturm College of Law (Nov. 15, 2014).

56. Tomer Broude, Yorman Z. Haftel & Alexander Thompson, *Who Cares About Regulatory Space In BITs? A Comparative International Approach*, HEBREW UNIV. OF JERUSALEM LEGAL STUD. RES. PAPER SERIES, No. 16-41, at 8, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773686.

of any third state."[57]

b. Minimum Standard of Treatment: FET and FPS

Minimum standard of treatment provisions, sometimes referred to 'absolute standard of treatment', typically include an FET requirement and a 'full protection and security' (FPS) requirement. The FET standard is designed to be an absolute standard of treatment, unrelated to how other investments are treated by the host state.[58] Minimum standard of treatment provisions are the most controversial provisions in traditional IIAs because they are commonly cited by investors in arbitrations, and have proven to be a successful basis for claims.[59] FET and FPS provisions permit arbitral tribunals to "look not just at the change in value[,] but also at the surrounding circumstances"[60] of a potential violation of an investors' rights.

The origin of FET comes from a 1926 international arbitration, *Neer v. the United Mexican States*,[61] a commonly cited decision in modern arbitrations. The *Neer* tribunal stated that:

> [I]n order to constitute an international delinquency, [treatment of a foreign investment] should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.[62]

In an IIA context, the first uses of FET and FPS were in early international economic agreements such as the Havana Charter for an International Trade Organization, the US Friendship, Commerce and Navigation treaties, and the OECD Draft Convention on the Protection of Foreign Property, all developed between 1948 and 1967.[63] These agreements merely stipulate that parties shall "ensure fair and equitable treatment to the property of nationals of the other parties," and that "[s]uch property shall be accorded the most constant protection and security."[64] FET and FPS provisions which proliferated in IIAs over the past 50 years are simply not as robust as the *Neer* standard. They often mirror the OECD Draft Convention, merely restating unqualified FET and FPS terms without

57. A common example of a National Treatment provision. This example from Agreement between the Government of the Republic of India and the Government of the Republic of Bulgaria for the Promotion and Protection of Investments art. 4:2, India-Bulg., Oct. 29, 1998, http://investmentpolicyhub.unctad.org/IIA/country/96/treaty/678 (emphasis added).

58. United Nations Conference on Trade and Development, *supra* note 27, at 6.

59. Eric De Brabandere, *Human Rights Considerations in International Investment Arbitration*, THE INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS: LEGAL AND PRACTICAL IMPLICATIONS 17 (Malgosia Fitzmaurice & Panos Merkouris eds., 2012).

60. Stiglitz, *supra* note 24, at 39.

61. L. F. H. Neer v. United Mexican States, IV R.I.A.A. 60, Opinion of Commissioners, ¶ 6 (Oct. 15, 1926).

62. *Id.* ¶ 4.

63. United Nations Conference on Trade and Development, *supra* note 27, at 5.

64. *Id.*

reference or definition. Today, there is no generally accepted definition of FET.

The China-Myanmar BIT provides the simplest example of a traditional unqualified FET provision: "Investments of investors of each Contracting Party shall all the time be accorded *fair and equitable* treatment in the territory of the other Contracting Party."[65]

Relying on traditional BIT provisions, modern arbitral tribunals have held FET to be a widely-accepted principle "encompassing such fundamental standards as good faith, due process, non-discrimination, and proportionality."[66] Tribunals have held that regulatory measures which go beyond an investor's 'legitimate expectations' to one of the fundamental standards listed above can violate the FET requirement. Investors have claimed a range of harms under the legitimate expectations standard, including that a state failed to provide a stable legal or regulatory system,[67] that treatment was unfair and arbitrary due to unintended bureaucratic inefficiencies which caused financial harm to an investment,[68] or that a state had not acted in 'good faith' when making a regulatory policy decision.[69]

Judgments which penalize a state in reliance on this form of 'good faith' requirement can have the effect of repudiating states who attempt to enhance environmental or human rights regulations, or those which make adjudicatory decisions for the well-being of its citizens.[70] FET provisions traditionally require that states bear the burden of proof in demonstrating good faith.[71] Most tribunals only rule in favor of a state when the "record shows that the [state] treated the Claimant and its investment in good faith, and on equal footing."[72]

Some tribunals, however, have interpreted the standard to be even more investor friendly; in *Tecmed*, a tribunal awarded the investor just over US $5 million because the Mexican government refused to renew an operating license for their landfill, which was polluting drinking water in a local community.[73] The tribunal held that "a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[74] This expansion of the good faith standard places significant burden on states to not only *refrain* from acting in 'bad

65. Agreement between the Government of the People's Republic of China and the Government of the Union of Myanmar on the Promotion and Protection of Investments, China-Myan., art. 3, Dec. 12, 2012, http://investmentpolicyhub.unctad.org/Download/TreatyFile/762 (emphasis added).

66. MTD Equity Sdn. Bdh. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶ 109 (May 25, 2004).

67. Frontier Petrol. Services Ltd. v. The Czech Republic, UNCITRAL, Final Award, ¶ 261 (Nov. 12, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0342.pdf.

68. MTD Equity, *supra* note 66, ¶ 189.

69. Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 153 (May 29, 2003).

70. *See* United Nations Conference on Trade and Development, *supra* note 27.

71. *See id.*

72. Chemtura Corporation v. Government of Canada, UNCITRAL, Award, ¶ 236 (Aug. 2, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf.

73. Tecnias Medioambientales Tecmed S.A., *supra* note 69.

74. *Id.* ¶ 153.

faith', but to *actively* engage in 'good faith' actions. This is one way unqualified BIT provisions can lead to interpretations with the potential to restrict a state's policy space.

Additionally, in *Tecmed*, the investor had expected the government was aware of the long-term investment required to operate a landfill, and had assumed that the investment and initial approval would lead to a guaranteed re-approval of the operating license at each scheduled renewal period.[75] The government's revocation of the operating license after they discovered the pollution was cited as evidence of action contrary to the investors "legitimate expectations[.]"[76] It is possible this decision has had a restricting effect on the Mexican government's inclination to make changes to regulations which affect other similar industrial operations, even if they are found to be polluting communities, placing citizens in danger. This is an example of indirect regulatory chill.

When determining whether a regulation constitutes unfair or inequitable treatment, tribunals also consider the 'proportionality' of the harm suffered as compared to the benefit advanced by the regulatory measure. The tribunal in *Occidental* applied a case-by-case test "balancing the interests of the state against those of the [investor], to assess whether the particular sanction is a proportionate response in the particular circumstances."[77] The complication with this is that multinational enterprises (MNE's) backing foreign investment are often well equipped to file claims against states regardless of whether the expectation is of 'lower level punishments' that the court suggested may pass scrutiny as proportionate when there is no direct causal link between the act that the law seeks to punish and the harm that the law seeks to prevent.[78]

c. *Stabilization Clauses*

Other than these core provisions, there are other types of treatment provisions which distinctly affect government policy space, the most vilified being stabilization clauses. Typically inserted in private direct contracts between investors and states, and rarely included in state-state IIAs, these provisions guarantee that investment will be exempt from almost all new governmental regulations regardless of the reason for the measure, or that they will be compensated for any loss of income resulting from such a change.[79] These provisions are some of the most damaging to policy space as they explicitly, and

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75. *See id.*

76. *Id.* ¶ 88.

