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Bilateral Investment Treaties: A Friend or Foe to Human Rights

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BILATERAL INVESTMENT TREATIES: A FRIEND OR FOE TO HUMAN RIGHTS?

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I. INTRODUCTION

The worst cases of corporate-related human rights harm have occurred, predictably, in the places that need economic development the most: "in countries that often had just emerged from or still were in conflict; and in countries where the rule of law was weak and levels of corruption high."[1] Notably, corporations "increasingly play a significant role in the civil wars of developing countries from Sierra Leone, Angola, and the DRC [Democratic Republic of the Congo] to Azerbaijan and Myanmar."[2] For example, a United Nations Panel regarding the ongoing DRC conflict found that corporations trading minerals in the DRC were not only involved in the conflict but were "the engine of the conflict."[3]

Sustainable economic development requires both foreign direct investment (FDI) by multinational corporations (MNCs) and the protection of human rights. FDI is a "category of international investment that reflects the objective of a resident entity in one economy to obtain a lasting interest in an enterprise resident in another economy."[4] Human rights law, as described by the Universal Declaration of Human Rights - and the subsequent International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) - provides duties for States and affect a multitude of human rights-related policy areas, such as labor law and environmental regulation. Undoubtedly, FDI and MNCs "constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law."[5]

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1. Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶ 16, U.N. Doc. A/HRC/8/5 (Apr. 7, 2009) (*prepared by* John Ruggie) [hereinafter Ruggie – *Protect, Respect and Remedy*].

2. Ole Kristian Fauchald & Jo Stigen, *Transnational Corporate Responsibility for the 21st Century: Corporate Responsibility Before International Institutions*, 40 GEO. WASH. INT'L L. REV. 1025, 1045-46 (2009).

3. *Id.* at 1065.

4. Org. for Econ. Co-operation & Dev., *Glossary of Statistical Terms – Foreign Direct Investment* (Sept. 25, 2001), http://stats.oecd.org/glossary/detail.asp?ID=1028.

5. Ruggie – *Protect, Respect and Remedy*, *supra* note 1, ¶ 2.

Nevertheless, MNCs can also hinder economic development by violating, and inhibiting the protection of, human rights.

In addition to actively perpetrating and enabling human rights violations, MNCs can hinder a State's regulatory power to provide human rights protections. The increasing power of MNCs is strengthened, at least in part, by Bilateral Investment Treaties (BITs). A BIT is a treaty between two States that ensures that investors of a State-Party receive certain standards of treatment when investing in the territory of the other State-Party.[6] The purpose of the BIT is to encourage FDI between the two State-Parties, which hopefully leads to economic growth for both State-Parties. However, BITs grant MNCs rights against States, and allow MNCs to directly initiate arbitration against a State when the State has not fulfilled its obligations under a BIT. The threat of a multi-million dollar adverse arbitration decision pressures States to placate MNCs, and this limits a State's ability to regulate, even in important human rights-related policy areas. For example, MNCs have claimed millions of dollars in damages under BITs for State regulations addressing an emergency financial crisis, refusing to grant a license for a toxic waste facility, and enacting affirmative action legislation.[7]

The field of corporate social responsibility is vast and deep, and has produced a great deal of discussion and proposed solutions. However, this paper explores the narrow subject of BITs. Currently, BITs empower MNCs and encumber a State's regulatory power to promote and protect human rights. However, BITs can be reformed to remove, or at least limit, these encumbrances. Moreover, BITs could be restructured, not to remove the rights BITs grant to MNCs, but to create reciprocal obligations for MNCs to act responsibly and not violate human rights. Section I provides a brief history of the international investment law system and the development of BITs. Section II defines the basic components of a BIT. Next, Section III explains why the current patchwork BIT regime is insufficient. Finally, Sections IV and V discuss proposed solutions to the inadequacies of the present BIT regime.

II. BRIEF HISTORY OF INTERNATIONAL INVESTMENT LAW

The regulation of international investment has deep roots in the development of law regarding the treatment and legal status of foreigners over the past several centuries.[8] Formal treaties governing international commerce, known as Treaties of Friendship, Commerce and Navigation, flourished in the post-WWII era, and the

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

7. Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . and They Could Bite* 2, n.1 (World Bank Pol'y Res. Working Paper No. 3121, 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=636541 (citing CME Ltd. v. Czech Republic, an award of $350 million; Loewen Group v. The United States, a claim for $450 million; and Methanex v. The United States, a claim for $950 million).

8. ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 3-4 (2009).

investment protection function of these treaties came to dominate and evolved into BITs.[9] During this period, there were a series of initiatives to establish a multilateral legal framework for investment, including an International Trade Organization (ITO), which failed, in part, due to existing preferences for BITs. Consequently, the General Agreement on Trade and Tariffs, negotiated in 1947, did not include an investment framework.[10]

Since then, the international trade and investment law regimes have developed separately. The Uruguay Round of negotiations, which established the World Trade Organization (WTO) in 1994, provided for centralized regulation of international trade, but again excluded discussion of an investment framework. While two WTO agreements touch on trade-related investment they do not constitute comprehensive multilateral investment regulations: the Agreement on Trade-Related Investment Measures reaffirms that investment laws must be consistent with WTO trade obligations, and the General Agreement on Trade in Services creates rights for foreign investors to invest in certain service sectors.[11]

Presently, international investment law exists through a fragmented patchwork of BITs created to entice FDI. The frenetic rate of globalization has increased the number of MNCs, and consequently, the frequency of FDI and the use of BITs. During the 1970s there were more than 1,000 instances of States nationalizing private investments, which made the compelling need to protect foreign investors from unfair and arbitrary treatment by host governments more apparent and led to a proliferation of BITs.[12] Over the last two decades developing nations have entered the international investment environment, providing fertile new ground for investment opportunities and an exponential multiplication of BITs.[13] The rapid spread of BITs was likely the result of the increasing enthusiasm for foreign investment in the developing world. BITs appeared to address a need on the part of the developing countries "to add credibility to commitments these countries made to investors."[14] Today, there are nearly 3,000 separate BITs[15] among more than 170 countries.[16]

Recent attempts to restructure the patchwork BIT regime and create a multilateral investment framework have been largely unsuccessful. Following the

9. *Id.* at 23-24.

10. *Id.* at 19-20.

11. *Id.* at 54-55.

12. Human Rights Council, *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*, ¶ 22, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) *(prepared by* John Ruggie) [hereinafter Ruggie – *Further Steps*].

13. Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?*, 34 BROOK. J. INT'L L. 303, 307-09 (2009).

14. Louis T. Wells, *Protecting Foreign Investors in the Developing World: A Shift in US policy in the 1990s?*, *in* INTERNATIONAL BUSINESS AND GOVERNMENT RELATIONS IN THE 21ST CENTURY 421, 444 (Robert Grosse ed., 2005).

15. Ruggie - *Further Steps, supra* note 12, ¶ 22.

16. Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. INT'L & COMP. L. REV. 429, 430 (2004).

failure of the Uruguay Round to obtain investment protection, the United States promoted negotiations of a Multilateral Agreement on Investment (MAI) within the Organization for Economic Cooperation and Development (OECD).[17] Activists argued against the agreement, concerned that it would constitute a corporate bill of rights with no corresponding obligations. In February 1998, more than 600 organizations from 67 countries released a joint statement calling for the suspension of MAI negotiations.[18] This heightened public scrutiny further discouraged interest by international businesses, which was already lacking. For these reasons, in addition to disagreement between States on a broad range of issues, MAI negotiations ended in April 1998 and have not resumed.[19]

However, the failure of the MAI renewed enthusiasm for bringing investment into the WTO regime. The 2001 Doha Declaration expressly recognized the need for a multilateral investment framework.[20] In 2003, at the Fifth Session of the Ministerial Conference in Cancun, Mexico, investment was at the center of the debate between developed and developing countries, and was one of the proximate causes for the breakdown of negotiations.[21] Developing nations wanted an investment framework to include special considerations for developing countries, including allowances for development policies and governments' rights to regulate in the public interest. [22] Due to the divisive nature of this debate, the WTO General Council has decided to exclude further discussion of multilateral regulation of investment from the Doha Round of negotiations.[23]

Most recently, the European Union (EU), whose members are parties to over 1,200 BITs, has taken steps to solidify its members' investment policies.[24] When the Lisbon Treaty entered into force on December 1, 2009, the EU received exclusive competence over FDI. This includes a transition of power to enter into

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17. NEWCOMBE & PARADELL, *supra* note 8, at 55.

18. *National & International Opposition to the MAI*, PUBLIC CITIZEN, http://www.citizen.org/trade/issues/mai/Opposition/ (last visited Mar. 1, 2011).

19. Press Release, Org. for Econ. Co-operation & Dev., Multilateral Agreement on Investment – Report to Ministers, April 1998 (Apr. 28, 1998) (on file at http://www.oecd.org/document/4/0,3746,en_2649_34529562_1933060_1_1_1_34529562,00.html).

20. World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 20 WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

21. AARON COSBEY, ET. AL., INT'L INST. FOR SUSTAINABLE DEV., INVESTMENT AND SUSTAINABLE DEVELOPMENT: A GUIDE TO THE USE AND POTENTIAL OF INTERNATIONAL INVESTMENT AGREEMENTS 25 (2004), *available at* http://www.iisd.org/pdf/2004/investment_invest_and_sd.pdf.

22. Doha Declaration, *supra* note 20, ¶ 22.

23. Doha Work Programme, *Decision Adopted by the General Council on 1 August 2004*, WT/L/579, ¶ 1(g) (Aug. 2, 2004), *available at* http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm.

24. Marc Maes, *Reclaiming the Public Interest in Europe's International Investment Policy: Will the Future EU BITs Be Any Better Than the 1200 Existing BITs of EU Member States*, INVESTMENT TREATY NEWS, Sept. 2010, at 5, *available at* http://www.iisd.org/itn/2010/09/23/reclaiming-the-public-interest-in-europe-s-international-investment-policy-will-the-future-eu-bits-be-any-better-than-the-1200-existing-bits-of-eu-member-states/.

BITs; the power EU members previously had to negotiate BITs with non-EU States has shifted to the Union.[25]

On July 7, 2010 the European Commission released a draft Regulation and a Communication. The draft Regulation, which proposes a transitional arrangement for existing BITs, has to be approved by both the Council and the Parliament.[26] It would give members temporary authority to maintain their existing BITs with non-EU countries, and to even negotiate new BITs. However, the Commission would be able to withdraw that authority if it concluded that a member's BIT compromised the EU's investment policy.[27] The Communication is not very detailed but it does mention broader policy objectives. It explicitly refers to the objectives of the overall European foreign policy, including the promotion of the rule of law, human rights, and sustainable development, and also to the OECD Guidelines for Multinationals.[28] The Communication does not add any nuance or a more balanced construction of typical BIT provisions, which are described in the next section. Nevertheless, this is a unique opportunity for an assessment of the existing BITs and for an open and broad discussion on the future European international investment policy.[29]

III. DESCRIPTION OF BILATERAL INVESTMENT TREATIES

A BIT is a treaty between two States. The BIT ensures that investors of a State-Party receive certain standards of treatment when investing in the territory of the other State-Party.[30] When there is a violation of a BIT, a victim investor can directly bring a claim against the State that violated the BIT. Generally speaking, there are five major actors on the international investment stage. First, a "Host-State" is the State-Party in which an investment exists. Generally, because developing States import more FDI, they are more often the Host-State. Second, a "Home-State" is the State of corporate citizenship of the investing MNC. Generally, because developed States export more FDI, they are more often the Home-State.[31] Third, "Investors" are the MNCs that are corporate citizens of the Home-State and that are making an investment in the Host-State. Fourth, "impacted non-State actors" are those people groups that are affected by the actions or demands of the investing MNCs. Fifth, "arbitration tribunals" serve as the dispute resolution mechanisms for disputes arising under a BIT.

