Investors, States and Stakeholders:
Power Asymmetries and the Stabilizing Potential of Investment Treaties

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I. Introduction

Investment treaties offer a wide array of protections for covered investors and may help stimulate foreign investment as a result. Such investment, in turn, can bring substantial benefits to investors, states, and local stakeholders alike. Among other things, foreign investment can generate much-needed governmental revenues and enhance local stakeholders’ enjoyment of human rights by providing employment and raising standards of living, expanding educational and health care opportunities, and introducing cleaner and safer technology and business practices. Yet foreign investors can also act inconsistently with human rights. Indeed, a number of investors have been accused in recent years of committing or being complicit in a multitude of egregious human rights violations. These range from causing illness and death in

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1 ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 62-63 (2009) (noting that several studies indicate that investment treaties can have a positive impact on investment flows, but that “the existence of a causal relationship and the strength of that relationship remain disputed.”)

2 The term “stakeholder” is used herein to refer to any individual, group, people or organization in the host state impacted by investment activity. For similar uses of the term, see Gerald P. Neugebauer III, Note: Indigenous Peoples as Stakeholders: Influencing Resource-Management Decisions Affecting Indigenous Community Interests in Latin America, 78 N.Y.U.L. Rev. 1227, 1241 (2003) (“In its simplest form, ‘stakeholder’ refers to an individual or group affected by corporate operations. It is important to stress that a ‘stakeholder’ need not have any formal relationship with the corporation, nor is stakeholder status a privilege bestowed by the corporation. Rather, the determination of which entities constitute stakeholders is objective; groups are stakeholders solely by reference to the impact company decisions have on them.”); id. at 1230-31 (arguing that indigenous peoples impacted by petroleum operations carried out by a foreign investor should be considered stakeholders in the project); R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 46 (1984) (“A stakeholder in an organization is (by definition) any group or individual who can affect or is affected by the achievement of the organization’s objectives.”).

3 See Smita Narula, The Right to Food: Holding Global Actors Accountable Under International Law, 44 COLUM. J. TRANSNAT’L L. 691, 758 (2006) (“With appropriate regulation, [MNEs] have enormous potential to contribute to hunger and poverty solutions. They employ the world’s best technologies, have the leading research units, and possess organizational and logistical operations that are superior to most public sector institutions.”) See also DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS 228 (2d ed. 2006):

[S]ome observers note that [MNEs] export standard operating procedures that are sometimes an improvement over those previously existing in a developing country. [MNE] plants in the global south may provide infirmaries for health care, or improved safety conditions. [MNE], even while paying wages below standards in the global north, may pay wages in developing countries that permit growth, savings, and investment over time.
local populations through severe industrial pollution to employing forced labor to using violence to suppress local opposition to their operations.\(^4\)

In part because of this risk, investment treaties have attracted much criticism, and one of the common charges against them is that they give investors excessive rights and privileges vis-à-vis host states, and undermine the latter’s ability to regulate to protect the environment, prevent corporate abuses of human rights, or otherwise promote the public interest.\(^5\) In fact, some assert that many investors are now more powerful than host states, in part because of investment treaties.\(^6\) Consequently, calls for reform of international investment law by human rights advocates tend to focus on narrowing investor rights, expanding host state regulatory powers, or emphasizing host states’ authority to deviate from treaty standards to promote human rights.

It is worth questioning these criticisms and calls for reform. As will be seen, while some investment treaties (at least as interpreted by certain tribunals\(^7\)) may give investors more protection than is necessary or appropriate, in general the host state retains broad leeway to regulate for the public interest—should it be inclined to do so—and otherwise enjoys considerable leverage over investors by virtue of its status as a sovereign. Accordingly, the

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\(^4\) See, e.g., Iris Halpern, Tracing the Contours of Transnational Corporations’ Human Rights Obligations in the Twenty-First Century, 14 BUFF. HUM. RTS. L. REV. 129, 160 (2008) (discussing a case in which a foreign mining company operating in Papua New Guinea was accused of causing “devasting environmental degradation and poisoning which ruined the health and subsistence of the islanders,” discriminating against black workers and subjecting them to “slave-like” conditions, and calling on the government to use violence to suppress local opposition to the mine’s operations); Shelli Stewart, The Alien Tort Claims Act Impacting Environmental Rights: Reconciling Past Possibilities with Future Limitations, 31 AM. INDIAN L. REV. 743, 757-58 (2006/2007) (discussing a case in which a foreign mining company operating in Indonesia was accused of destroying an indigenous people’s natural waterways, deforesting the rainforest on which they depended for subsistence, contaminating their surface and groundwater, and committing “cultural genocide”); Sandra Coliver, Jennie Green & Paul Hoffman, Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies, 19 EMORY INT’L L. REV. 169, 209 (2005) (noting that claims have been filed against foreign investors alleging “direct involvement in human rights violations such as destructive environmental practices, abusive sweatshop conditions in the garment industry, or the production of dangerous products,” as well as “complicity in the actions of government officials or soldiers who actually commit the human rights violations”).