77. Occidental Petrol. Corp., *supra* note 22, ¶ 417.

78. While corporations are undeterred by low-level penalties, they are often conscious of their image and may choose to employ CSR strategies themselves. Unfortunately, often enough, only the worst corporate violators are exposed. Stronger penalties are required to deter the worse violators who have less of a concern for corporate image, including those in the extractives, manufacturing, and construction industries.

79. *See* Titus Edjua & Antony Crockett, *Human Rights Not Negotiable: Stabilization Clauses and Human Rights*, 28 INT'L FIN. L. REV. 50 (2009).

by design, prohibit regulation. While demonstrably harmful, stabilization clauses are appropriately outside of the scope of this analysis because, first, they have faded from common use, and second, are not commonly included in state-state BITs.

V. INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND IIAS: WHICH LAW APPLIES?

What happens when there is a conflict of law between a BIT and another international treaty to which the responding state is a party? More simply put, do states' investment obligations supersede the states' other international treaty obligations? Some authors speak of a "presumption of compliance with international law[,]" which posits that "the treaty parties would not have intended that their agreement offends existing rules of international law."[80] However, arbitral tribunals have rarely ruled in this manner, holding that while a state may have a responsibility to regulate to the standard of its international obligations, "it equally is beyond a doubt that the state holds responsibility towards the foreign investor for the breach of the provisions of the investment treaty"[81] if remedy of a regulatory shortcoming causes the violation. Often this type of claim arises, and is most critical for state policy space, when a respondent state asserts, in defense of a claim, that a regulatory measure disputed by an investor was intended to comply with a human rights obligation.

The complex relationship between relevant international human rights obligations and obligations owed to investors under a BIT requires an analysis of what rights and obligations each assigns, and to whom. International human rights law, including the ICCPR[82] and ICESCR,[83] and customary international law (CIL)[84] such as the responsibility to protect (R2P),[85] *jus cogens*, and *erga omnes*,[86] primarily create rights for people and obligations for states. IIAs create rights only for investors, and obligations for states to protect investors and investments. As the

80. JACOB, *supra* note 8, at 28.

81. Brabandere, *supra* note 59, at 12.

82. ICCPR, *supra* note 35.

83. ICESCR, *supra* note 35.

84. BLACK'S LAW DICTIONARY (9th ed. 2014) ("International law that derives from the practice of states and is accepted by them as legally binding...This is one of the principal sources or building blocks of the international legal system.").

85. For more on R2P, *see, e.g.*, Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOR. AFF. 99, 102–03 (2002)

> The responsibility to protect implies a [state] duty to react to situations in which there is compelling need for human protection. If preventive measures fail to resolve or contain such a situation, and when the state in question is unable or unwilling to step in, then intervention by other states may be required.

86. *Jus cogens* are peremptory principles of international law that cannot be overridden by specific treaties between countries; that is: norms that admit of no derogation; they are binding on all states at all times, regardless of accession (e.g., prohibitions on aggression, slavery, and genocide). BLACK'S LAW DICTIONARY (9th ed. 2009)

SRSG wrote in 2007, international human rights treaties do not "impose direct legal responsibilities on corporations."[87] The responsibility to advance domestic human rights legislation and protect its citizens from harm is a responsibility that rests solely on state actors, which includes protecting citizens from harm caused by investors covered under a BIT.[88] It is easy to see how a conflict could arise between these obligations.

Some have questioned whether placing robust international legal obligations directly on investors would solve this dilemma. The SRSG himself, in referencing the *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights*,[89] said that criticism of applying direct responsibilities on businesses through international law was appropriate because international law has not been "transformed to the point where it can be said that the broad array international human rights attach direct legal obligations to corporations."[90] International law is also ill-equipped to place direct legal obligations on businesses because the international judicial and monitoring mechanisms available for enforcement of any potential direct obligations is lacking.[91] While the CSR movement, driven in the area of domestic regulation by states like India with its mandatory corporate philanthropy tax,[92] is gaining ground, it is still a largely voluntary regime, and often national in context, not international.

While there is a lack of consensus amongst tribunals on when a state's international human rights obligations will pre-empt obligations under an investment agreement or excuse a violation of a BIT provision, preemptory *jus cogens* are an exception to the rule. In a case where a term in a BIT were interpreted to award a corporation damages as a result of a policy measure designed to prevent *jus cogens* violations, the Vienna Convention on the Law of Treaties would invalidate such interpretation.[93] Vienna Convention Article 53 states that "A treaty is void if, at the time of its conclusion, it conflicts with a

87. Report of the SRSG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc. ¶ 44, A/HRC/4/035 (Feb. 9, 2007). It should also be noted that corporations are now, as a result of some national CSR laws, and for other gross violations, being held accountable for actions which violate human rights, but this is not yet a common occurrence.

88. Patrick Dumberry & Gabrielle Dumas-Aubin, *When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration*, 13 J. WORLD INV. & TRADE 349, 352 (2012).

89. UN Sub-commission on the Promotions and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Respect to Human Rights*, E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter U.N. Draft Norms].

90. Interim Report of the Special Representative of the Secretary-General of the United Nations on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises E/CN.4/2006/97 (Feb. 22, 2006).

91. *See* Castellino & Bradshaw, *Sustainable Development and Social Inclusion: Why a Changed Approach is Central to Combating Vulnerability*, WASH. INT'L L. J., 459, 467 (2015).

92. *See* Ananda Das Gupta, *Implementing Corporate Social Responsibility in India: Issues and the Beyond*, IMPLEMENTING CORPORATE SOCIAL RESPONSIBILITY: INDIAN PERSPECTIVES (Ray & Raju eds., 2014) (India has mandated a 2% tax on all businesses for corporate philanthropy purposes).

93. *See* Vienna Convention on the Law of Treaties, Jan. 27 1980, 1155 U.N.T.S. 331 (1980).

peremptory norm of general international law."[94] A case presenting such a scenario is unlikely to occur, however it does highlight an interesting distinction; provisions within international human rights treaties which have grown to become preemptory norms, such as ICCPR Article 8 prohibiting slavery, torture, and forced labor,[95] supersede any BIT-based right an investor could claim if conflicting. Additionally, investors may be held directly accountable for violations of *jus cogens* norms these norms under international law.[96]

While conflict of law issues are fundamental to this discussion, there are very few arbitral tribunals who have ruled directly on them, most seeking to decide such cases on procedural issues.[97] In *Azurix Corp. v. the Argentine Republic*, the tribunal gave no consideration to the fact that Azurix failed to make repairs of a water treatment facility causing an outbreak of dangerous algae in the provincial water system,[98] which Argentina claimed was a "violation of its citizens' right to water[.]"[99] The tribunal ultimately did not directly address Argentina's human rights claim, or provide a holding on the conflict of law issue. The arbitrators merely issued a judgment in favor of the corporation on the basis of unfair and arbitrary treatment under an FET standard.[100] The tribunal did declare a position in the conflict of law debate, albeit unintentionally; by ignoring the petitioners claim relating to human rights violations the tribunal made it clear that it is acceptable for arbitrators to ignore other obligations outside the scope of the IIA's express mandate.