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25. James Zhan, *UNCTAD's 2010 World Investment Forum: High-level Experts Discuss Investment Policies for Sustainable Development*, INVESTMENT TREATY NEWS, Dec. 2010, at 14, *available at* http://www.iisd.org/itn/2010/12/16/unctads-2010-world-investment-forum-high-level-experts-discuss-investment-policies-for-sustainable-development/.

26. Maes, *supra* note 24, at 5.

27. Zhan, *supra* note 25, at 14.

28. Maes, *supra* note 24, at 5.

29. *Id.*

30. Alvarez, *supra* note 6, at 957-59.

31. *See* NEWCOMBE & PARADELL, *supra* note 8, at 3, n.6.

BITs confer foreign investors rights, and while the specific language of BITs vary, they tend to contain the following similar provisions.[32] Most countries have a Model BIT which serves as a template and is typically used as a starting point to conduct negotiations of new BITs. The following provisions, taken from the United States Model BIT, are examples of rights BITs commonly confer.

A National Treatment provision provides that foreign investors have the right not to be treated less favorably than domestic investors in like circumstances:

> Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.[33]

A Most-Favored-Nation provision provides that foreign investors have the right not to be treated less favorably than investors of any other country:

> Each Party shall accord to investors of the other Party [and investors' investments] treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.[34]

A Fair and Equitable Treatment provision provides that foreign investors have the right to a minimum standard of treatment:

> Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> . . .
>
> (a) "fair and equitable treatment" includes 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; and
>
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.[35]

Expropriation provisions ensure that foreign investors have the right to be compensated for expropriations:

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32. Alvarez, *supra* note 6, at 957-59.

33. 2004 Model BIT, Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment art. 3 (2004), *available at* http://www.state.gov/documents/organization/117601.pdf [hereinafter U.S. Model BIT].

34. *Id.* art. 4.

35. *Id.* art. 5.

> Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) in a non-discriminatory manner;
>
> (c) on payment of prompt, adequate, and effective compensation; and
>
> (d) in accordance with due process of law and [the Minimum Standard of Treatment][36]

Lastly, most BITs have a dispute resolution clause that constitutes "a unilateral offer to settle disputes by arbitration, extended to the investor by the state, and which the investor accepts by initiating arbitration under the treaty."[37] Where a Host-State has a BIT with a foreign investor's Home-State and the Host-State breaches its obligations to the investor enumerated in the BIT, the investor may bypass domestic court systems and bring a claim directly against the Host-State before an international arbitration tribunal.[38] Thus, the arbitration is not between the two States that entered into the BIT, but rather, BITs allow MNCs to directly sue nation-States for violating their treaty obligations to the corporate investor. Notably, investors have initiated the vast majority of cases. The few instances where Host-States have raised claims against foreign investors have not been based on a BIT, but rather based on the contractual relationship between the Host-State and the investor.[39]

There are a variety of arbitration institutions that are used to resolve disputes arising under BITs. The leading international arbitration institution devoted to investor-State dispute settlement is the International Centre for the Settlement of Investment Disputes (ICSID). ICSID is an autonomous international institution established under a multilateral treaty, the Convention on Settlement of Investment Disputes between States and Nationals of Other States, which has over 140 member States. ICSID does not arbitrate disputes directly, but rather it provides the institutional and procedural framework for independent arbitral tribunals to resolve the dispute.[40] Another example of an international arbitration institution is the United Nations Commission on International Trade Law (UNCITRAL).[41]

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36. *Id.* art. 6.

37. Noemi Gal-Or, *The Investor and Civil Society as Twin Global Citizens: Proposing a New Interpretation in the Legitimacy Debate*, 32 SUFFOLK TRANSNAT'L L. REV. 271, 281 (2009).

38. *Id.* at 281-82.

39. Fauchald & Stigen, *supra* note 2, n.118 (citing Tanzania Elec. Supply Co. v. Ind. Power Tanzania Ltd., ICSID Case No. ARB/98/8 (2001); Genin v. Republic of Estonia, ICSID Case No. ARB/99/2 (2001); SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6 (2004)).

40. *About ICSID*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home (last visited Mar. 1, 2011).

41. United Nations Commission on International Trade Law, *About UNCITRAL*, http://www.uncitral.org/uncitral/en/about_us.html (last visited Mar. 1, 2011).

Regardless of which arbitral rules are used, the decisions of the arbitrators are only binding on the parties to the arbitration and do not create binding precedent. Awards from BIT arbitration tribunals are limited to financial compensation and "normally eminently enforceable."[42]

The enforceability of BIT arbitration awards is a function of two factors. First, a Host-State's non-compliance with an adverse award may deter future investments because investors will see the Host-State as inhospitable and a higher-risk investment environment. Second, where a MNC receives a favorable decision in a BIT arbitration and the Host-State does not comply with the arbitration award, the Host-State can expect diplomatic pressure from the Home-State to pay the MNC the compensation awarded by the arbitration tribunal.

For example, CalEnergy, a U.S. corporation, had two geothermal projects in Indonesia that became the subject of an arbitration and an award was issued in favor of CalEnergy. However, Indonesia refused to pay. CalEnergy had political risk insurance with the Overseas Private Investment Corporation (OPIC),[43] an agency of the United States government.[44] OPIC then had authority to seek payment from Indonesia under the arbitration award. In July 2000, the U.S. ambassador to Indonesia, Robert Gelbard, stated that he was "running out of patience" with Indonesia's tardy payment to OPIC. He threatened to cut off aid to Indonesia and declare expropriation: "There is always the possibility of declaring expropriation . If we were to do this, it would result in a dramatic deterioration of the rupiah and would hurt Indonesia very much."[45] OPIC also removed Indonesia from the list of countries eligible for political risk insurance. The strategy worked. OPIC and Indonesia reached a settlement in mid-2001.[46]

Investor-State disputes are increasing faster than other areas of public international law dispute settlement. These investor-State dispute resolution mechanisms were largely unknown until recently.[47] The first modern investor-State arbitration was decided in 1990.[48] After the passage of the 1994 North American Free Trade Agreement (NAFTA), which under Chapter 11 provides many of the same investors' rights provided in BITs, investors began to

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42. Weiler, *supra* note 16, at 430-31.

43. Wells, *supra* note 14, at 452.

44. Press Release, Overseas Private Investment Corporation, Spinelli Addresses Sustainable Development at London Conference (June 17, 2009), *available at* http://www.opic.gov/news/press-releases/2009/pr061709 [hereinafter OPIC-Spinelli].

45. Wells, *supra* note 14, at 452.

46. Jennifer M. DeLeonardo, *Are Public and Private Political Risk Insurance Two of a Kind? Suggestions for a New Direction for Government Coverage*, 45 VA. J. INT'L L. 737, 770 (2005).

47. Int'l Inst. for Sustainable Dev., *European Parliament Hearing on Foreign Direct Investment*, at 7 (Nov. 9, 2010) (*presented by* Nathalie Bernasconi-Osterwalder), *available at* http://www.europarl.europa.eu/document/activities/cont/201011/20101118ATT96250/20101118ATT96250EN.pdf.

48. *Id.* at 3.

increasingly use investor-State arbitration as way of settling disputes.[49] The exact number of investor-State arbitration cases are unknown because the initiation of the arbitrations and their results are not always released publicly. Given that there have been over 350 known cases, commentators estimate that the total is well over 400. On average, at least 30 to 40 more investor-State cases occur every year.[50]

To summarize, BITs give foreign investors highly enforceable rights against the Host-State, but provisions setting out investor obligations "are virtually nonexistent."[51] However, given that BITs are widely used and that the investment arbitration tribunals are very effective, BITs may be a promising choice to serve as a mechanism for the promotion of corporate social responsibility and the protection of human rights.

IV. GAPS IN THE PATCHWORK REGIME OF BITS

The patchwork of BITs that comprise the international investment system has resulted in a diverse and varied legal system, which suffers from several flaws. BIT investor-State arbitration tribunals pose challenges that are unique and not present in more traditional commercial arbitrations, which typically involve two private parties contesting commercial matters and do not include State governments.[52]

A. The Origin of BITs Has Created an Asymmetry in Power and Experience

One problem posed by BITs comes from the historical development of the patchwork BIT regime. BITs have been designed to facilitate and promote global commerce, and because international investment law is rooted in early notions of the protection of foreigners, BITs can be seen as primarily safeguarding the interests of private investors.[53] Essentially, BITs secure an exchange: the State agrees to certain protection obligations in exchange for a foreigner's commitment to invest.[54]

Given that the origins of BITs are in the former colonial powers with presently the largest economies, it should be recognized that "[e]xisting international investment agreements are based on a 50-year-old model that remains focused on the interests of investors from developed countries."[55] According to a 2007 study of concluded and pending ICSID cases, the majority of cases have been filed against developing countries: 74 percent against middle-income developing

49. *Id.*

50. *Id.*

51. Fauchald & Stigen, *supra* note 2, at 1054.

52. *See, e.g.*, Luke Eric Peterson, *Pakistan Attorney General Advises States to Scrutinize Investment Treaties Carefully*, INVESTMENT TREATY NEWS (Dec. 1, 2006) [hereinafter Peterson – *Pakistan*].

53. Weiler, *supra* note 16, at 430-31.

54. *Id.* at 431.

55. S. Afr., Dept. of Trade & Indus., *Bilateral Investment Treaty Policy Framework Review: Government Position Paper*, at 11 (June 2009), *available at* http://www.pmg.org.za/files/docs/090626trade-bi-lateralpolicy.pdf [hereinafter S. Afr. BIT Review].

countries; 19 percent against low-income developing countries; and only 1.4 percent against G8 countries. Additionally, most cases have concluded in favor of the investors: 36 percent were decided in favor of investors and 34 percent were settled out of court with compensation to the investor.[56]

This asymmetry of power and experience has resulted in developing States negotiating BITs without fully appreciating the risks involved and entering into agreements that have heavily favored foreign investors.[57] Some scholars express that this will lead, or already has led, to a "race to the bottom," whereby developing nations loosen investment regulations in competition to attract FDI, constraining their regulatory power to pursue legitimate public interest objectives, and resulting in more human rights abuses.[58]

Currently, South Africa, like a growing number of developing States, is reviewing its BIT commitments "as an exercise to do damage control."[59] In reviewing the *travaux préparatoires* of its current BITs, the South African Department of Trade and Industry realized that the inexperience of its negotiators and their lack of knowledge of investment law have resulted in investment agreements that are not in the interests of South Africa.[60]

Similarly, Pakistan has, until recently, treated BITs as "photo-op" agreements, which were signed hastily with little consideration of the legal consequences. In 2006, Pakistan's Attorney General described this former approach as follows: "Because someone is going visiting someplace and wants to sign an 'unimportant' document; or someone is coming over for a visit and an 'unimportant' document has to be signed. And a BIT . . until very recently was regarded as one such (unimportant) document." Pakistani officials estimate that dozens of BITs were concluded in this manner, with the consequences only becoming clear after foreign investors began invoking BITs and initiating investor-State arbitrations against Pakistan. In 2001, the first arbitration, filed by a Swiss MNC, Société Générale de Surveillance S.A. (SGS), took Pakistan's government by surprise: "SGS having lost before the Swiss Supreme Court, having lost in Pakistan, how could it start a third round?" Pakistan's Attorney General commented that "[i]n many ways, the foreign investor is seeking an international arbitral review of sorts of government

56. SARAH ANDERSON & SARA GRUSKY, INST. FOR POL'Y STUDIES & FOOD AND WATER WATCH, CHALLENGING CORPORATE INVESTOR RULE: HOW THE WORLD BANK'S INVESTMENT COURT, FREE TRADE AGREEMENTS, AND BILATERAL INVESTMENT TREATIES HAVE UNLEASHED A NEW ERA OF CORPORATE POWER AND WHAT TO DO ABOUT IT, ix (2007), *available at* http://www.ips-dc.org/reports/challenging_corporate_investor_rule.