\(^5\) See, e.g., Kate Miles, International Investment Law: Origins, Imperialism and Conceptualizing the Environment, 21 COLO. J. INT’L ENVTL. L. & POL’Y 1, 11 (2010) (asserting that international investment law has “an inherent [pro-]investor bias,” manifested in an “excessive focus on the rights of the investor” and an “obsessive promotion of foreign investment to the exclusion of the interests of the host state and of other stakeholders”); Megan Wells Sheffer, Bilateral Investment Treaties: A Friend or Foe to Human Rights?, 39 DENV. J. INT’L L. & POL’Y 483, 492 (2011) (collecting scholarship purporting to identify a risk that when developing countries sign investment treaties they will relax their investment regulations, thereby “constraining their regulatory power to pursue legitimate public interest objectives, and resulting in more human rights abuses.”).

\(^6\) See, e.g., Halpern, supra note 4, at 145 (asserting that there often exists a “power imbalance between the TNC [Transnational Corporation] and developing states,” and that “enforcement mechanisms established by international investment and trade organizations have conferred limited rights of standing to the TNC, further facilitating its agglomeration of power in relation to the state”); Tai-Heng Cheng, Power, Authority and International Investment Law, 20 AM. U. INT’L L. REV. 465, 492 (2005) (asserting that international investment law “transfers power and authority from states to investors,” and that “[m]ultinational corporations can be more powerful than the states in which they invest”); Ray C. Jones, Note: NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?, 2002 B.Y.U.L. REV. 527, 545 (2002) (contending that, by virtue of NAFTA’s investment chapter, “[p]owerful foreign investors may have the opportunity to hold governments hostage by threatening or bringing litigation with the intention of influencing the government’s policy-making process.”).

\(^7\) For an explanation of how some tribunals have interpreted treaty standards too expansively, see George K. Foster, Recovering “Protection and Security”: The Treaty Standard’s Obscure Origins, Forgotten Meaning and Key Current Significance, 45 VAND. J. TRANSNAT’L L. ___ (forthcoming 2012).
problem is not so much that investment treaties unduly empower investors or restrain host states from protecting human rights as that host states are sometimes not *inclined* to protect human rights. To the contrary, the host state may be perfectly willing to look the other way when investors violate human rights, or even commit violations in its own right.8

And if there is a power9 asymmetry in international investment that is particular cause for concern from a human rights standpoint, it is not between the investor and the host state but between the investor and local stakeholders. When such an asymmetry exists it can open the door to corporate human rights abuses, and yet investment treaties presently do nothing to address it.

For these reasons, I would submit that that those concerned about investor human rights abuses should focus less on seeking to expand host state regulatory authority and curtail investor rights, and more on expanding or clarifying investor human rights obligations and establishing a mechanism whereby local stakeholders could enforce those obligations directly, on their own initiative—without having to rely on action from the host state.

II. Power Dynamics in International Investment

A. Investor-State Relations

Host states are often eager to attract and retain foreign investment because of the material and economic benefits associated with it. Nevertheless, investors can be quite vulnerable if the host state decides to take adverse action against the investment. For example, the risk always exists that after the investor devotes years of effort and large amounts of capital to make an investment profitable, the host state will step in and expropriate all or part of the investment to appropriate those profits for itself.10 The host state can also take other measures short of expropriation, such as arbitrarily denying or canceling a governmental permit, imposing bad faith penalties for non-existent regulatory violations, or denying the investor justice in a judicial proceeding. After all, host states are sovereigns, and this entails the power to regulate everyone and everything within their territory, as well as a monopoly on the use of force. The investor may be a large multinational enterprise (MNE) with vast resources at its disposal, but it has no way of resisting if the host state decides to pass laws or issue decrees adverse to the investment.