In the few cases which do affirmatively consider human rights obligations, most tribunals "seem to be very cautious in elevating human rights laws to the same status of investment protections[,]"[101] and are "are generally reluctant to accord significant weight to human rights."[102] In fact, "no investment tribunal has absolved a [state] that has encountered inconsistent human rights obligations from its investment obligations, or reduced the amount of compensation paid."[103] While it is true that as a general policy "[s]tates are not liable to pay compensation to a

94. *Id.*

95. ICCPR, *supra* note 35, art. 8.

96. ICCPR, *supra* note 35, art. 8.

97. JACOB, *supra* note 8, at 30.

98. Azurix v. Argentina, ICSID Case No. ARB/01/12, IIC 24, Award, ¶ 124 (July 14, 2006).

99. U.N. Committee on Economic Social and Cultural Rights, General Comment No. 15, ¶ 39–44, U.N. Doc. E/C.12/2002/11 (Nov. 29, 2002).

100. *See* Azurix, *supra* note 98, at Executive Summary. Also, in a similar case against Argentina, Vivendi v. Argentina, ICSID Case No. ARB/03/19, Decision on Liability (July 30, 2010), the tribunal did not rule on the conflict of law issue. These cases are some of the primary reasons Argentina is currently voiding their BITs.

101. Claire Cutler, *Human rights Promotions through Transnational Investment Regimes: An international Political Economy Approach*, 1 POLITICS & GOVERNANCE 16, 27 (2013).

102. Moshe Hirsch, Int'l L. Forum at the Hebrew Univ. of Jerusalem, *The Interaction between International Investment Law and Human Rights Treaties: A Sociological Perspective*, Research Paper no. 06-13, at 228 (2013).

103. *Id.* at 218.

foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare[,]"[104] few arbitral tribunals are keen to adopt this holding if language in the agreement creating such a protection is not explicit.[105]

In a slight exception to the rule, some recent tribunals have endorsed the 'clean hands' doctrine,[106] giving the English common-law rule weight in arbitral proceedings. The doctrine may be successfully cited as a state defense when investors are alleged to have directly contributed to a human rights violation.[107] If a tribunal comes to the conclusion that an investor has committed a human rights violation in relation to the disputed investment, it could find the investor's claim inadmissible as a matter of jurisdiction.[108] A number of tribunals have denied that they have the jurisdiction to hear claims on the basis inadmissibility due to lack of 'clean hands' for committing acts such as fraud and bribery in the course of the investment.[109] This should assuage some human rights concerns, but as the application of this doctrine is not yet widespread states may still fear that investors with poor human rights records may be awarded damages as a result of a suit alleging inequitable regulation of their practices, leading to a regulatory chilling effect.

One scholar contends that, from a sociological perspective, it is "not surprising that investment tribunals are generally reluctant to accord significant weight to human rights treaties in international investment law[,]" because the "relationships between the social settings involved in human rights laws and investment laws reveal a considerable socio-cultural divide."[110] It is possible that including in BITs explicit references to international human rights treaties, or to international law in general, could bridge not only the socio-cultural gap between these two legal regimes, but also reduce the potential conflicts between them.[111] Additional instruction in the language of IIAs themselves is necessary to direct tribunals to engage with international human rights instruments in the case of a conflict, and in the case of allegations of violations by investors.

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104. Saluka Invs. BV v. Czech Republic, UNCITRAL Arb., Partial Award, ¶ 255 (Mar. 17, 2006).

105. BITs which include this language explicitly in the general exceptions provisions are discussed in section VI.

106. Patrick Dumberry & Gabrielle Dumas-Aubin, *How to Impose Human Rights Obligations on Corporations Under Investment Treaties? Pragmatic Guidelines for the Amendment of BITS*, Y.B. ON INT'L L. & POL'Y 575, 575 (2011-2012) (Karl P. Sauvant ed., 2012).

107. *Id.*

108. *Id.* at 589.

109. *See* Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, Award ¶ 96 (Aug. 27, 2008); Inceysa Vallisolentana, S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award ¶ 92 (Aug. 2, 2006); World Duty Free Company Limited v. Kenya, ICSID Case No. ARB/00/7, Award ¶ 157 (Oct. 4, 2006).

110. Hirsch, *supra* note 102, at 228–29.

111. Examples of how this can be accomplished follow in section VI.

VI. UNGP ARTICLE 9

UNGP Article 9 specifically recommends that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts."[112] The SRSG's commentary agrees that while IIAs create economic opportunities for states, "they can also affect the domestic policy space of governments."[113] As an example, the commentary explains that "the terms of [IIAs] may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so."[114] The SRSG recommends that states retain "adequate policy and regulatory ability to protect human rights"[115] when drafting BITs, while balancing that with the need to provide "necessary investor protections."[116]

Some scholars argue that the UNGP was a failure, and fault the SRSG for catering to industry efforts to stall the progress of sustainable development efforts.[117] These scholars claim that by not creating positive obligations on investors, the UNGP will not be effective in advancing human rights. Why does the UNGP merely require that states maintain 'domestic policy space' to regulate human rights, and not recommend that IIA's include requirements that states implement specific regulations or that investors maintain certain standards? The answer is two-fold.

First, positive obligations exist in other international human rights agreements, such as the ICCPR[118] and the ICESCR,[119] which are open for accession, and which many nations have eruditely signed. States who accept and accede to international human rights treaties are typically required to maintain domestic regulations implementing the standard set by the provisions of the agreement. For nations not bound by these agreements, *jus cogens* and *erga omnes* still apply.[120] In both situations states are bound by these obligations, however the duty to correct lax domestic enforcement is entrusted in the UN and the UN Security Council,[121] not in investor-state arbitral tribunals. From the perspective of

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112. UNGP, *supra* note 1, art. 9.

113. *Id.* art. 9, Commentary.

114. *Id.*

115. *Id.*

116. *Id.*

117. ICCPR, *supra* note 35.

118. Positive obligations in the ICCPR include; the regulations on use of the death penalty in art. 6, the prohibition on torture in art. 7, and the prohibitions on slavery, servitude, and compulsory labor in art. 8. ICCPR, *supra* note 35.

119. Positive obligations in the ICESCR include; the right to work in art. 6, the right to collective bargaining art. 8, and the requirement of improving all aspects of environmental and industrial hygiene in art. 12. ICESCR, *supra* note 35.

120. *See* Vienna Convention on the Law of Treaties, Jan. 27 1980, 1155 U.N.T.S. 331 (1980).

121. *Id.*

international law, positive obligations in IIA's would allow arbitral tribunals to rule on subject matter far outside of the scope of their mandates.

Second, each state is a sovereign nation with the power to exercise control over its territory,[122] and hence is generally free to select its own regulatory regime. Specific recommendations from the UNGP could invade this right. The SRSG selects the term policy space as a means of recommending the implementation of language into IIA's which will reduce restrictions placed on a host states ability to make legitimate policy decisions regarding human rights regulation, while not mandating that any specific regulatory changes be made. The choice is left to each state to develop their domestic regulations in compliance with international human rights standards.