57. *See, e.g.*, S. Afr. BIT Review, *supra* note 55, at 5.

58. Ruggie - *Further Steps, supra* note 12; Ruggie - *Protect, Respect and Remedy, supra* note 1, ¶ 14; Chalamish, *supra* note 13, at 317; Weiler, *supra* note 16, at 433.

59. S. Afr. BIT Review, *supra* note 55, at 55.

60. *Id.* at 5.

conduct on important public policy issues issues which, until recently, were immune from any non-domestic scrutiny."[61]

As these examples show, the patchwork BIT regime has developed in an ad hoc manner and developing countries are put at a disadvantage for two reasons. First, as developing nations entered the global economy they lacked the experience developed States possessed with decades of FDI, treaty negotiation, and knowledge of BITs. Second, developing nations are induced to sign BITs because they want to attract FDI for economic development. Thus, developing nations are more often Host-States rather than Home-States, and consequently, more often the defendant in BIT arbitration claims. Conversely, the plaintiff MNCs tend to be from larger, more powerful, developed States.

B. The Separation of Human Rights and Investment Law in Policymaking

Another problem with the current patchwork BIT regime is that, thus far, international investment law and human rights have existed in separate spheres. Generally, human rights norms are absent in the development of domestic investment policies and in the formation of BITs. A State's "duty to protect against non-State abuses [including those perpetrated by MNCs] is part of the very foundation of the international human rights regime."[62] However, governments often keep human rights policy within its own conceptual and typically weak institutional box, segregated from the development of other policies regarding investment and corporate governance.[63] This "horizontal incoherence" often results in circumstances where "departments and agencies which directly shape business practices – including corporate law and securities regulation, investment, export credit and insurance, and trade – typically work in isolation from, and uninformed by, their Government's own human rights obligations and agencies."[64] The fact that BITs are generally devoid of any mention of human rights[65] exemplifies the "horizontal incoherence" of government policymaking.

C. Lack of Jurisdiction to Address Human Rights-Related Issues in BIT Arbitration Tribunals

In investment arbitration, disputes arising under BITs are generally treated as solely commercial disputes.[66] Human rights and broader public interest

61. Peterson – *Pakistan, supra* note 52.

62. Human Rights Council, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 18, U.N. Doc. A/HRC/4/035 (Feb. 19, 2007) (*prepared by* John Ruggie).

63. Ruggie - *Protect, Respect and Remedy, supra* note 1, ¶ 22.

64. Ruggie – *Further Steps, supra* note 12, ¶ 18; Ruggie - *Protect, Respect and Remedy, supra* note 1, ¶ 33.

65. Recently, States have considered adding human rights protections to their model BITs and this will be discussed later in this article.

66. Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶ 37.

considerations typically have little if any role.[67] Moreover, the jurisdiction of the tribunal to address human rights violations will depend on the specific language of the underlying BIT.[68]

For example, consider the investment arbitration tribunal's decision in *Biloune and Marine Drive Complex Ltd. v. Ghana.* Mr. Biloune, a foreign investor, sought recovery alleging that the Government of Ghana's detention and expulsion of him and violations of his property and contractual rights constituted an actionable human rights violation under an applicable BIT. The arbitration tribunal concluded that it lacked jurisdiction over human rights violations because the underlying BIT only obligated the parties to arbitrate disputes regarding foreign investment and Mr. Biloune's allegations were independent of the investment violation claim.[69]

Additionally, when arbitral panels have referenced human rights issues in BIT arbitration awards, it is in relation to only the investors' rights (e.g. – rights to property, due process, etc.) and not the rights of Host-State's citizens. In 2008, arbitrators awarded moral damages to a company whose executives were intimidated by the Host-State's agents and armed individuals, and subsequently suffered the "stress and anxiety of being harassed, threatened and detained."[70]

D. Lack of Transparency and Public Participation in BIT Arbitration Tribunals

Further problems stem from the fact that BIT disputes are often resolved in secret. Preferences for commercial confidentiality often prohibit public knowledge of, or involvement in, the arbitration process.[71]

ICSID offers the greatest level of transparency.[72] All ICSID pending and concluded cases are available to the public, including the subject matter of the arbitration, party names, date of registration, composition of the tribunal, and the procedural timeline.[73] However, actual ICSID arbitration tribunals cannot be described as completely open.[74] Information on the parties' arguments, the

67. *Id.*

68. NEWCOMBE & PARADELL, *supra* note 8, at 107-09.

69. *Id.*

70. LUKE ERIC PETERSON, RIGHTS & DEMOCRACY, INT'L CTR. FOR HUMAN RIGHTS AND DEMOCRATIC DEV., HUMAN RIGHTS AND BILATERAL INVESTMENT TREATIES: MAPPING THE ROLE OF HUMAN RIGHTS LAW WITHIN INVESTOR-STATE ARBITRATION 44 (2009), *available at* http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf [hereinafter PETERSON – MAPPING].

71. Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶ 37.

72. PETERSON – MAPPING, *supra* note 70, at 41-42.

73. MARC JACOB, INST. FOR DEV. & PEACE, INTERNATIONAL INVESTMENT AGREEMENTS AND HUMAN RIGHTS 24 (2010), *available at* http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf.

74. PETERSON – MAPPING, *supra* note 70, at 41-42; Ignacio Torterola, *The Transparency Requirement in the New UNCITRAL Arbitration Rules: A Premonitory View*, INVESTMENT TREATY NEWS, Sept. 23, 2010, at 10.

minutes and other records of the proceeding are not available, and the parties may agree to keep the contents of the final award confidential.[75] Moreover, all proceedings are closed to the public unless both parties agree otherwise, and in the past many ICSID stakeholders have objected to measures for greater transparency.[76]

Additionally, there are many other investment tribunals that offer much less transparency. For example, the UNCITRAL rules require that awards not be published unless both parties consent.[77] Consequently, an unknown number of BIT arbitration cases have been completed without any public disclosure or any ability of interested observers to monitor and analyze developments in the investment law regime.[78]

Investment tribunals do often consult and cite other investment arbitration decisions. While BITs differ, many employ very similar language, as described above in Section II. For example, many BITs have similar language referring to "fair and equitable treatment." Looking at how other tribunals have interpreted this broad language is helpful. However, the lack of published decisions and the secrecy of BIT disputes make it difficult to know what areas of investment law are consistent and established and what areas are still emerging or ambiguous.[79]

E. Arbitrators' Lack of Human Rights Expertise and Opposing Allegiances in BIT Arbitration Tribunals

The arbitrators that resolve BIT disputes can also present a problem for the promotion and protection of human rights. Generally, in investor-State arbitration tribunals, the parties choose the arbitrators. Each party has the right to appoint one arbitrator and the third arbitrator is chosen through agreement of the two party-nominated arbitrators, and ideally, the parties as well.[80]

However, arbitrators present two distinct problems. First, human rights norms may be outside the scope of the arbitrator's expertise.[81] There are no significant restrictions on who can serve as arbitrators. ICSID requires that arbitrators must have "recognized competence in the fields of law, commerce, industry or finance."[82] Most BIT arbitrators have commercial backgrounds and are

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75. JACOB, *supra* note 73.

76. PETERSON – MAPPING, *supra* note 70, at 41-42.

77. JACOB, *supra* note 73.

78. LUKE ERIC PETERSON & KEVIN R. GRAY, INT'L INST. FOR SUSTAINABLE DEV., INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND IN INVESTMENT TREATY ARBITRATION 34-35 (2005), *available at* http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf; PETERSON – MAPPING, *supra* note 70, at 44.

79. Torterola, *supra* note 74, at 10-11.

80. Tony Cole, *Arbitrator Appointments in Investment Arbitration: Why Expressed Views on Points of Law Should be Challengeable*, INVESTMENT TREATY NEWS, Sept. 23, 2010, at 14, *available at* http://www.iisd.org/itn/2010/09/23/arbitrator-appointments-in-investment-arbitration-why-expressed-views-on-points-of-law-should-be-challengeable-2/.

81. Chalamish, *supra* note 13, at 352-53.

82. Cole, *supra* note 80.

not familiar with matters pertaining to human rights-related laws. Thus, even if a tribunal found it appropriate to address a human rights-related matter, the arbitrators may not be fully versed in how to proceed. Conversely, many human rights experts would similarly lack the necessary expertise in international investment law to serve as an arbitrator in a BIT arbitration.[83]

Secondly, the world of international investment arbitrators is a relatively small, close community. Understandably, these specialized arbitrators are concerned with "the securing of their next appointment to a tribunal" and consequently, their actions must ensure that MNCs will want them to serve as arbitrators in the future. In this small community, to obtain future employment, arbitrators must make a "display of commercial probity and their loyalty to the values of multinational business." Moreover, arbitrators often also serve as counsel to parties in other international investment related cases.[84]

F. BITs Can Limit State Sovereignty

One of the most-discussed problems posed by BITs is their capability to limit State regulatory power. When a State creates a law or policy in an area that affects an MNC, and there are many policy areas that can affect a foreign MNC's investment, the State runs the risk that the MNC may bring a multi-million dollar claim against the State for violating a BIT. The majority of investment cases involve economic sectors and policy areas that governments often regulate because these areas are of critical importance to any society. According to a 2007 study of concluded and pending ICSID cases, the majority of cases involved either basic public services or energy resources: 42 percent involved water, electricity, telecoms, and waste management, and 29 percent involved oil, gas, and mining.[85]

Additionally, MNCs have won systematic victories regarding State regulation that could be characterized as responding to social and economic emergencies. The Argentine financial crisis of the early 2000s produced such emergencies, yet the resulting investor-State arbitration cases upheld investment contracts despite the fact that they were arguably economically and socially impossible due to the financial crisis. In the absence of express BIT provisions regarding human rights, arbitrators struggled with Argentina's human rights defense arguments.[86]

Generally, international arbitration tribunals have held that States must comply with both international investment law and domestic human rights obligations.[87] The following are four ways in which the current patchwork BIT regime can limit State sovereignty.