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8 See Luke Eric Peterson & Kevin R. Gray, International Institute for Sustainable Development, *International Human Rights in BITs and Investment Treaty Arbitration* 16 (April 2003), http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf (“It is an unfortunate reality that host states are not always minded to place their international human rights commitments at the forefront of their interaction with foreign investors. Indeed, as all nations—but developing countries in particular—increasingly compete for scarce foreign direct investment, it is sometimes the case that host states will ignore their international human rights obligations, or worse, permit them to be openly violated through the actions of State authorities or other third parties.”).

9 The term “power” is used here and elsewhere in this Article to refer to an actor’s ability to affect or obtain a preferred outcome, whether via the use of force, economic resources, legal entitlements, or otherwise. See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 155-57 (2005) (listing diverse definitions of “power” and noting that, at its most general, “[p]ower typically describes—in courts, politics, war, sports, and other contexts—an ability to affect or obtain a preferred outcome.”); Tai-Heng Cheng, *Power, Norms, and International Intellectual Property Law*, 28 MICH. J. INT’L L. 109, 118 (2006) (asserting that a “generally accepted definition” of the term “power” is “the capacity of a participant to deploy resources to influence or coerce other participants into complying with its preferred outcome.”).

and enforce them with its police and military forces. Indeed, it was precisely to address this power asymmetry that investment treaties were devised.11

Critics of investment treaties seemingly do not dispute this, but suggest that investment treaties go too far in their effort to protect investors, granting them overly expansive rights without imposing any corresponding obligations. As will be seen, however, investors typically have numerous obligations derived from other sources, which host states can readily enforce when they are inclined to do so, notwithstanding treaty commitments.

1. **Investors Typically Have Obligations under Investment Contracts or Domestic Law, Which Host States Can Readily Enforce if They so Choose**

In many cases foreign investors are not able to undertake an investment without concluding a contract with the host state or a company that the host state controls, in light of the significant role that many governments play in the national economy and state ownership of natural resources. This provides the host state with an opportunity to impose any number of obligations on the investor, which it can then enforce pursuant to its own sovereign powers or with the aid of whatever external adjudicatory authority might be designated in the contract for resolving disputes thereunder.

In addition, it is widely acknowledged that investors are obliged to comply with host state law when conducting the investment, assuming that law meets minimum international standards. And the host state typically has a wide range of sanctions that it can impose in response to an investor’s violation of its laws, from monetary penalties to terminating the investor’s contract or operating permit. If the investor has violated domestic law (and the state is inclined to enforce that law), then imposing sanctions is generally within the accepted “police powers” of the state, and hence non-actionable under an investment treaty.12

Moreover, many tribunals have recognized that after an investment is made the host state is free to enact new laws and regulations that have an adverse impact on the investment, so long as they are generally applicable and adopted in good faith for a public purpose, and the state has not somehow assured the investor that it would not adopt such measures.13 In fact, even if the host state

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11 Andrea K. Bjorklund, *The Necessity of Development? in Sustainable Development in World Investment Law* 373, 374 (Marie-Claire Cordonier Segger et al eds., 2011) (noting that investment treaties’ asymmetrical allocation of rights (on investors) and obligations (on states) is “designed to counteract the advantage States have in their unilateral ability to regulate and to legislate in ways injurious to foreign investors.”).

12 See Peterson & Gray, *supra* note 8, at 17 (noting that if the host state sanctions an investor for violating national law, the sanction would normally be non-compensable as an exercise of the state’s “police powers,” and therefore could not be successfully challenged in treaty arbitration). See also Restatement (Third) of the Foreign Relations Law of the United States § 712, cmt. (g) (1987) (providing that “bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states” is not compensable under international law, provided that it is “not discriminatory ... and is not designed to cause the alien to abandon the property to the state or sell it at a distress price.”).

13 See, e.g., Methanex Corporation v. United States, Final Award on Jurisdiction and Merits (3 August 2005) 44 I.L.M. 1345 at 1456 (“[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.”); Grand River Enter. Six Nations, Ltd. v. United States of America, Award, para. 128 (NAFTA Arb. Trib. Jan. 12, 2011), available at http://www.state.gov/documents/organization/156820.pdf (asserting that “legitimate expectations of the kind protected by NAFTA” can “arise through targeted representations or
state has made such assurances, the investor should not be able to state a successful treaty claim based on the same if the assurances were inconsistent with the host state’s human rights obligations. Simply put, an investor is in no position to rely on a promise by the host state to violate its international obligations. In light of the significant regulatory leeway that a host state retains after it signs an investment treaty, when an investor prevails in a treaty arbitration it is usually because the tribunal found the host state’s conduct to be discriminatory, in bad faith, expropriatory (and targeted at the investor or a narrow category of similarly-situated actors rather than being generally applicable), or contrary to a commitment to the investor that the host state was free to make without violating its international obligations.