In an ideal-world, each state would be an efficient, effective actor, with the power to regulate and enforce domestic human rights regulations, and the will do to so. This ideal state would always fulfill its internationally binding obligations to protect its citizens as required by the international instruments they are party to, and would therefore would be best positioned to regulate investors operating within in its sovereign territory.[123] UNGP Article 1 even recognizes the state responsibility to protect as a core duty which guides the remainder of the recommendations.[124]

The ideal scenario for a developing state which completely and effectively implements UNGP Article 9 recommendations into its BIT regime is as follows. The developing nation proliferates a progressive BIT regime, effectively catalyzing growth in FDI inflows, kick-starting its economy. As a result of the FDI boom, the state's available financial resources increase and are allocated to the development and enforcement of domestic regulations. State citizens then enjoy increased quality of life resulting from economic development coupled with increased protection from harms caused by investment.

In the current geopolitical system, some states can effectively regulate and enforce domestic prohibitions on human rights abuses, but many cannot.[125] "Because of the overwhelming economic power"[126] of some foreign investors, many states, particularly developing nations, may not have the resources to effectively regulate or enforce human rights laws.[127] Additional capacity building and resource sharing is required to overcome this gap.

The UNGP recommendation expressly allows for a case-specific and differentiated analysis of policy space to be done by each state internally. It refrains from infringing on state sovereignty or creating obligations which cannot be adequately implemented. If policy space is the answer, the real question then

122. U.N. Charter art. 2, ¶ 1.
123. Dumberry & Dumas-Aubin, *supra* note 88, at 352.
124. UNGP, *supra* note 1, art. 1.
125. Dumberry & Dumas-Aubin, *supra* note 88, at 371.
126. *Id.* at 352.
127. *Id.*

becomes, what is the best way for states to effectively heed the UNGP Article 9 recommendations and maintain domestic policy space to regulate human rights when engaging in IIAs?

VII. MAINTAINING POLICY SPACE IN IIAS

There are numerous ways to ensure that when engaging in an IIA a state protects its domestic policy space to regulate human rights, some of which are evidenced in state practice.[128] Structurally, states can renegotiate existing BITs, void their BITs and draft entirely new ones, or implement interpretative addendums to existing treaties that clarify provisions.[129] Interpretive language can be inserted into provisions to clarify ambiguous terms of art; traditional provisions can be expanded to provide additional protections for human rights and policy space; additional provisions can be added which explicitly protect governmental policy space; and, most controversially, positive obligations can be inserted into BITs which place direct responsibilities on corporations and states to protect human rights. The following sections present various methodology, as utilized by some existing IIAs and models.

Section A briefly questions the efficacy of two untenable options which have been recommended; section B discusses additional language that can be inserted into agreements; section C analyzes interpretive language that can be included in troublesome provisions; section D considers general exceptions provisions; section E highlights potential additional provisions which can be added to bolster the treaty, although not all are recommended for use therein.[130]

a. Untenable Options

There are several unrealistic and untenable methods which have been suggested to universalize international investment law in a way that would reduce the regulatory chill and assist states in better maintaining domestic policy space to regulate human rights. A global Multilateral Agreement on Investment (MAI) has been proposed and rejected twice, most recently one that was developed by the Organization for Economic Co-operation and Development (OECD) in 1995.[131] A global MAI, complete with robust provisions protecting domestic policy space, would go a long way to alleviating the regulatory chill. A global MAI is untenable, simply because all nations have different needs, and as recent history shows, even smaller 'dozen-nation' IIAs such as the Trans-Pacific Partnership Agreement take years to develop.[132]

128. JACOB, *supra* note 8, at 33.

129. JACOB, *supra* note 8, at 33.

130. This section proceeds without distinction between 'void and re-draft' and 'renegotiation' methods of adapting agreements.

131. Organization for the Economic Co-operation and Development, Multilateral Agreement on Investment Draft Consolidated Text, DAFFE/MAI(98)7/REV1, 95 (Apr. 22, 1998) (not enacted).

132. IAN F. FERGUSSON ET AL., CONG. RESEARCH SERV., 7-5700, THE TRANS-PACIFIC PARTNERSHIP AGREEMENT (TPP): IN BRIEF, summary (Feb. 9, 2016) (It took 5 years of negotiation to

Others have suggested amending the International Centre on the Settlement of Investment Disputes between States and Nationals of other States Convention (ICSID convention), which arbitrates a vast majority of investment disputes, in order to allow tribunals to consider international human rights law when hearing cases.[133] Most scholars agree that amending this treaty is 'nearly impossible', as it has not been changed since 1965 and has resisted other more spirited attacks on its severe rigidity.[134]

This is not to say that neither of these changes cannot be accomplished; only that it would be exceedingly difficult.

b. Preambular Language

Preambular language referencing international human rights treaties, principles of international law, or other international obligations may help states maintain domestic policy space in IAAs. While preambular language is not binding, it can be important in arbitral interpretation.[135] It allows tribunals to adopt an approach that places more weight on international human rights treaties, even if not explicitly controlling.[136]

A preamble proffered by the South African Development Community Model Bilateral Investment Treaty (SADC Model) includes a recognition that sustainable development led by FDI can encourage the "furtherance of human rights and human development."[137] It also states that

> [r]eaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives, and—taking into account any asymmetries with respect to the measures in place—the particular need of developing countries to exercise this right[.][138]

This paragraph highlights three important things. First, that states have a *right to regulate* and meet national policy objectives, explicitly creating state rights under the IIA. Second, that there may be *asymmetries* in domestic legislation which need to be corrected, noting that investors should expect future regulation to shore-up those asymmetries. This language is adapted from the World Trade Organization's General Agreement on Trade in Services (WTO GATS),[139] which

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agree on a final publishable draft of the TPP); MAUDE BARLOW & TONY CLARKE, MAI AND THE THREAT TO AMERICAN FREEDOM (1998).

133. Dumberry & Dumas-Aubin, *supra* note 88, at 358.

134. *Id.* at 578; CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY art. 65 (2d ed. 2009). Also, while this author (I) notes that it is illogical, and usually failure-inspiring, to assume that anything which has not been accomplished in a long time is impossible, it is justifiable in this situation.

135. JACOB, *supra* note 8, at 34.

136. Dumberry & Dumas-Aubin, *supra* note 88, at 359.

137. SADC Model, *supra* note 54.

138. *Id.* (emphasis added).

139. World Trade Organization, General Agreement on Trade in Services (GATS).

many developed nations are party to, and therefore "is likely to be universally accepted."[140] Third, that this is especially true for *developing states* who are just beginning to regulate.

The preamble to the Model International Agreement on Investment for Sustainable Development (IISD Model)[141] makes no explicit reference to human rights, instead focusing on sustainable development and existing international law. It begins by stating that the goal of the agreement is to promote *sustainable development* through investment,[142] defining sustainable development as per the 1992 Rio Declaration.[143] The IISD Model preamble continues by "affirming the progressive development of international law and policy on the relationships between enterprises and host governments as seen in...the [ILO Declaration],[144] the OECD Guidelines for Multinational Enterprises,[145] and the [UN Draft Norms].[146] The preamble adds that it is "seeking an overall balance of rights and obligations in international investment between investors, host countries and home countries,"[147] which is language that strikes right at the heart of the issue while leaving appropriate room for states and investors to perceive both benefits and obligations.