83. JACOB, *supra* note 73, at 25.
84. *Id.* at 25-26.
85. ANDERSON & GRUSKY, *supra* note 56.
86. NEWCOMBE & PARADELL, *supra* note 8, at 75.
87. *Id.*

1. Host-State Agreements and Risk-Stabilization Clauses

In addition to BITs, Host-States enter into agreements with individual investors. Host-State agreements often include "risk stabilization clauses." These clauses can serve to insulate investors from having to implement human rights-related laws (e.g. – laws related to labor rights, environmental regulation, etc.) or may require Host-States to compensate investors for the costs of compliance.[88] Additionally, risk stabilization clauses can include promises to "freeze" the existing regulatory regime for the duration of the investment, which can be as long as fifty years if it is a major infrastructure or extractive industries project.[89]

Where a Host-State attempts to force an investor to comply with new legislation despite a risk stabilization clause, even where the legislation applies to all businesses uniformly, this action can be seen as violating the BIT between the Host-State and the investor's Home-State. Specifically, such an action would violate a BIT's assurances of "fair and equitable" treatment and "umbrella clauses," which require States to abide by contractual obligations with investors.[90] BIT disputes arising from these circumstances have involved staggering claims and awards for compensation, reaching to hundreds of millions of dollars.[91]

Studies have shown that this regulatory imbalance is particularly problematic for developing countries. Agreements between investor-MNCs and non-members of the OECD constrain Host-States' regulatory power significantly more than agreements with the thirty members of the OECD.[92] A study of 90 Host-State agreements showed that none of the Host-State agreements with OECD countries offered investors exemptions from new laws and they generally tailored risk stabilization clauses to preserve public interest considerations.[93] Conversely, a majority of the Host-State agreements between investing MNCs and non-OECD countries contained provisions that insulated investors from compliance with new environmental and social laws or mandated compensation from the Host-State for compliance. Host-State agreements between investor-MNCs and Sub-Saharan African nations had the most sweeping risk stabilization provisions.[94]

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88. *Id.*

89. *Id.*

90. ANDREA SHEMBERG, INT'L FIN. CORP. & OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, STABILIZATION CLAUSES AND HUMAN RIGHTS ¶ 138 (2008), *available at* http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf; Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶12.

91. Hallward-Driemeier, *supra* note 7, at 2, n.1.

92. Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶¶ 34-36. OECD members: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

93. Human Rights Council, *Business & Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework*, ¶ 32, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) (*prepared by* John Ruggie) [hereinafter Ruggie – *Towards*].

94. *Id.* ¶ 32.

2. Host-State Regulatory Power and Indirect Expropriation

Investor-MNCs have challenged Host-State regulations by alleging that they violate BIT protections against expropriation. As discussed above, BITs generally prohibit government expropriation of an investor's investment unless the expropriation is for a non-discriminatory public purpose and the investor is compensated. An expropriation may be direct or indirect. Defining an indirect expropriation requires an "effects based approach" whereby "the focus of the analysis is the effect of the State measure on the investment."[95] A wide variety of government measures have been found to constitute an indirect expropriation: exorbitant or arbitrary taxation; measures substantially interfering with the management or control of a business enterprise; annulment and cancellation of property rights, contractual rights, debts, or licenses; the harassment of employees, blocking of access to a plant, and government take-over of a key supplier; and other arbitrary conduct depriving the investor of the benefits of its property.[96]

A recently decided BIT case further illustrates the problem.[97] In November 2006, European investors registered a claim with ICSID against South Africa, contending that the Mineral and Petroleum Resources Development Act (MPRDA) violated the Italy-South Africa BIT and BITs concluded by South Africa with Belgium and Luxembourg.[98] The investors involved hold large investments in the natural stone business in South Africa, controlling about 80 percent of South Africa's stone exports.[99] The MPRDA vests all mineral and petroleum rights with the South African government and requires that businesses apply for a right to convert their former holdings into "new-order" rights, which are held and used under license from the South African government. In this conversion process, South Africa's Department of Mining and Energy considers the Constitution's overall goal of redressing historical, social, and economic inequalities.[100] The investors claimed that the MPRDA extinguished their ownership of mineral rights in South Africa, which constituted an indirect expropriation. The claimants also alleged that they have been denied fair and equitable treatment because of affirmative action requirements for the hiring of black or historically disadvantaged managers and the selling of 26 percent of their shareholdings to black or historically disadvantaged individuals.[101]

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95. NEWCOMBE & PARADELL, *supra* note 8, at 326.
96. *Id.* at 327-28.
97. Ruggie - *Further Steps, supra* note 12, ¶ 21 (citing Piero Foresti v. Republic of S. Afr., ICSID Case No. ARB/07/1, Award (Aug. 4, 2010)).
98. Luke Eric Peterson, *European Mining Investors Mount Arbitration Over South African Black Empowerment*, INVESTMENT TREAT NEWS, Feb. 14, 2007, *available at* http://www.iisd.org/pdf/2007/itn_feb14_2007.pdf.
99. *Id.*
100. *Id.*
101. *Id.*

Ultimately, this case was settled outside of the arbitration tribunal. Following an agreement between the parties whereby South Africa granted the investors new mining rights, the investors requested to discontinue the arbitration proceedings. In August 2010, the tribunal then dismissed the investors' claims and ordered the investors to pay EUR400,000 to South Africa for arbitration costs.[102] While this case could have ended with much weightier consequences for South Africa, it exemplifies how the current BIT regime provides MNCs with a cause of action and a forum to directly challenge a nation-State's domestic policies. The stakes for developing nations are enormous.

Similarly, there have been several disputes regarding Host-State measures affecting the privatization of water supplies, which pit investors' rights against the increasingly recognized right to water.[103] In *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania,* the investors, a British-German consortium, won a bid to upgrade and manage water and sanitation infrastructure in Tanzania, but underestimated the difficulty of the project and sought to renegotiate the contract. Tanzania refused to renegotiate, repudiated the contract, and seized control of the project. The investors initiated a claim with ICSID requesting $20 million in compensation for the alleged expropriation of their investment in the water project. The arbitration tribunal held that Tanzania violated the expropriation clause of the United Kingdom-Tanzania BIT.[104] Tanzania, and several *amici curaie* submissions, argued that Tanzania's actions were justified on human rights grounds. Nevertheless, the tribunal refused to defer to human rights laws for clarification because the expropriation provisions were clear and Tanzania's repudiation of the contract was inconsistent with the contract's termination clause.[105] However, the tribunal awarded no compensation given that, due to the investor's poor planning and implementation, the monetary loss was inevitable.[106]

3. Police Powers and Indirect Expropriation

Not all governmental deprivations of property constitute an expropriation. International law authorities have regularly recognized three broad categories of "police power" regulation that might justify non-compensation where there is a deprivation: (1) public order and morality; (2) protection of human health and environment; and (3) State taxation.[107] However, particularly with public morality regulations and policies to protect human health and environment, there is a lack of precise definitions and guidance.[108]

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102. Piero Foresti v. Republic of S. Afr., ICSID Case No. ARB/07/1, Award, ¶ 133 (Aug. 4, 2010).

103. JACOB, *supra* note 73, at 14.

104. *Id.*

105. Jorge Daniel Taillant & Jonathan Bonnitcha, *International Investment Law and Human Rights, in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 57, 75-76 (Marie-Claire Cordonier Segger et al. eds., 2011).

106. JACOB, *supra* note 73, at 14.

107. NEWCOMBE & PARADELL, *supra* note 8, at 358.

108. *Id.* at 360-61.

Moreover, perspectives differ regarding the effect of police powers. One perspective is that the "police powers" are a criterion which is weighed in the balance with other factors. Others argue that "police powers" are a controlling element that exempts automatically the measure from any duty for compensation.[109] In practice, BIT tribunal's put the burden of proof on the State, forcing the police power justification to become a defense.[110]

"A significant consideration in assessing police power regulations . is the proportionality between the harm that the government measure aims to address and its effect on the investor, in light of the investor's legitimate investment-backed expectations."[111] This was the issue in the ICSID case of *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States* (*Tecmed*).[112] In *Tecmed*, the investor alleged that the Mexican government's failure to re-license its hazardous waste site violated the Spain-Mexico BIT and constituted an indirect expropriation.[113] The waste site had been plagued by "sit-ins by local residents protesting the site's technical viability and lack of public participation in decisions regarding the hazardous waste confinement and [facility's] proximity to [nearby communities]."[114] Notably, civil society groups had alleged that the waste facility had "lacked the proper environmental impact authorization, and had illegally deposited hazardous waste from another company prior to the closing of the waste site in 1999." Consequently, the NAFTA Commission for Environmental Cooperation held that a fact-finding inquiry was warranted but this was deferred due to the ongoing ICSID arbitration.[115] The investor argued that its waste facility "was the target of organized protests designed to achieve a protectionist end: protecting Mexico's only other hazardous waste storage facility in Mina, near Monterrey."[116]

The Tribunal attempted to determine whether the Mexican government's measures had "a reasonable relationship of proportionality"[117] "with respect to their goals, the deprivation of economic rights and the legitimate expectations of [the investor]."[118] This standard appears to lie somewhere in vast expanse between

109. Organization for Economic Co-operation and Development [OECD], *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law* 18 (Working Papers on International Investment No. 2004/4, Sept. 2004), *available at* http://www.oecd.org/dataoecd/22/54/33776546.pdf.

110. NEWCOMBE & PARADELL, *supra* note 8, at 366.

111. *Id.* at 363.

112. OECD, *supra* note 109, at 18 (discussing Tecnicas Medioambientales Tecmed S.A, v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003)).

113. *Id.*

114. Luke Eric Peterson, *Mexico's Treatment of Hazardous Waste Site Violates Mexico-Spain BIT*, INVESTMENT L. & POL'Y WKLY. NEWS BULL., June 6, 2003, *available at* http://www.iisd.org/pdf/2003/investment_investsd_june6_2003.pdf.

115. *Id.*

116. *Id.*

117. OECD, *supra* note 109, at 18.

118. *Id.* at 20.

the requirement that there be a plausible basis for the measure and the requirement that the measure be the least restrictive means necessary to meet the government's objectives.[119] The Tribunal noted:

> Even before the Claimant made its investment, it was widely known that the investor expected its investments in the Landfill to last for a long term and that it took this into account to estimate the time and business required to recover such investment and obtain the expected return upon making its tender offer for the acquisition of the assets related to the Landfill.[120]

Based on these considerations of the investor's legitimate expectations and a finding that the government's actions were disproportionate to the investor's "infringements," the Tribunal found against Mexico and awarded the investor $5 million.[121]

4. Lack of Guidance Regarding How Tribunals Should Balance Investors' Rights Against States' Obligations and Sovereignty

Many BIT disputes pit an investor's rights against a Host-State's obligations under domestic and international law, and BITs give tribunal arbitrators little to no guidance on how these conflicts should be reconciled. At some point a Host-State's obligations must outweigh an investor's rights under BITs, but where this line is drawn remains unclear. States have achieved some limited success in arguing that international human rights law should be used as an interpretative aid to guide vague treaty and contract standards.[122]

An example of a successful attempt to invoke human rights obligations would be the case discussed above in Section III(F)(2), *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania.* While the investors won their expropriation claim, the tribunal rejected their fair and equitable treatment claim based on Tanzania's human rights obligations. The tribunal found that the investors' legitimate expectations were partly determined by the "particular investment environment." Here, the environment had two important characteristics: (1) Tanzania was a developing State; and (2) Tanzania was bound by international human rights obligations to protect its citizens' right to water.[123]

Conversely, an example of a failed attempted to invoke human rights obligations would be the case of *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal v. Argentina.*[124] This claim concerned a 1993 water privatization program and a 30-year concession granted by the Argentine

119. NEWCOMBE & PARADELL, *supra* note 8, at 365.

120. OECD, *supra* note 109, at 20.

121. *Id.*; Peterson, *supra* note 114.