In addition, host state regulatory authority over foreign investors may be further buttressed if the treaty contains special exceptions, carve-outs, or reservations of the nature discussed by Professor Vandevelde, which relieve the state of liability for measures that would otherwise violate standards of protection set forth in the treaty.

2. Host States Have Means of Deterring Claims or Avoiding Collection Even When Their Conduct Violates Treaty Standards and Is Not Exempted From Liability

When evaluating the relative power of investors and the host state after the conclusion of an investment treaty, it is important to keep in mind that the leverage the investor obtains from the possibility of pursuing a treaty claim against the state is distinctly limited. Even if the host state’s behavior toward the investor is contrary to a treaty standard and not exempted from liability by an exception in the treaty, the investor may be too intimidated by the sovereign power of the host state to file a treaty claim. Investors know that if they initiate treaty arbitration

assurances made explicitly or implicitly by a state party,” but rejecting the investor’s claim because the host state made no such representations, and therefore the investor should have expected the enactment of new regulations). See also Ursula Kriebaum, Human Rights of the Population of the Host State in International Investment Arbitration, 10 J. World Inv. & Trade 633, 670 (2009) (asserting that an investor normally cannot legitimately expect “that the national regulatory regime will not be adapted in line with human rights obligations” but that it “may be otherwise if there is a stabilization clause.”). Bruno Simma & Theodore Kill, Harmonizing Investment Protection and Human Rights: First Steps Towards a Methodology, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 678, 705 (Christina Binder et al. eds., 2009) (“An investor’s ‘legitimate expectations’ form the ‘dominant element’ in the fair and equitable treatment standard. Therefore a tribunal in interpreting what is and what is not a legitimate expectation should have reference also to the host State’s obligations under international human rights law. Whatever expectations an investor may have had, these must have included an expectation that the State would honour its international human rights obligations.”).


See, e.g., Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12, Award (July 14, 2006).

See, e.g., ADC Affiliate Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award (Oct. 2, 2006); Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Award (Feb. 6, 2007).

See, e.g., Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentina, ICSID Case No. ARB/03/19, Decision on Liability (July 30, 2010) (finding Argentina in violation of an investment treaty for abrogating express commitments to a foreign investor, which, according to the tribunal, were fully consistent with Argentina’s human rights obligations).
the host state could retaliate by taking even more hostile action, up to and including expelling the investor from the country altogether.¹⁹

When a perceived treaty violation occurs, therefore, the investor must undertake a careful calculation. It must multiply its likelihood of success in a treaty arbitration against its potential recovery, and compare the result against the profits the investor would expect to make if it acquiesced in the host state’s conduct and continued operating in the country. When making this calculation, the investor must take into account the reality that treaty arbitrations can be long, expensive, and burdensome affairs, sometimes dragging on for more than a decade. Moreover, even if the investor obtains an award in its favor at the end of the day, it may be difficult or impossible to collect on it. Although some states promptly honor awards against them, others vigorously resist collection, and some have been quite successful to date in so doing. Argentina, for example, has incurred liability in excess of $400 million in treaty arbitrations, and yet the claimants have collected little or nothing on those awards so far.²⁰

For all these reasons, it seems difficult to conclude that investment treaties have resulted in any significant power asymmetry in favor of investors as against host states, at least as a general matter, even if some are better at others in preserving host state regulatory authority.

B. Investor-Stakeholder Relations

Whereas foreign investors have an inherent disadvantage in their relations with host states based on the latter’s status as sovereigns (which may or may not be offset by other factors in investors’ favor), they face no comparable disadvantages in their relations with local stakeholders. Such stakeholders may consist, for example, of an indigenous people on whose lands an oil, mining, logging, or hydroelectric project will be carried out; workers or potential workers; or consumers who depend on the investor to provide an important service such as water treatment and distribution. For any such investment to succeed, the investor will need to convince local stakeholders to consent to its activities, or at least avoid (or suppress) active resistance. The relative power of the investor and local stakeholders can therefore be critical to determining whether or not an investment goes forward and under what conditions.