The clear majority of other national model agreements do not explicitly assert human rights or international legal instruments in the preamble. The US Model states that it desires to increase investment "in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights."[148] State regulation of international obligations under labor treaties is crucial to advancing sustainable development, and they are likely be applicable in arbitral disputes, however preambular language of this kind does not create an explicit recognition that labor rights supersede investor rights under an IIA.

Other nations' model agreements are less robust. The Canadian Model BIT preamble has just one provision which references a desire to promote sustainable

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140. *Id.*

141. International Institute for Sustainable Development, Model International Agreement on Investment for Sustainable Development (2005) [hereinafter IISD Model] (developed by the International Institute for Sustainable Development [hereinafter IISD]).

142. *Id.* at preamble.

143. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol.I), Annex I (Aug. 12, 1992) (sustainable development is defined as "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.").

144. International Labor Organization Declaration on Fundamental Principles and Rights at Work and its Follow-up, Annex 1, 27A.Doc/v3 (June 19, 1998).

145. Organization for Economic Co-operation and Development, Guidelines for Multinational Enterprises (2008).

146. U.N. Draft Norms, *supra* note 89.

147. IISD Model, *supra* note 141, at preamble.

148. SADC MODEL BIT, *supra* note 54.

development,[149] the German Model BIT preamble merely recognizes that encouraging investment is "apt to stimulate...the prosperity of both nations[,]"[150] and the French Model BIT preamble has no reference to sustainable development, human rights, or labor rights.[151]

Other European nations have been more inclusive when drafting model BIT preambles. One of the most progressive national model BITs, which was never formally adopted, is the 2007 Norwegian Draft Model BIT. Its preamble has a number of paragraphs which collectively highlight the importance of "health, safety, and the environment[,]" "internationally recognized labor rights[,]" "corporate social responsibility [(CSR)][,]" "obligations under international law[,]" "human rights and fundamental freedoms[,]" "principles set out in the [UN] Charter and the [UDHR][,]" and "provisions of international agreements relating to the environment[.]"[152] The breadth of its preambular reference to human rights and international law may have been why this model was never formally adopted.

The Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area (COMESA IA) is one of the most progressive active IIAs.[153] It is in use by nations in the Southern African regional association, including South Africa. In preface to its 'Part Two', which contains substantive rights and obligations of investors, the COMESA IA expressly requires an "overall balance of rights and obligations between investors and Member States."[154]

Preambular language is effective at presenting the object and purpose of the treaty, and may be considered by arbitral tribunals when interpreting the intent of ambiguous language in a provision of an IIA. Most importantly however, it is, invariably, non-binding. For a state to effectively maintain domestic policy space to regulate human rights, it must look beyond the preamble of the IIA.

c. Interpretive Language

Several progressive BITs and IIAs include additional interpretive language defining the intended scope and meaning of BIT provisions. Frequently, this language is added to traditional treatment provisions to clarify ambiguous terminology and standards. Interpretive language is most effective in defining and clarifying language in treatment provisions.

149. Canada Model Treaty for the Promotion and Protection of Investments (2004) [hereinafter Canada Model].

150. German Model Treaty Concerning the Encouragement and Reciprocal Protection of Investments (2008) [hereinafter German Model].

151. Draft France Model Agreement on the Reciprocal Promotion and Protection of Investments (2008) [hereinafter France Model].

152. Norway Draft Agreement for the Promotion and Protection of Investment (2007) [hereinafter Norway Model].

153. Common Market for Eastern and Southern Africa, Investment Agreement for the COMESA Common Investment Area art. 11, Rmm/(07) (2007) [hereinafter COMESA IA] (this agreement is progressive throughout its text).

154. *Id.*

1. Interpretive Language in National Treatment and MFN

The Association of Southeast Asian Nations Comprehensive Investment Agreement (ASEAN CIA) requires host states to accord investors "treatment no less favourable than that it accords, *in like circumstances*, to its own investors[.]"[155] The language 'in like circumstances' "ensure(s) that a broad view is taken, rather than simply a narrow question of whether the investors are in the same or related or competitive sector."[156] This additional text "ensures the *reasons* for any measures can be fully considered" by tribunals.[157]

The limitation of the language 'in like circumstances' is that it leaves the interpretation of what 'like circumstances' should include to the discretion of the tribunal. The COMESA IA has the same language as the ASEAN CIA, but adds that "[f]or greater certainty, references to 'like circumstances' in paragraph 1 of this Article requires an overall examination on a *case by case* bases of all the circumstances of an investment."[158] It explains that the circumstances of an investment include; "its effects on third persons and the local community[,]" "effects on the [environment][,]" its sector, the "aim of the measure concerned[,]" the common regulatory process applied to the type of measure, and other factors.[159] Few modern BITs contain interpretive language as comprehensive as the COMESA IA.[160]

Some progressive national treatment and MFN provisions include additional language which limits the scope of application to specific investor actions. The Finland – Zambia BIT guarantees investors national treatment with respect only to "the acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments."[161] By limiting the scope of non-discrimination provisions within each clause the state can exclude claims to "existing or new measures that may be inconsistent with the non-discrimination obligations."[162] Similarly, many progressive national treatment and MFN provisions include additional qualified exemptions for non-conforming measures, taxation, and other international investment treaties to which the state may be a

155. Association of South East Asian Nations Comprehensive Investment Agreement art. 5, Feb. 26, 2009, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3095 [hereinafter ASEAN CIA or CIA] (emphasis added).

156. SADC MODEL, *supra* note 54, art. 4.

157. *Id.* (emphasis added).

158. COMESA IA, *supra* 153, art. 17 (emphasis added).

159. *Id.*

160. *E.g.*, Agreement for the Promotion and Protection of Investments, Can.-Kuwait, Sept. 26, 2011, 2014 Can. T.S. No. 2014/5, http://investmentpolicyhub.unctad.org/IIA/country/35/treaty/788 (The national treatment provision does include the language 'like circumstances,' but does not have any defining clause).

161. Agreement between the Government of the Republic of Finland and the Government of the Republic of Zambia on the Promotion and Protection of Investments, Fin.-Zam., art. III, ¶ 2, July 9, 2005, http://investmentpolicyhub.unctad.org/IIA/country/232/treaty/1552 (not in force).

162. SADC MODEL, *supra* note 54.

party.[163]

Other BITs explicitly list ways in which the state can be found to have provided 'treatment less favorable' to the exclusion of others possible ways. The Germany – Oman BIT list includes, among others, that treatment less favorable may include "unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country."[164]

For a state to effectively reduce restrictions on its domestic policy space regarding human rights obligations, the minimum language recommended for a national treatment or MFN clause would be something similar to US Model Article 3. This provision includes a 'like circumstances' requirement, limits the scope of the provision to the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment[,]" and has exceptions for regional government treatment.[165] National treatment and MFN provisions are not the only ones which cause worry for states; FET and FPS provisions also have a profound effect on policy space.