122. Taillant & Bonnitcha, *supra* note 105, at 75.

123. *Id.* at 75-76.

124. Lise Johnson, *Argentina on the Hook for Breach of Fair and Equitable Treatment,* INVESTMENT TREATY NEWS, Sept. 23, 2010, at 23, *available at* http://www.iisd.org/itn/2010/09/23/awards-and-decisions/.

government to a company created by the claimants to operate water and waste-water services for Buenos Aires. In April 2003, the investor-MNCs initiated an ICSID arbitration against Argentina. They alleged that government actions and omissions related to the Argentine financial crisis stymied the concession and destroyed the value of the investment, in violation of Argentina's BITs with Spain, the United Kingdom, and France. During the arbitration, the tribunal addressed this claim under the BIT's fair and equitable treatment provisions. The tribunal interpreted the provision to require that Host-States must protect investors' objective and reasonable "legitimate expectations" by taking into account all relevant circumstances, including the nature of the investment, Argentina's rights and interests to exercise its regulatory authority, and Argentina's historical, political, economic, and social conditions.[125] Argentina, and NGOs, through *amicus curiae* briefs, argued that a government's human rights obligations to assure its population the right to water should trump its obligations to investors under BITs. In July 2010, the Tribunal rejected this, holding that a State must respect both its human rights and treaty obligations equally, and found Argentina liable for violating the applicable BITs.[126]

Thus, the fact that the current, nebulous BIT regime allows MNCs to punish a State's regulatory actions regarding important policy areas, such as public services or the energy sector, is particularly problematic. Notably, even where such disputes are decided with minimal financial awards to investors, the mere potential of an adverse arbitration decision with great financial and political costs "might suffice to cause 'chilling effect' on national regulation."[127]

V. HOW TO PROTECT HUMAN RIGHTS WITHIN THE PRESENT BIT REGIME

The future possibility of a multilateral investment framework is bleak. Nevertheless, given the increasing and widespread use of BITs worldwide and the effectiveness of BIT dispute mechanisms, it may still be possible for States to revamp the present BIT regime to better incorporate public interests, State sovereignty, and human rights. For example, in 2005, the International Institute for Sustainable Development (IISD) published a draft Model Investment Agreement including such protections, which will be discussed in more detail in Section VI.

Changing a treaty is complex and time consuming. Change can occur in one of three ways. First, a completely new BIT could be negotiated and concluded. Second, existing BITs could be amended. Third, the State-parties could issue binding interpretations of certain BIT provisions.[128] Given that BITs are a treaty between two States, the following are several suggested steps States could take in revising their BITs.

125. *Id.*
126. *Id.*
127. JACOB, *supra* note 73, at 13.
128. *Id.* at 33.

A. Integrate Domestic Human Rights Policy and Investment Policy

States should harmonize their approach to BITs with the rest of their domestic policy. As discussed above, many States' laws and policies suffer from "horizontal incoherence" where their investment-related departments may be working separately from, and potentially in conflict with, their human rights-related agencies and obligations.[129] A cohesive domestic legal system will help prevent risk stabilization clauses from constraining a State's ability to regulate.[130] The goal is to strike a balance between the need for investor certainty and ensuring that a State's legitimate interests are not compromised.[131]

Increasingly, States are exploring ways to integrate their domestic investment policies and human rights-related policies. For example, many of South Africa's BITs that were signed after 1994 will soon expire, providing an opportunity to reassess the State's approach towards BITs.[132] South Africa has announced that it intends to closely scrutinize the "horizontal incoherence" between its BITs and protections offered under South African law.[133]

B. Add Broader Policy Objectives to BIT Preambles

States should add broader policy objectives to the preambles, or the *chapeau*, of their BITs. While provisions of a preamble are not binding, they are a valuable tool for treaty interpretation and aid in deciphering the object and purpose a treaty.[134] Many arbitration tribunals have sought to interpret BITs, particularly fair and equitable treatment provisions, by looking to the treaty's preamble to decipher its object and purpose.[135] This is the principle of *effet utile,* in "that interpretation which accords practical content to a treaty provision will be favored over one that deprives it of such effect."[136] However, a teleological method of interpretation that would result in the implementation of a treaty's purpose in a manner not contemplated by the parties must be rejected as contrary to the parties' intention.[137] Additionally, interpretations which exaggerate investor protections may dissuade Host-States from admitting foreign investments and thereby undermine a BIT's overarching purpose of "intensifying" the economic relationship between the parties.[138]

Most BIT preambles are one-dimensional, emphasizing the need to create a favorable investment climate, without mentioning broader policy goals.[139] Very few BITs include in their preambles the need to respect State sovereignty and the

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129. Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶ 33.
130. *See* SHEMBERG, *supra* note 90.
131. S. Afr. BIT Review, *supra* note 55, at 56.
132. *Id.* at 55.
133. *Id.*
134. Vienna Convention on the Law of Treaties art. 31(2), May 23, 1969, 1155 U.N.T.S. 331.
135. NEWCOMBE & PARADELL, *supra* note 8, at 113-14.
136. *Id.* at 114.
137. *Id.* at 115, 125.
138. *Id.* at 115-16, 126.
139. *Id.* at 116.

laws of the State-parties.[140] However, a number of more recent BITs have included in their preambles that investment promotion and protection must be consistent with the recognition of internationally recognized labor rights,[141] the objective of not relaxing health, safety, and environmental measures, [142] and the goal of sustainable development.[143]

Norway's 2007 draft model BIT contains arguably the most extensive policy objectives in its preamble. In addition to the provisions discussed above, the preamble also references the following:

> . . sustainable utilization of economic resources . . the importance of corporate social responsibility [the parties'] commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights.[144]

However, in 2009, Norway abandoned its draft model BIT following polarized public criticism. While some felt that the model did not provide enough investor protections, others argued that the model would still restrain a government's ability to regulate in the public interest.[145]

While these preambles are not binding, they do affect the interpretation of Host-State's obligations to investors. Including broader policy objectives, like those in Norway's draft Model BIT, would counter-balance BITs' predominant focus on investor's rights and force BIT arbitration tribunals to reconcile investor protections with a Host-State's sovereignty and human rights-related obligations.

C. Acknowledge State Sovereignty

States should include in their BITs substantive language that acknowledges State sovereignty. While provisions recognizing human rights are rare in preamble provisions and non-existent in substantive treaty provisions, human rights-related areas, such as environmental and labor laws, are increasingly discussed. For example, Article 12 of the United States Model BIT provides for the following:

> The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it

140. *Id.* at 123.

141. *Id.*

142. *Id.* at 123-24.

143. *Id.* at 123.

144. Draft Version 191207, Agreement Between the Kingdom of Norway and _ for the Protection and Promotion of Investments pmbl. cls. 4, 6, 8 (Dec. 19, 2007), *available at* http://www.asil.org/ilib080421.cfm [hereinafter Norway Model BIT].

145. Damon Vis-Dunbar, *Norway Shelves Its Draft Model Bilateral Investment Treaty,* INVESTMENT TREATY NEWS, June 8, 2009, *available at* http://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/.

> does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.[146]

Additionally, Article 13 contains nearly identical provisions regarding "internationally recognized labor rights."[147] Language like these provisions should be included in BITs to recalibrate the balance between investors' rights and State sovereignty.

D. Provide Jurisdiction for Human Rights-Related Matters

States should provide investment tribunals with broader jurisdiction to include human rights-related matters. BITs should include that an investment tribunal "is competent to decide matters of public international law or human rights law that might arise in the course of an arbitration."[148] Specifically, a Host-State should be able to raise as a defense that the Host-State's action was necessary to prevent the investor from harming its citizenry or that the actions were necessary pursuant to the Host-State's human rights obligations under international law. This concept should include more specific guidance in BITs regarding the scope of the Police Powers and a State's ability to regulate public health, the environment, and labor rights, as discussed above.[149]

Additionally, requiring that the Host-State prove that such actions were done in good faith and with a non-discriminatory intent can mitigate the risk of abuse of this defense. For example, the U.S. Model BIT provides that "[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[150]

E. Provide Human Rights Expertise in BIT Arbitration Tribunals

States should provide in BITs that when a human rights-related matter arises, the arbitration tribunal must incorporate appropriate expertise into the decision-making process. As discussed above, one problem in BIT arbitrations is that arbitrators may lack the necessary expertise to deal with human rights-related matters. To deal with this issue, many commentators have suggested two solutions. First, BITs should require that arbitration tribunals dealing with human rights-related claims include at least one arbitrator with knowledge of human rights law.[151] Secondly, arbitrators should be allowed, encouraged, or perhaps even

146. U.S. Model BIT, *supra* note 33, art. 12.
147. *Id.* art. 13.
148. JACOB, *supra* note 73, at 45.
149. *See supra* Section III(F)(3).
150. U.S. Model BIT, *supra* note 33, Annex B 4(b).
151. Chalamish, *supra* note 13, at 352-53; Weiler, *supra* note 16, at 439.

required to consult outside experts or specialized agencies regarding human rights-related issues implicated in a case.[152]

F Require Transparency and Public Participation in BIT Arbitration

States should mandate open dispute resolution to bring greater transparency to the BIT regime.[153] Wider publication of BIT decisions will enable greater study of the international investment law environment. "Only the availability of a sufficiently large number of cases will lead to the emergence of a body of arbitral case law."[154] In turn, the development of a body of case law is necessary to bring more certainty to the investment arbitration system. This would benefit MNCs and States in that interpretations of common BIT provisions would gradually become more consistent and the outcome of disputes would become more predictable. Additionally, greater consistency in the arbitration process would also contribute to the credibility of, and public trust in, arbitration as an appropriate and effective dispute settlement mechanism.[155]

As discussed above, the United States now requires that investment rules expressly provide for full transparency in BIT arbitrations.[156] Article 10 of the U.S. Model BIT requires that decisions be "promptly published or otherwise made publicly available."[157] Similarly, ICSID offers the greatest level of transparency.[158] All ICSID pending and concluded cases are available to the public, including the subject matter of the arbitration, party names, date of registration, composition of the tribunal, and the procedural timeline.[159]

Additionally, States could add language to BITs allowing for *amicus curiae* participation in the arbitration proceedings. Participation by observers, who do not have a direct interest in the case, could be of great assistance to a tribunal by both drawing attention to relevant matters not pleaded by the parties and by offering expertise that may be outside the arbitrators' knowledge.[160] Currently, under ICSID's rules, a tribunal *may*, after consulting the parties, allow persons or entities, who do not have a significant interest in the proceeding, to file a written submission on a matter within the scope of the dispute.[161]

Notably, UNCTRAL is considering adopting greater transparency rules, including publicly registering cases (possibly via an on-line docket), publishing documents related to the arbitration, and providing rules for third-party *amicus*

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152. Chalamish, *supra* note 13, at 352-53; PETERSON – MAPPING, *supra* note 70, at 45; PETERSON & GRAY, *supra* note 78, at 35.