In many cases the investor has a tremendous advantage in its interactions with local stakeholders, resulting from several factors. To begin with, the investor may have substantially greater financial resources than local individuals or communities, particularly when the investor is a large MNE. The investor also necessarily has superior information about the relevant project and its potential benefits and impacts, and can create inflated expectations regarding the former and minimize awareness of the latter.

Moreover, this initial power asymmetry may be enlarged by rights and privileges conferred on the investor under an investment contract with the host state, as well as under domestic and

¹⁹ Emily A. Witten, Arbitration of Venezuelan Oil Contracts: A Losing Strategy?, 4 TEX. J. OIL GAS & ENERGY L. 55, 69 (2008) (“While the apparent certainty of the ICSID process and awards would seem to allay investor concerns, it is important to remember that the sovereign power of the host government is always lurking.”).
²⁰ See Katia Fach Gomez, Latin America and ICSID: David Versus Goliath?, 17 LAW & BUS. REV. AM. 195, 208 (2011) (noting that investors may decide to forgo arbitration claims despite reduced profit margins from adverse host state conduct, if there is still room for profit to be made under the new circumstances); Witten, supra note 19, at 77 (“Even if a favorable arbitral decision is rendered, an award can be difficult to collect, and the process can take years.”); Come and get me: Argentina is putting international arbitration to the test, ECONOMIST (Feb. 18, 2012), http://www.economist.com/node/21547836.
international law. As noted previously, it is quite common for foreign investors to enter into investment contracts with host states or state-owned entities, as well as to obtain licenses or other governmental permits, which grant the investor the right to carry out the investment on specified terms. And in some cases the investor may obtain those rights without having consulted with or obtained consent from local stakeholders.\(^{21}\)

International law likewise provides foreign investors with rights that may buttress their position vis-à-vis local stakeholders, including the international minimum standard enshrined in customary international law and most investment treaties. This requires, \textit{inter alia}, that the host state use due diligence in protecting the investor against injuries from host state nationals and provide redress for any violations of its rights.\(^{22}\) At least one investor has already sought to rely on these protections under international law in an effort to pressure the host state into suppressing resistance to the investor’s operations by local stakeholders (an indigenous people), or otherwise obtain compensation for the impacts of that resistance.\(^{23}\)

Whatever rights and privileges investors derive from these sources can potentially be enforced via the host state’s courts and enforcement agencies, as well as via its police and military forces. And in some cases the financial incentive that host states have to support foreign investments may be strong enough to ensure that the state enforces the investor’s rights vigorously even in the face of opposition by local stakeholders.\(^{24}\)

To be sure, foreign investors have obligations toward local stakeholders as well as rights. For example, the host state may have environmental or tort laws that prohibit certain types of pollution or other forms of environmental degradation, as well as labor laws that preclude exploitative labor practices. Investors sometimes also unilaterally undertake to meet certain standards toward local stakeholders, as when they adopt a corporate code of conduct or commit themselves to follow the OECD Guidelines for Multinational Enterprises, the U.N. Global Compact, or similar voluntary standards.\(^{25}\) In addition, there is a growing consensus that corporate entities owe human rights obligations under international law, which is derivative of states’ obligation to protect their nationals from human rights violations by third parties within their jurisdiction.\(^{26}\) Notably, this was the conclusion reached by John G. Ruggie, whom the U.N. Secretary-General appointed in 2005 as his Special Representative for Business and Human Rights with a view toward identifying and clarifying standards of corporate human rights responsibility and accountability.\(^{27}\)

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\item Foster, \textit{supra} note 7, at ___.
\item Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶¶ 27-37 (June 2, 2010).
\item Foster, \textit{supra} note 21, at ___.
\item \textit{See} JERNEJ LETNAR ČERNIĆ, \textit{HUMAN RIGHTS LAW AND BUSINESS: CORPORATE RESPONSIBILITY FOR FUNDAMENTAL HUMAN RIGHTS} 95 (2010).
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Unfortunately, however, local stakeholders may have no better prospects for enforcing the investor’s obligations toward them than they do avoiding enforcement of the investor’s affirmative rights. Stakeholders are generally limited to enforcing investor obligations in host state courts, and—as already mentioned—the host state may have a strong incentive to allow the relevant project to go forward notwithstanding impacts on local stakeholders. Moreover, corruption is endemic in some developing countries, and the investor may be able to use its vast financial resources to influence governmental officials in the exercise of their enforcement duties.