2. Interpretive Language in FET and FPS

The use of interpretive language in FET provisions often expressly directs tribunals to apply provisions in a manner that is the least restrictive of the host state's domestic policy space. Due to the generally risky nature of unqualified FET provisions, the inclusion of interpretive language in these provisions may be the single most effective method by which states can protect their policy space.

Among the common qualifiers added to these provisions is language explaining that "treatment [is] in accordance with customary international law[.]"[166] This language clarifies that FET does not require treatment beyond the minimum required by CIL.[167] However, this is often confusing to tribunals because "there are further difficulties in determining precisely what standard is required by [CIL]."[168] In the US Model, following basic FET and FPS provisions,[169] a longer explanatory clause states that "for greater certainty, paragraph 1 prescribes the customary international law *minimum* standard of treatment of aliens as the

163. *See, e.g.*, Treaty between the Federal Republic of Germany and the Sultanate of Oman concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Oman, art. 3, ¶ 4–7, May 30, 2007, 1475 U.N.T.S. 261, http://investmentpolicyhub.unctad.org/IIA/country/159/treaty/1731.

164. *Id.* ¶ 3 (addressing "measure[s] that have to be taken for reasons of public security and order, public health or morality[,]" by exempting those from the provisions requirement).

165. U.S. Model, *supra* note 40, art. 3.

166. *Id.* art. 5, ¶ 1.

167. BONNITCHA, *supra* note 7, § 3.2.1.

168. *Id.*

169. U.S. Model, *supra* note 40, art. 5, ¶ 1 ("Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.").

minimum standard of treatment to be afforded to covered investments."[170] It continues, "the concepts of [FET] and [FPS] do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights."[171] This explanation distinctly qualifies FET and FPS, explicitly prohibiting some ways in which investors have been able to file illegitimate claims, such as by claiming 'regulatory stability', which is not required by CIL.

"By limiting the source of FET to [CIL], these treaties seek to rein in the discretion of tribunals" and says "to arbitrators that [they] cannot go beyond what [CIL] declares to be the content of the minimum standard of treatment."[172] The US Model goes even further by specifically defining FET as "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;"[173] and defines FPS as requiring "each Party to provide the level of police protection required under [CIL]."[174]

The COMESA IA approaches this issue from a different perspective. It states that FET is merely the minimum standard required under CIL, but adds "[s]tates understand that different [states] have different forms of administrative, legislative and judicial systems, and that [states] at different levels of development may not achieve the same standard at the same time."[175] While this provision does leave more decisions to the discretion of tribunals, it allows them to consider more broadly the needs of developing nations when applying the FET standard.

The recently published TPP[176] stipulates the minimum standard of treatment owed to covered investments is "treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security."[177] This language qualifies FET and FPS as merely subsets of customary international law principles. The TPP states that, "[f]or greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments," and continues by stipulating that "[t]he concepts of [FET] and [FPS] do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights."[178]

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170. *Id.* ¶ 2 (emphasis added).

171. *Id.*

172. United Nations Conference on Trade and Development, *Fair and Equitable Treatment,* U.N. Doc. UNCTAD/DIAE/IA/2011/5, at 28 (2012).

173. U.S. Model, *supra* note 40, art. 5, ¶ 2a.

174. *Id.* ¶ 2b.

175. COMESA IA, *supra* note 153, at art. 14.

176. TPP, *supra* note 132. The agreement, negotiated between nations representing 40% of the world's economy, is far from guaranteed to be implemented as of now, but presents some exceptional examples of policy space protective language. TPP signatory nations are: The United States, Canada, Mexico, Peru, Chile, Japan, Singapore, Malaysia, Vietnam, Brunei, Australia, and New Zealand. As of December 2016, it seems likely that the TTP will not go into effect.

177. *Id.* art. 9.6(1).

178. *Id.* art. 9.6(2).

To ensure that tribunals consider the minimum standard of treatment as the lowest possible standard required under international law, the TPP expressly defines FET as including "the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world[,]"[179] and FPS as requiring "each Party to provide the level of police protection required under customary international law."[180]

The TPP also directly addresses concerns of civil society that 'legitimate expectation' claims can still be brought under a partially qualified FET provision; "the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."[181] It states further that "[f]or greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."[182] This reduces fears that states may place themselves at risk by using subsidies or grants to attract investment or incentivize good behavior.

The SADC Model recommends against the inclusion of any FET standard, instead suggesting a 'fair administrative treatment' standard be used.[183] Fair administrative treatment requires that, *taking into account the level of development*, "administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies justice."[184] It also guarantees that investors will be "notified in a timely manner of administrating or judicial proceedings that directly affect investment"; that there exists a "right of appeal"; that investors will have "access to government-held information" in a timely manner; and that states will "progressively strive to improve the transparency, efficiency, independence, and accountability" of their governmental processes.[185]

As a more traditional alternative, the SADC Model does provide an example of a reduced FET standard for use if needed, which requires "the demonstration of an act or action by the government that are an outrage, in bad faith, a willful neglect of fury or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency."[186] Even this standard, the SADC posits, can lead to unintended claims.[187]

Only South Africa and other COMESA state have even considered adopting

179. *Id.* art. 9.6(2)(a).
180. TPP, *supra* note 132, art. 9.6(2)(b).
181. *Id.* art. 9.6(4).
182. *Id.* art. 9.6(5).
183. SADC MODEL, *supra* note 54, art. 5.
184. *Id.* art. 5.1 (option 2).
185. *Id.* art. 5.2–5.5 (option 2).
186. *Id.* art. 5.2 (option 1).
187. *Id.* art. 5.

the SADC Model's fair administrative treatment requirements.[188] Some of the interpretive language presented in the US Model, the TPP, and other progressive model BITs is becoming more commonly used. The addition of interpretive language into existing provisions in IIAs may be the most effective method of maintaining domestic policy space to regulate human rights, but other changes are also possible.

d. General Exceptions Provisions

Most IIAs include a general exceptions provision which exempts certain types of regulatory measures from application. Common exceptions include those for non-conforming measures, taxation, and national security.[189] The Canada Model BIT specifically addresses issues with policy space in its general exceptions provision, emphasizing that the guarantees therein do not apply to a party enforcing measures to "protect human, animal or plant life or health[,]" taking action "in pursuance of its obligations under the [UN] Charter[,]" or to any investments in "cultural" industries.[190] The last requirement, for actions relating to any cultural industries, can be especially protective of human rights policy space because of the potentially sensitive rights involved, such as those enumerated in the ICCPR and CERD.[191]

Another approach, adopted by the US Model, is to not include a single general exceptions clause, but to provide separate provisions which create exceptions specifically for taxation, non-conforming measures, national security, financial services industries, and ones which intend to reduce regulatory chill.[192] The TPP follows in a similar vein, mandating that no investment provisions "shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with *this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives."[193] The most confounding approach is evident in the ASEAN CIA, which merely exempts from application of the IIA any measures "necessary to secure compliance with laws or regulations which are not inconsistent with this agreement."[194] It is unclear what measures would be inconsistent with the agreement itself, leaving this determination to the discretion of the tribunal.

188. The SADC MODEL was heavily considered in the drafting of the COMESA IA, over which South Africa had a great influence.