153. PETERSON – MAPPING, *supra* note 70, at 44.

154. Torterola, *supra* note 74, at 11.

155. *Id.* at 8, 11.

156. PETERSON & GRAY, *supra* note 78, at 34.

157. U.S. Model BIT, *supra* note 33, art. 10.

158. PETERSON – MAPPING, *supra* note 70, at 41-42.

159. JACOB, *supra* note 73.

160. *Id.* at 37.

161. Torterola, *supra* note 74, at 11.

curiae submissions. However, there is a major divergence regarding whether new transparency rules should become the default UNCITRAL rules or whether they should be offered merely as a secondary alternative option to the current default rules. Indeed, a few States appear to prefer leaving the default rules in their current form. One proposed compromise would be to create an annex to the generic UNCITRAL rules that would apply to all investor-State arbitration, unless the parties to the BIT explicitly opt-out of the annex. This would ensure the "maximum application of the transparency rules" while preserving the opt-out option for States.[162]

VI. HOW TO PROTECT HUMAN RIGHTS BY MAKING ONE FUNDAMENTAL CHANGE IN THE BIT REGIME

Some argue that the above changes are not enough and that BITs, which provide investor-MNCs with highly enforceable rights, should also require of investors reciprocal obligations. However, such a concept is highly controversial as it would be a "radical departure" from the traditional purpose of a BIT – the protection of foreign investors – to having the dual purpose of human rights enforcement.[163] Additionally, those opposed to adding investor obligations to BITs argue that "such drastic gestures would run the serious risk of driving businesses out of the public system of international law and into the even less transparent, accountable, and legitimate realms of private regulation and non-legal dispute resolution."[164]

Commentators have generally suggested three very different possible constructions of investor obligations in BITs. One, an investor's failure to comply with investor obligations in the BIT would have "mitigating or off-setting effects... on the merits of a claim or on any damages award in the event of such award."[165] Two, investor obligations could act as a limit on investor rights. For example, a MNC would not be able to claim protection under the BIT unless they had complied with the investor obligations required by the BIT.[166] Three, investor obligations could expand the rights of the Host-State against an investor. For example, a Host-State would be enabled to bring a claim or counterclaim against an investor where the investor did not meet its obligations under the BIT.[167]

Below, Sub-Section A lays out a theoretical foundation for holding investor-MNCs responsible for human rights abuses. Sub-Sections B through K discuss

162. *Transparency in UNCITRAL Arbitration Rules Discussed in Vienna,* News in Brief, INVESTMENT TREATY NEWS, Dec. 16, 2010, at 14-15, *available at* http://www.iisd.org/itn/2010/12/16/news-in-brief-2/.

163. JACOB, *supra* note 73, at 38.

164. *Id.* at 37.

165. HOWARD MANN ET AL., INT'L INST. OF SUSTAINABLE DEV., MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT art. 18(B), (D) (2005), *available at* http://www.fes-globalization.org/dog_publications/Appendix%202%20IISD%20Model.pdf [hereinafter IISD Model].

166. Fauchald & Stigen, *supra* note 2, at 1051-52.

167. *Id.*; IISD Model, *supra* note 165, art. 18(E).

several of the investor obligations that various commentators and scholars have proposed. These descriptions do not represent an exhaustive list of proposed investor obligations. Moreover, they are not meant to be considered in isolation; rather several of these obligations could be incorporated into a single BIT.

A. Theoretical Foundation: MNCs & Human Rights Obligations

Widespread trade and investment liberalization has allowed dominant corporations to enjoy increasing levels of economic and political clout.[168] However, the theory behind creating obligations for MNCs does not rest on the benefits or harm MNCs have brought to the global community but rather their collective global power as non-State actors. Many MNCs' revenues surpass the entire gross domestic products of nation-States.[169] In 2000, 51 of the world's top 100 largest economies were corporations, not nation-States, and 6 percent of the top 200 corporations' annual combined sales exceeded the total combined annual income of 1.2 billion of the world's population living in severe poverty.[170] Indeed, relations between States no longer dominate the international environment. Rather, autonomous, non-State actors, supranational corporations wield an extraordinary amount of financial and political power, acting "in near-total impunity."[171] Such power should be matched with a corresponding degree of responsibility and accountability.

Some argue that discussing international legal duties for MNCs redefines international human rights in an "unacceptable way," in that it is a departure from international law's traditional sphere of supplying duties only to governmental action.[172] Three factors must be considered in response to this concern.

First, a right may exist "without knowing who is bound by duties based on it or what precisely these duties are."[173] Thus, a right may exist with a wide range of corresponding duty-holders. Human rights are an entitlement to all mankind. In theory, the number of corresponding duty-holders is unlimited. However, historically, duties have been assigned primarily to nation-States.

Secondly, international law has recognized human rights duties on non-State actors, although this is limited to relatively few human rights abuses.[174] Under international humanitarian law, rebel groups have a duty to respect the

168. SARAH ANDERSON & JOHN CAVANAGH, TOP 200: THE RISE OF CORPORATE GLOBAL POWER 1 (2000), *available at* http://s3.amazonaws.com/corpwatch.org/downloads/top200.pdf.

169. *Id.* at 3.

170. *Id.*

171. Anne-Christine Habbard, *The Integration of Human Rights in Corporate Principles, in* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GUIDELINES FOR MULTINATIONAL ENTERPRISES 99, 99 (2001).

172. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility,* 111 YALE L.J. 443, 466 (2001).

173. *Id.* at 468 (citing JOSEPH RAZ, THE MORALITY OF FREEDOM 184 (1986)).

174. *Id.* at 466-67.

fundamental rights of persons under their control.[175] States have also accepted that non-State actors have duties within international criminal law on human rights atrocities.[176] Lastly, war crimes, genocide, crimes against humanity, torture, slavery, forced labor, apartheid, and forced disappearances are all crimes under international law, even when perpetrated by non-State actors.[177] However, while these obligations on non-State actors have been extended to individuals, they have not been extended to legal entities. For example, the Nuremberg Tribunal after WWII focused on individual criminal responsibility, not corporate criminal responsibility. Similarly, the statutes for the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court do not authorize the prosecution of legal entities, only natural persons.[178]

Third, the origins of our present State-centered human rights system provides persuasive evidence that human rights duties should be extended to MNCs. Throughout history, nation-States have represented the greatest danger to the individual and human dignity. After WWII, the human rights developed and embodied in the Universal Declaration of Human Rights provided duties for States.[179] Given that MNCs have integrated into the daily fabric of our societies, have economic power comparable to some States, and have shown that they can pose a great danger to human dignity, it is not a leap in logic to suggest that these same human rights necessitate that MNCs should have some duties as well. Thus, new rights would not be created, but rather the duties States have to protect human rights would be extended onto MNCs.

Additionally, some argue that international corporate responsibility will only enable "company directors . . . to reallocate liability onto corporations by dispersing any penalty amongst the shareholders of the company." Additionally, "this not only diminishes the deterrent effect of the punishment," but it "ultimately may shift the punishment onto individuals [like shareholders] who may be entirely innocent."[180] However, corporate liability and individual liability are not mutually exclusive.[181] Moreover, like the breach of a fiduciary duty, or any poor corporate decision-making, shareholders would likely experience consequences if a corporation was found legally responsible for a human rights violation; plummeting stock values and tarnishing the corporate name are pivotal components to deterring illegal corporate behavior.

Lastly, while investor obligations may be a new, emerging concept, they are not "radical." Investment treaty awards have already incorporated the concept of investor obligations indirectly. Tribunals have interpreted the requirement in

175. *Id.*
176. *Id.*
177. *Id.*
178. Fauchald & Stigen, *supra* note 2, at 1037-40.
179. Ratner, *supra* note 172, at 469.
180. Fauchald & Stigen, *supra* note 2, at 1043-44.
181. *Id.* at 1044.

treaties that the investment be made "in accordance with local laws" as an investor obligation. Tribunals have also recognized a requirement of "good faith" by investors "to avoid hearing claims that are based on unlawful conduct . . . such as, bribing government officials or misrepresentation to authorities at a tender stage."[182] Moreover, there seems to be growing momentum towards serious consideration of investor obligations. Tomas Baert, the European Commission Directorate General for Trade, Services and Investment, has commented that the discourse and debate surrounding the formation of an EU investment policy has included the possibility of adding investor obligations in areas of human rights and corporate social responsibility in EU investment treaties.[183]

B. Umbrella Clauses: Discard Them or Make Them Reciprocal

One option for an investor obligation would be to structure "umbrella clauses" in BITs to be reciprocal. Umbrella clauses are common provisions that require a Host-State to, for example, "observe any obligation it may have entered" or "constantly guarantee the observance of the commitments it has entered into."[184] The exact wording for umbrella clauses varies[185] and the meaning of individual umbrella clauses has been very controversial.[186] For example, a MNC could bring a claim against a State under the umbrella clause where the State violated the terms of a contract, like a Host-State Agreement, between the State and the MNC. However, violations of umbrella clauses are not limited to contractual violations, and can also include legislation, regulation, and administrative acts,[187] and "collateral guarantees, warranties or letters of comfort" provided by a Host-State to induce foreign investment.[188] The effect of umbrella clauses is that violations of promises, contractual or not, given to an investor are elevated to be a violation of a BIT.

Umbrella clauses first appeared in the 1950s and originated in the trepidation of the asymmetrical balance of power between investors and States.[189] Given that

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182. Mahnaz Malik, *The IISD Model International Agreement on Investment for Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 561, 581 (Marie-Claire Cordonier Segger et al. eds., 2011).

183. *Towards a Comprehensive European International Investment Policy: An Interview With Tomas Baert, European Commission, Directorate General for Trade, Services and Investment*, INVESTMENT TREATY NEWS, Sept. 23, 2010, at 4, *available at* http://www.iisd.org/itn/2010/09/23/towards-a-comprehensive-european-international-investment-policy-an-interview-with-tomas-baert-european-commission-directorate-general-for-trade-services-and-investment/.

184. NEWCOMBE & PARADELL, *supra* note 8, at 437; Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*, *in* ORG. FOR ECON. CO-OPERATION & DEV., INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS 101, 102 (2008), *available at* http://www.oecd.org/dataoecd/3/6/40471535.pdf [hereinafter OECD – Umbrella Clauses].

185. *Id.*

186. *Id.* at 101.

187. NEWCOMBE & PARADELL, *supra* note 8, at 457.

188. *Id.*

189. OECD – Umbrella Clauses, *supra* note 184, at 124; JACOB, *supra* note 73, at 20.

this power imbalance is less prominent in the present international environment and that some MNCs may arguably be as powerful, or even more powerful, than certain States, some argue that umbrella clauses are no longer necessary to insulate and protect investors.[190] Notably, the United States Model BIT no longer contains an umbrella clause.[191]

Alternatively, instead of abandoning umbrella clauses, they could be made to be reciprocal. While conceivably either an investor or a Host-State could breach an obligation or commitment, umbrella clauses are generally formulated as obligations solely on the Host-State. An umbrella clause could be recast to place strong reciprocal obligations on an investor to observe their commitments and obligations to the Host-State.[192] These reciprocal umbrella clauses could be re-framed to either allow the Host-State to invoke the clause as a defense or mitigating factor when an investor institutes a claim under a BIT, or as a basis for a Host-State to initiate a BIT arbitration against the investor.

C. Improve the Transparency of BITs and Host-State Agreements

States should consider stipulating in their BITs, or subsequent Host-State agreements with investors, that investment contracts and project information must be published. For example, Article 11 of the IISD Model requires that investors provide any information that a potential Host-State Party "may require concerning the investment in question for purposes of decision-making in relation to that investment or solely for statistical purposes," except "confidential business information . . . that would prejudice the competitive position of the investor or the investment."[193] Additionally, Article 15 requires that:

> [i]n accordance with the size and nature of an investment . . . Investors and investments shall make available to the public any investment contract or agreement with the [H]ost-[S]tate government involved in the investment authorization process, subject to the redaction of confidential business information. Investors or investments shall publish all information relating to payments made to [H]ost-[S]tate public authorities, including taxes, royalties, surcharges, fees and all other payments.[194]

Publication of project information, as described by these provisions, would serve three functions. First, it would inform impacted non-State actors of the investing MNC's plans and of the obligations that the government and the MNC have undertaken. Impacted non-State actors would then have notice of the impending investment and if needed, and were possible, take appropriate steps to object to actions or obligations undertaken by the investing MNC or their own government. Second, this notice would provide Host-States with an important

190. JACOB, *supra* note 73, at 20.
191. *Id.*
192. Fauchald & Stigen, *supra* note 2, at 1054.
193. IISD Model, *supra* note 165, art. 11(D).
194. *Id.* art. 15(B).

assurance of legitimacy of process. Third, because foreign investors negotiating Host-State agreements would have notice that their agreement would be published, and thus open to public scrutiny, foreign investors may act with a greater sense of fairness in negotiating Host-State agreements.[195]

D. "Due Diligence" Standard

Another option for investor obligations would be in line with the framework put forth by John Ruggie, the United Nations Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises. Ruggie's "Protect, Respect, and Remedy" policy framework, adopted unanimously by the Human Rights Council in June 2008, rests on three pillars. First, "the State [has a] duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication."[196] Second, there must be "corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others."[197] Third, States and MNCs should ensure that victims have "greater access . . to effective remedy, judicial and non-judicial."[198]

Thus, drawing from Ruggie's second pillar, one option would be "a due diligence standard for all obligations that have not attained the status of *jus cogens* norms."[199] Ruggie defines due diligence as requiring the following four components. First, companies should adopt a human rights policy,[200] and secondly, companies should integrate this policy throughout the company.[201] Third, companies should conduct a human rights impact assessment, including meaningful engagement and dialogue with impacted non-State actors, to better understand the effects of their existing and proposed activities.[202] "When conducting such assessments, companies can find an authoritative list of rights at a minimum in the International Bill of Human Rights" (including the Universal Declaration of Human Rights, the ICCPR, and the ICESCR), the International Labor Organization's (ILO) core conventions,[203] international humanitarian law in conflict-affected areas, and standards specific to vulnerable groups, such as, indigenous peoples or children.[204] Fourth, companies should adopt monitoring and auditing procedures to track the company's human rights impact and

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195. SHEMBERG, *supra* note 90, at 43.
196. Ruggie – *Further Steps, supra* note 12, ¶ 1.
197. *Id.*
198. *Id.*
199. Weiler, *supra* note 16, at 445; Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶ 25.
200. Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶ 60.
201. *Id.* ¶ 62.
202. *Id.* ¶ 61; Ruggie – *Further Steps, supra* note 12, ¶ 84.
203. Ruggie – *Further Steps, supra* note 12, ¶ 60; Ruggie – *Protect, Respect and Remedy, supra* note 1, ¶ 58.
204. Ruggie – *Further Steps, supra* note 12, ¶ 61.

performance.[205] Due diligence, unlike commercial, technical, and political risk management, is not a one-time action but must be "ongoing and dynamic."[206]

This approach of a non-specific due diligence standard is advantageous for several reasons. First, this standard would not be new, but an extension of well-established practices. MNCs already routinely conduct due diligence to ensure that a contemplated transaction has no hidden risks and to manage risks to the company and stakeholders, for example, to prevent employment discrimination, environmental damage, or criminal misconduct.[207] Second, this standard is flexible to meet the needs of different industries, different size MNCs, and different country conditions, in that it allows MNCs to develop their own solutions and measures to comply with this standard.[208] The scope of due diligence depends on three factors: the country context in which a company is operating, the human rights impacts its activities may have, and whether the company may be contributing to abuses through relationships connected to its activities (e.g. subcontractors).[209] Thus, the due diligence standard "would permit investors to be held accountable for serious abuses but would not unduly impair their ability to efficiently establish and maintain their investment activity in the territory of the [H]ost-[S]tates."[210] Third, this approach would provide corporate boards with strong protection in mismanagement claims by shareholders, and in lawsuits under the Alien Tort Statute and similar lawsuits, as it would be proof that the corporation took reasonable steps to avoid involvement in the alleged wrong.[211]

Lastly, Ruggie describes this approach as "a game-changer" from "naming and shaming," the response by external stakeholders to a MNC's failure to respect human rights, to "knowing and showing," a MNC's internalization of human rights due diligence.[212]

E. Anti-Corruption Provisions

The IISD Model suggests an anti-corruption obligation,[213] derived from the 2003 United Nations Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business, which entered into force in 1999.[214] Investors and their investments can not, either prior

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205. Ruggie – *Protect, Respect and Remedy*, *supra* note 1, ¶ 63.
206. Ruggie – *Further Steps*, *supra* note 12, ¶ 84-85.
207. *Id.* ¶ 81.
208. *Id.* ¶ 82.
209. Ruggie – *Protect, Respect and Remedy*, *supra* note 1, at ¶ 25, ¶ 57.
210. Weiler, *supra* note 16, at 445-46.
211. Ruggie – *Further Steps*, *supra* note 12, ¶ 86.
212. *Id.* ¶ 80.
213. IISD Model, *supra* note 165, art. 13.
214. HOWARD MANN ET AL., INT'L INST. FOR SUSTAINABLE DEV., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT: NEGOTIATORS' HANDBOOK 24-25 (2d ed. 2005), *available at* http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf [hereinafter IISD MODEL - HANDBOOK].

to or after the establishment of an investment, commit, be complicit in, incite, aid and abet, authorize, or conspire to commit any of the following acts:

> [an] offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the [H]ost-[S]tate, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment.[215]

The terminology is meant to make corruption practices an unacceptable business practice.[216] Where an investor or its investment breaches this provision, the investor would lose the right to initiate any dispute settlement process established under the BIT.[217]

F. Require Pre-Establishment Environmental and Social Impact Assessments

A BIT should include an investor obligation for environmental and social impact assessments. An environmental impact assessment would evaluate the investments anticipated impact on the local community's land, natural resources, air quality, water resources, and the like. Similarly, a social impact assessment would evaluate the investment's anticipated impact on the local community's society, which could include impacts on human rights, the decision-making and governing structure, religious beliefs, family values, and many other topics. In his April 2010 report, Ruggie stated that a key policy tool for States striving to uphold the "Protect" pillar is"[e]ncouraging or requiring companies to report on human rights policies and impacts."[218] Notably, it "enables shareholders and other stakeholders to better engage with businesses, assess risk and compare performance within and across industries" and reinforces and compliments the due diligence standard's component regarding human rights assessments.[219]

1. The Scope of Environmental and Social Impact Assessments

General descriptions of environmental and social impact assessments are necessarily ambiguous, as such assessments apply to a wide variety of investments. For example, OPIC's environmental and social assessment policy includes the following key process elements:

(1)project definition;

(2)(initial) screening of the project and the scoping of the Assessment process;

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215. IISD Model, *supra* note 165, art. 13.
216. IISD MODEL – HANDBOOK, *supra* note 214, at 24-25.
217. IISD Model, *supra* note 165, art. 18(A).
218. Ruggie – *Further Steps, supra* note 12, ¶ 36.
219. *Id.*

(3) stakeholder identification and gathering of social and environmental baseline data, where relevant;

(4) impact identification and analysis; and

(5) generation of mitigation or management measures and actions.

Additionally, OPIC requires that the "breadth, depth and type of analysis . . . be proportionate to the nature and scale of the proposed project's potential impacts," and that the assessment conform to any related Host-State requirements.[220]

Similarly, Article 13 of IISD's Model requires both environmental and social impact assessments. The Model requires a social impact assessment for all investments, according to "standards" that would have to be established by the State-parties.[221] However, environmental assessments would only be required for "applicable" proposed investments. The Model requires that the State-parties establish "screening criteria" and a process for the environmental assessments. The scope of the required assessment would vary depending on issues related to the enterprise's size and its inputs and output.[222] For example, small enterprises and many service-related enterprises should be exempt from the assessment requirements, while resource-related projects should be required to comply with the assessment process.[223] Thus, this assessment requirement could be introduced gradually, applying only to the most high-risk investments.

Determining what investments should be required to perform an environmental or social assessment would not be a new question, as it has been discussed and determined in other areas outside of BITs. For example, consider the approach of OPIC. OPIC refuses to provide political risk insurance for investments in the following specific categorically prohibited sectors:

- Conversion or degradation of Critical Natural Habitats (areas protected by traditional local communities and sites critical to biodiversity and vulnerable animal species).
- Large dams that disrupt ecosystems, displace more than 5,000 people, or impact local inhabitants' ability to earn a livelihood.
- Commercial manufacturing of ozone-depleting substances or persistent organic pollutants that are banned or scheduled to be phased out during the life the project.
- Projects that require the resettlement of 5,000 or more persons
- Projects in or impacting natural World Heritage Sites.[224]

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220. INT'L FIN. CORP., GUIDANCE NOTE 1: SOCIAL AND ENVIRONMENTAL ASSESSMENT AND MANAGEMENT SYSTEMS G10 (July 31, 2007) *available at* http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_GuidanceNote2007_1/$FILE/2007+Updated+Guidance+Note_1.pdf.

221. IISD Model, *supra* note 165, art. 12.

222. *Id.*

223. *Id.* n.10

224. OVERSEAS PRIVATE INVESTMENT CORP., *Investor Screener*, http://www.opic.gov/doing-

Given that these investments have already been identified as representing a particularly high-risk, these would be the type of investments that BITs should require to complete an environmental and social impact assessment prior to establishing the investment. Thus, States can look to public and private political risk insurers for guidance regarding what investments are particularly risky in each Host-State.

Additionally, the IISD Model states that investors and the Host-State should apply the "precautionary principle" to the environmental impact assessment and decisions taken in relation to a proposed investment.[225] The precautionary principle, as defined in Article 15 of the Rio Declaration on Environment and Development, requires that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[226]

2. Publish Environmental and Social Impact Assessments

The requirements for environmental and social impact assessments should also include that the assessments be published. For example, the IISD Model requires that all environmental and social impact assessments must be made public and accessible to the local community and affected interests in the Host-State before the Host-State makes any final decisions regarding whether to allow the investment.[227] This minimum obligation ensures that communities will be adequately informed about potential activities in the local area and that communities will generally have a chance to respond if needed.