189. *See* Agreement Between the Government of Japan and the Government of the Republic of the Union of Myanmar for the Liberalization, Promotion and Protection of Investment art. 7, Japan-Myan., Dec. 15, 2013, http://investmentpolicyhub.unctad.org/IIA/country/105/treaty/2155.

190. Canada Model, *supra* note 149, art. 10.

191. *See generally* ICCPR, *supra* note 35; International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195 (1966).

192. U.S. Model, *supra* note 40, *passim*.

193. TPP, *supra* note 132, art. 9.15 (emphasis added).

194. ASEAN CIA, *supra* note 155, art. 17.

e. Additional Approaches

There are two categories of novel provisions, less common than those previously presented, which are intended to maintain state domestic policy space. The first category is one of 'passive provisions'; those which provide exceptions for certain industries, types of activity, or sectors, like the approach taken by the US Model.[195] Included in this category are inventive provisions which are likely to be effective, and be universally accepted by states.

Several scholars and international organizations have also recommended the inclusion of provisions from a second category, those which place 'positive obligations' on states and investors in a few specific areas of international law, including human rights, labor rights, environmental protection, and anti-corruption.[196] These provisions are more aggressive and more controversial. They expand international legal obligations of states and have a larger negative financial impact on investors.

1. 'Passive Provisions'

One passive provision, which is arguably successful at preventing a regulatory 'race to the bottom',[197] requires that member states "not waive or otherwise derogate from or offer to waive or otherwise derogate from measures concerning labour, public health, safety or the environment as an encouragement for the establishment, expansion or retention of investments."[198] While this does eliminate the ability of states to reduce regulations to attract investment, it has no protection for states who wish to improve their regulations from the current baselines. Most BITs are concluded between developing and developed nations,[199] providing little benefit to the developing nation where human rights abuses are more likely to occur due to weak regulation and inadequate enforcement.[200]

The SADC Model recommends the inclusion of a 'right to regulate' clause as a stand-alone provision in BITs;[201] "In accordance with [CIL] . . . the Host State has the *right* to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and

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195. U.S. Model, *supra* note 40, art. 14–21.

196. Dumberry & Dumas-Aubin, *supra* note 88, at 356–58; *see, e.g.*, SADC MODEL, *supra* note 54, art. 13 (placing pre- and post-entry impact assessment requirements on states and investors).

197. *Definition of race to the bottom*, FINANCIAL TIMES LEXICON, http://lexicon.ft.com/Term?term=race-to-the-bottom (last visited Apr. 20, 2015) ("The situation in which companies and countries try to compete with each other by cutting wages and living standards for workers, and the production of goods is moved to the place where the wages are lowest and the workers have the fewest rights").

198. COMESA IA, *supra* note 153, art. 5.

199. J ANTHONY VANDUZER ET AL., INTEGRATING SUSTAINABLE DEVELOPMENT INTO INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE FOR DEVELOPING COUNTRIES (Aug. 2012), https://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf.

200. *Id.*

201. SADC MODEL, *supra* note 54, art. 20.

with other legitimate social and economic policy objectives."[202] This provision explicitly protects policy space relating to measures designed to advance sustainable development, which are often directly related to measures seeking to regulate human rights.[203] The IISD Model has a similar provision in Article 25 titled "[i]nherent rights of states[,]" and recommends that this clause, when included, should be featured in a stand-alone provision.[204]

The TPP, in an effort to increase the number of enterprises voluntarily employing internal CSR programs, states that parties "reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party."[205] While this does not create any mandatory obligations, it is one of the first such clauses included in an active IIA, highlights the importance of social issues, and reaffirms the notion that investors have a responsibility to people in the countries in which they operate.

Passive provisions can benefit states seeking to maintain domestic policy space. Many of these inventive provisions, while quite uncommon, are efficient at addressing state concerns without creating significantly burdensome fears for investors. Nonetheless, some progressive IIAs go further, prescribing positive obligations on both states and investors.

2. Positive Obligations

The inclusion of positive obligations in IIAs as a method for maintaining domestic policy space to regulate human rights is controversial. Provisions of this type are diverse. They include provisions requiring recognition of environmental impact from investments,[206] specifically requiring parties to reaffirm their obligations to the ILO and other international treaties,[207] requiring both pre-entry and post-entry impact assessments on investments,[208] and creating direct human rights obligations. Some of these provisions are more widely accepted, such as those in the US Model; some are less widely accepted, such as those in the SADC Model.

A. Reference to Human Rights and Labor Treaties

One method by which a BIT may implicate international labor rights or human rights without directly obligating a state to bring its domestic regulations in

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202. *Id.* (emphasis added).
203. *Id.*
204. IISD Model, *supra* note 141, art. 25.
205. TPP, *supra* note 132, art. 9.17.
206. U.S. Model, *supra* note 40, art. 12.
207. *Id.* art. 13.
208. SADC MODEL, *supra* note 54, art. 13.

line with international labor standard[209] is to implement language similar to the US Model. US Model Article 13 requires that parties "reaffirm their respective obligations as members of the International Labor Organization (ILO) and their commitments under the [ILO Declaration]."[210] While this provision does not create additional substantive obligations or new grievance mechanisms, it does highlight the importance of international labor rights. [211] It also requires that states not weaken or reduce protections afforded by domestic labor laws or fail to enforce domestic laws as an encouragement for investment.[212]

COMESA IA Article 22 states that "nothing in this agreement shall be construed to preclude a [state] from applying measures that it considers necessary for its obligations under the [UN] Charter...with respect to the protection of its own essential security interests."[213] This type of provision can be expanded to include any international agreement. TPP Article 19.3 states that "each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO Declaration."[214]

This type of provision creates obligations through reference to existing international law, but there is no consistent pattern of arbitral tribunal interpretation to discern the effect this will have on increasing policy space.

B. Direct Human Rights Obligations

The most controversial provisions are those which create direct human rights obligations on states and investors without direct reference to a treaty. SADC Model requires that "[i]nvestors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights."[215] The IISD Model repeats this language and adds a clause which may be interpreted to expressly dictate that international human rights treaty obligations supersede BIT obligations; "Investors and Investments shall not manage or operate...in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties."[216]

209. Jeffrey S. Vogt, *Trade and Investment Arrangements and Labor Rights*, CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS: NEW EXPECTATIONS AND PARADIGMS (Lara Blecher, et. al. eds., 2014).

210. U.S. Model, *supra* note 40, at art. 13; ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, June 15, 2010, http://ilo.org/declaration/info/publications/WCMS_467653/lang—en/index.htm.

211. U.S. Model, *supra* note 40, art. 13.

212. *Id.*

213. COMESA IA, *supra* note 153, art. 22.

214. TPP, *supra* note 132, art. 19.3. This chapter of the TPP is binding on states and investors and is relevant to all investment provisions.

215. SADC MODEL, *supra* note 54, art. 15.

216. IISD Model, *supra* note 141, art. 14.

TPP chapter 19 expressly enumerates its own prohibitions, closely related but not identical to, the ILO Declaration Fundamental Principles; "each Party [recognize] the goal of eliminating all forms of forced or compulsory labour, including forced or compulsory child labour."[217] The TPP also expressly encourages businesses operating under the IIA to move to a forced labor free supply and manufacturing chain; each party is to "discourage, through initiatives it considers appropriate, the importation of goods from other sources produced in whole or in part by forced or compulsory labour, including forced or compulsory child labour."[218]

These provisions may help to reduce, and in some cases explicitly prevent, the chilling effect in designated policy areas. Most investors, however, fear the uncertainty of broad and unqualified language which may allow a state to act in a truly arbitrary or unfair manner.