Similarly, BITs could require that the assessments also be subject to a public comment period. For example, OPIC not only requires an impact assessment for environmentally or socially sensitive projects,[228] but also that the assessments be published and subjected to a public comment period. Assessments are posted for at least 60 days and OPIC invites public comment, which OPIC subsequently considers in making its final decision.[229]

G. Require Certification of a Management Standard

The IISD Model, in Article 14(A), also requires that all investments must "maintain an environmental management system." Specifically, companies with over a certain number of employees (e.g. 250 or 500) or high-risk industrial enterprises (e.g. resources exploitation), must maintain a current certification to the International Organization for Standardization's (ISO) "ISO 14001" standard, or an equivalent environmental management standard, including an emergency

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business/investor-screener (last visited Mar. 1, 2011) [OPIC – *Investor Screener*].

225. IISD Model, *supra* note 165, art. 12(D), n.11.

226. *Id.*

227. *Id.* art. 12(C).

228. OPIC-Spinelli, *supra* note 44.

229. *Id.*

response and decommissioning plan.[230] However, in countries or regions where certification may not be possible, the IISD Model requires that companies must make a good faith effort to obtain and maintain certification.[231]

The ISO is the world's largest developer and publisher of international standards. It is comprised of a network of 160 countries' national standards institutes with a Central Secretariat in Geneva, Switzerland that coordinates the system. The ISO bridges the gap between the public and private sectors to reach solutions that meet both the requirements of business and the broader needs of society.[232] The ISO 14001 is a standard that is intended to provide a framework for a holistic, strategic approach to the organization's environmental policy, plans and actions.[233] The ISO 14001 gives the generic requirements for an environmental management system:

- identify and control the environmental impact of activities, products or services;
- improve environmental performance continually; and
- implement a systematic approach to setting environmental objectives and targets, to achieving these and to demonstrating that they have been achieved.[234]

Fulfilling these requirements demands objective evidence which can be audited to demonstrate that the environmental management system is operating effectively in conformity to the standard.[235]

H. Require Investors to Uphold International Human Rights Norms

Article 14 of the IISD Model provides a very general requirement that investors and investments should "uphold human rights in the workplace and in the [S]tate and community in which they are located" and not undertake, cause to be undertaken, be complicit with, or assist in, the violation of the human rights, including during civil strife.[236] This provision does not encompass proactive requirements; for example, it does not require corporations to build schools to achieve a child's right to education. IISD derived this provision from the OECD and UN instruments on bribery and corruption and the introductory words of Principles 1 and 2 of the Global Compact.[237] As discussed above, this would not create a new human right, but merely extend the duty to uphold human rights to include, not only States, but also MNCs.

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230. IISD Model, *supra* note 165, art. 14(A).

231. *Id.* n.12.

232. INT'L ORG. FOR STANDARDIZATION, *About ISO*, http://www.iso.org/iso/about.htm (last visited Mar. 1, 2011).

233. INT'L ORG. FOR STANDARDIZATION, *ISO 14000 Essentials*, http://www.iso.org/iso/iso_14000_essentials (last visited Mar. 1, 2011).

234. *Id.*

235. *Id.*

236. IISD Model, *supra* note 165, art. 14(B).

237. IISD MODEL – HANDBOOK, *supra* note 214, at 25-26.

I. Require Investors Should Uphold the Core ILO Standards

Many commentators have discussed the possibility of including the ILO's core conventions as investor obligations in BITs. The IISD Model, in Article 14(C), provides that investors and investments must act in accordance with core labor standards as required by the ILO Declaration on Fundamental Principles and Rights of Work.[238] IISD notes that this "should be non-controversial, given the acceptance of this instrument by almost all countries of the world in the tri-partite ILO structure (labour, business, governments)."[239] Notably, some public political risk insurers, like OPIC, require that investors uphold the ILOs labor standards as a precondition to receiving political risk insurance for their foreign investments.[240]

J. Require a Standard of Corporate Social Responsibility

Another option would be to annex or adopt into the BIT human rights norms from existing corporate codes of conduct.[241] Since the early 1990s, MNCs have encountered criticism of their corporate practices in developing countries, which has pushed many to adopt corporate codes of conduct.[242] Corporate responsibility guidelines generally fall within two categories, those that are State-controlled and those that are industry-controlled. Examples of State-controlled codes include the United Nations Norms on the Responsibilities of Transnational Enterprises and Other Business Enterprises with regard to Human Rights, the United Nations Global Compact, and the OECD Guidelines for Multinational Enterprises.[243] Examples of industry-controlled codes include the Social Accountability 8000 Standard (SA 8000), the Global Sullivan Principles, and the Kimberly Process.[244]

However, all corporate codes of conduct share one characteristic; they are all voluntary with very limited enforcement mechanisms. Any code of conduct will not be successful if it lacks a credible threat of enforcement, including monitoring and reporting activities.[245] Additionally, many see corporate codes of conduct as public relations tools, rather than substantive and legitimate tools for the enforcement of human rights norms. For example, in 2007 the Global Compact Office reported that 63 percent of 400 companies surveyed indicated that one of the reasons they joined the Global Compact was to increase trust in their company.[246]

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238. IISD Model, *supra* note 165, art. 14(C).
239. IISD MODEL – HANDBOOK, *supra* note 214, at 26.
240. OPIC – *Investor Screener*, *supra* note 224.
241. Chalamish, *supra* note 13, at 350; Weiler, *supra* note 16, at 445-47.
242. Chalamish, *supra* note 13, at 349.
243. Weiler, *supra* note 16, at 434.
244. *Id.*
245. *Id.* at 435-37.
246. U.N. GLOBAL COMPACT OFFICE, U.N. GLOBAL COMPACT ANNUAL REVIEW 2007 LEADERS SUMMIT 11 (2007), *available at* http://www.unglobalcompact.org/docs/news_events/8.1/GC AnnualReview2007.pdf.

1. The SA 8000 Standard

Some commentators have highlighted the SA 8000 as a suggested standard for States to consider adopting into their BITs.[247] The SA 8000 was established by Social Accountability International and is grounded on the principles of core conventions of the ILO, the United Nations Convention on the Rights of the Child, and the Universal Declaration of Human Rights.[248] It is one of the world's preeminent social standards and is a recognized benchmark among the voluntary codes and standards initiatives by which companies and factories measure their performance.[249] The content of the standard includes nine requirements:

(1) prohibition of child labor;

(2) prohibition of forced and compulsory labor;

(3) basic health and safety requirements;

(4) guarantees for the freedom of association and the right to collective bargaining;

(5) prohibition on discrimination;

(6) disciplinary practices cannot include corporal punishment or other inhumane treatment;

(7) working hours are limited to 48 hours per week, not including overtime;

(8) requirements for reasonable remuneration; and

(9) requirements for management systems.[250]

Additionally, the SA8000 certifies conformance by auditing a corporation's facilities and practices.[251] Notably, a SA8000 certification would appear to meet Ruggie's "due diligence" standard and impose similar requirements to the IISD Model discussed above.

2. Non-Binding Aspirations for Corporate Social Responsibility

Alternatively, the IISD's Model remains in line with current non-binding, aspirational tone of corporate social responsibility, by using language just short of mandating compliance. Article 16 provides that "[i]nvestors and their investments should strive to make the maximum feasible contributions to the sustainable development of the [H]ost-[S]tate and local community through high levels of socially responsible practices."[252] In contributing to the sustainable development of the Host-State, the investor should take into account the following:

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247. Chalamish, *supra* note 13, at 352 n.323; Weiler, *supra* note 16, at 445-47.

248. SOCIAL ACCOUNTABILITY INTERNATIONAL, *Human Rights at Work*, http://www.sa-intl.org (last visited Mar. 1, 2011) [hereinafter SAI – *Human Rights at Work*].

249. *Id.*

250. SOCIAL ACCOUNTABILITY INTERNATIONAL, *The SA8000* Standard, http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=937 (last visited Mar. 1, 2011).

251. SAI – *Human Rights at Work*, *supra* note 248.

252. IISD Model, *supra* note 165, art. 16.

(1) the Host-State's development plans and priorities;

(2) the Millennium Development Goals;

(3) the ILO Tripartite Declaration on Multinational Enterprises and Social Policy;

(4) the OECD Guidelines for Multinational Enterprises;

(5) sectoral standards of responsible practice where these exist; and

(6) the preliminary list of corporate social responsibility issues included in Annex F to the Model BIT.[253]

This type of corporate social responsibility provision would be included into a BIT as a supplement to other investor obligations delineated elsewhere in the BIT.[254]

K. Provide Possibilities for New Awards More Appropriate for MNCs

Recognizing that direct investor obligations would be a new addition to BITs, the content of BIT arbitration awards and applicable remedies should also be addressed. As with any BIT claim, the remedy of compensation should also be expressly permitted in arbitration disputes regarding human rights.[255] However, given that the financial cost of potential claims is already a factor in most corporations' cost-benefit analysis, financial compensation may not be an effective deterrent for human rights abuses. The compensation awards given against corporations for human rights-related violations would have to outweigh the benefits the corporation obtained from the violation. Alternative punishments could include management intervention, community-service orders, and adverse publicity. "Of these alternatives, adverse publicity may well be the most effective deterrent as it affects both the corporation's prestige and financial success."[256]

VII. CONCLUSION

Currently, international investment law consists of a patchwork of BITs. Gaps in the BIT regime have greatly affected Host-States' abilities to protect human rights. Additionally, while BITs grant MNCs valuable rights, they do not provide any reciprocal obligations. Despite these problems, the widespread establishment of BITs and their highly efficient use of arbitration tribunals to resolves disputes, makes BITs an unlikely but promising mechanism for human rights enforcement.

States should reform BITs to remove, or at least limit, encumbrances on a State's regulatory power to protect human rights. States should review their BITs, and where there is horizontal incoherence, harmonize their human rights policies across government departments and agencies. Additionally, States should add to

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253. *Id.*

254. IISD MODEL – HANDBOOK, *supra* note 214, at 27.

255. Weiler, *supra* note 16, at 439 (noting that the "remedy of compensation for the breach of a human rights obligation has a long history in international treaty practice").

256. Fauchald & Stigen, *supra* note 2, at 1042.

their BITs broader policy objectives in preamble provisions, substantive language that acknowledges State sovereignty, broader jurisdiction regarding human rights-related matters, and requirements for expertise regarding human rights-related matters in arbitral tribunals. Lastly, States should mandate open dispute resolution to bring greater transparency to the BIT regime and wider publication of BIT decisions to enable greater study of the international investment law environment.

Moreover, BITs could be restructured, not to remove the rights and benefits BITs grant to MNCs, but to create reciprocal obligations for MNCs to act responsibly and not violate human rights. First, States could structure umbrella clauses in BITs to be reciprocal. Second, States could stipulate in their BITs, or subsequent Host-State Agreements with investors, that investment contracts and project information must be published. Third, States could require that investors comply with a "due diligence" standard, a general requirement to uphold human rights, the ILO's core conventions, existing corporate codes of conduct, and/or anti-corruption obligations. Lastly, States could require that investors complete and publish environmental and social impact assessments.

Given the growing body of scholarly discussion on this topic, and that States are willing and interested in revamping their approaches to BITs, political will seems to be growing in acknowledging that something must be done. Unfortunately, because investment law exists primarily through bilateral agreements, solutions to incorporate human rights must occur on a national level, and thus change undoubtedly will be diverse and slow.