C. Essential Elements Clause

The EU-Central America BIT (EUCAA) includes an 'essential elements' clause, which explicitly references human rights law.[219] The EUCAA states that "[r]espect for democratic principles and fundamental human rights, as laid down in the [UDHR]," and for the principle of the rule of law, underpins the internal and international policies of both parties and constitutes an *essential element* of this agreement.[220] While most of the fundamental UDHR obligations have become *jus cogens* norms, and therefore already enforceable in investment arbitration, the remainder of the treaty has a relatively "high level of human rights protection in relation to the rights mentioned" in BITs.[221] The inclusion of an essential elements clause protects the host states ability to regulate the worst human rights offenses perpetrated by business, and meet UDHR standards, without radically altering substantive language found in traditional BITs.

D. Impact Assessments

The IISD Model[222] and SADC Model[223] BITs suggest provisions requiring pre-entry and post-entry impact assessments, however few national model BITs or existing BITs contain them. Impact assessment requirements expressly codified in

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217. TPP, *supra* note 132, art. 19.3.

218. *Id.* art. 19.6.

219. Agreement Establishing an Association between Central America, on the one hand, and the European Union and its Member States, on the other, 2012/734, 2012 O.J. (L 346) 1, http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147660.pdf.

220. *Id.* (emphasis added).

221. Inta Droi, *The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements* 9 (Feb. 13, 2014), http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dv/study_hr_tradeagreements_/study_hr_tradeagreements_en.pdf.

222. IISD Model, *supra* note 141, art. 12.

223. SADC MODEL, *supra* note 54, art. 13.

BITs are helpful in theory, but most of the examples merely require assessments "as required by the laws of the Host State[.]"[224] There is not much purpose in creating additional burdens on investors when the assessment requirements are "consistent with domestic law in virtually every State today."[225] States seeking to enhance domestic regulations relating to pre-entry impact assessment requirements may fear that the regulatory adjustment would violate obligations under its BITs. However, if assessment standards in the IIA merely match the standards of the host state's domestic regulations, no additional policy space would be created, and the assessment requirements would be toothless. In these situations, general exceptions for environmental and human rights regulations, as discussed previously, would be more effective.

Few of these additional positive obligations are likely to be commonly used; many would assign arbitral tribunals topics for consideration outside of their mandated scope. Some passive provisions are tenable options for inclusion, particularly the 'essential elements' clause. In general, whether through preambular provisions, interpretive language, general exceptions clauses, other type of provision, states are increasingly seeking ways to maintain domestic policy space when engaging in IIAs. As the UNGP recommends, each state is to make its own determination as to how much domestic policy space is needed to achieve its sustainable development goals and to weigh the benefits and risks of each method of maintaining the ability to meet international human rights obligations.[226]

VIII. CONCLUSION

The fact that disagreements are brought to the decision of a third party, such as an ICSID arbitral tribunal, and that a country has offered to do so in a treaty strengthens rather than detracts from a country's endeavor to attract foreign investment and treat investors fairly and equitably.[227]

The tribunal in *MTD v. Chile* asserts that participating in dispute resolution in response to a claim emanating from an IIA can help a nation attract FDI. FDI does play a key role in development and in advancing economic and social rights enumerated in the ICESCR and other human rights treaties. However, the benefits to a state resulting from additional FDI may be outweighed by the negative impact that persistent unintended investor-state claims can have on a country's domestic policy space.

To strike a balance between attracting investment and abrogating policy space, states now seek to implement UNGP Article 9 recommendations into their IIAs through diverse methodology. To accomplish this, some states are choosing to renegotiate existing BITs. Others look to advance new IIAs and regional free trade associations which supersede exiting BITs.

224. *Id.*

225. *Id.* art. 13, Commentary.

226. UNGP, *supra* note 1.

227. MTD Equity, *supra* note 66, ¶ 89.

The interpretation of treatment provisions has been derided as especially invasive of domestic policy space to regulate human rights. The methods available to remedy failures in treatment provisions in traditional IIAs include through the inclusion of preambular language, interpretive provisions, general exceptions provisions, passive provisions, and positive obligations. Some are more widely-accepted and effective than others. The inclusion of direct references to existing human rights treaties and ILO obligations seem to be the most popular. The inclusion of interpretive language relating to FET standard is now universally accepted as fundamental to any IIA. The various methodology for implementing UNGP Article 9 recommendations highlighted herein do not make for a complete or exhaustive list.

There is also a need for capacity building by NGO's, IGO's, state policy makers, and regulatory enforcement departments in regards to assessing the impact of investment on human rights. The lack of resources in developing states to effectively regulate and enforce their human rights obligations exacerbates the issue. To maximize the effectiveness of the UNGP 'policy space' decree in developing states, the UN should provide states with additional resources by engaging in domestic capacity building on rule of law issues. Tribunals can also participate in healing this divide by beginning to take into consideration the respondent state's level of development. Developed nations should consider the differentiated level of responsibility they have towards helping developing nations achieve their policy goals, and should assist as much as possible with policy development in this regard.[228]

It is yet to be seen what effect, if any, progressive IIAs have on encouraging or discouraging FDI inflows, as there is not yet a consistent body of arbitration decisions reliant on them.[229] It is uncertain whether claims which most drastically restrict a state's policy space regarding human rights regulation are less likely to be brought under an IIA with progressive provisions.

Surely, it will be less difficult for developing nations to defend legitimate policy decisions under an agreement which conforms to the UNGP's recommendations; many of the provisions examined herein explicitly protect those legitimate policy decisions. The responsibility then rests on states which adopt the UNGP's recommendations to regulate, administer, and enforce laws which protect their own citizens. Hopefully arbitral tribunals will welcome this new generation of IIAs by more amply considering states' rights to regulate to meet their international human rights obligations in accordance with the intent of the drafters and the UNGP, and uphold the protections which reduce the regulatory chill. If they do, IIAs can be instruments which invite investment without restricting state's policy space regarding human rights regulation. Developing nations with progressive IIA regimes can then begin to reap the benefits resulting from simultaneous increases in human rights regulation and FDI inflows, most

228. *See* G.A. Res. 151/26, Rio Declaration on Environment and Development (Aug. 12, 1992).

229. Spears, *supra* note 25, at 1045.

importantly, an overall increase in the welfare of its citizens through sustainable economic and social development.

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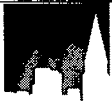

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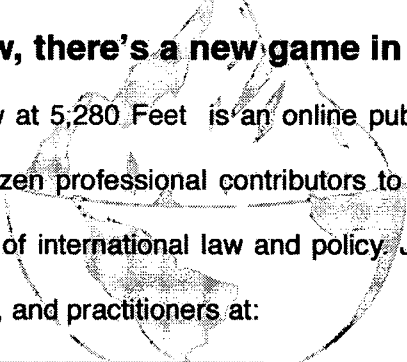

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