Investment treaties do not currently provide local stakeholders with access to any international forum for pursuing redress against investors who violate their rights, nor do human rights treaties. While some human rights treaties create international mechanisms for monitoring states’ respect for human rights, and some even authorize individuals or groups to file complaints against a state before a human rights court or commission, none give such a body jurisdiction over private actors.

Accordingly, there now exists a distinctly asymmetrical situation in which foreign investors enjoy various protections under international law vis-à-vis local stakeholders (which many investors can seek to vindicate in an international forum by virtue of investment treaties), but owe no obligations toward them that could be enforced in comparable fashion.

III. Options for Expanding Investor Obligations toward Local Stakeholders and Improving Their Enforceability

Power asymmetry between an investor and local stakeholders can and does sometimes lead to exploitation and abuse, as demonstrated by a growing body of literature detailing alleged MNE human rights violations in developing countries. And yet international law currently does nothing to address this situation in any direct way. As M. Sornarajah has observed:

28 See Jorge Daniel Taillant & Jonathan Bonnitcha, International Investment Law & Human Rights in Sustainable Development in World Investment Law 57, 59 (Marie-Claire Cordonier Segger et al eds., 2011). Some stakeholders have pursued claims against investors in other countries’ courts, but such claims typically face a multitude of obstacles, including the possibility of dismissal under the doctrine of forum non conveniens. See infra, Part ___.
29 See Foster, supra note 21, at ___.
32 In addition to the examples provided supra note 4, see Miles, supra note 5, at 26 (“There are numerous recent examples of environmental malpractice and breaches of human rights by foreign-owned entities, particularly in developing countries. The disputes have involved allegations of environmental devastation, contamination of lands and rivers, ravaged rainforest, damage to human health, including death and birth defects, the fracturing of communities, human rights abuses, and collaboration with repressive state regimes. Notable conflicts include controversies surrounding the operations of the Shell Oil Company in Nigeria, Freeport and Rio Tinto in Indonesia, ChevronTexaco Corporation in Ecuador, Broken Hill Proprietary Company (BHP) in Ok Tedi, Papua New Guinea, and Union Carbide in Bhopal, India.”).
[International investment] law was developed in the context of flows of investments from developed to developing states. In that context, the focus has entirely been on the protection of the multinational corporation, which is often the vehicle of these investments, from the exercise of sovereign power of the host state. The fact that the modern multinational corporation is in itself a basis of global power and can hurt the interests of the host economy is seldom addressed in international law.33

By contrast, in certain other contexts involving relationships with extreme power asymmetries, legal reforms have been adopted at the domestic or international level to buttress the position of the weaker party. This can be seen, for example, in the enactment of antitrust regulations to preclude companies with a dominant market position from engaging in price fixing or other behavior harmful to the interests of consumers; in the adoption of laws to protect franchisees from exploitative treatment by franchisors; in the adoption of international conventions to regulate contracts for the carriage of goods at sea and prevent carriers from taking advantage of shippers; and in the adoption of investment treaties to mitigate the power asymmetry between host states and foreign investors.

The question arises whether similar reforms could be adopted to reinforce the position of local stakeholders vis-à-vis foreign investors. As will be seen, several such reforms could indeed be adopted, if only the political will existed to do so.

A. Domestic Laws and Institutions Should Be Strengthened, But Not Relied Upon Exclusively

The risks to local stakeholders posed by foreign investment would be largely mitigated if either the investor’s home state or the host state enacted legislation imposing the obligation to respect key human rights, and had domestic institutions capable of holding the investor accountable for any violations. For the reasons discussed below, however, it seems unlikely that domestic laws and institutions can be relied upon exclusively for this role.

Some attempts have been made in capital-exporting countries to adopt legislation seeking to ensure that their corporations (or their foreign subsidiaries) comply with human rights norms in their operations abroad, but these have repeatedly failed.34 One obstacle to the enactment and


34 Peter Muchlinski, Corporate Social Responsibility, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 637, 674 (P. Muchlinski et al. eds., 2008) (“[S]pecialized legislation on MNEs and human rights is virtually non-existent. One example of what might be possible arose in Australia where the draft Corporate Code of Conduct Bill contained a provision that subjected the overseas subsidiaries of Australian companies to a general obligation to observe human rights and the principle of non-discrimination. That Bill was never adopted. Similar proposals in the USA and the UK have also met with little success.”); David Kinley & Junko Tadaki, From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law, 44 VA. J. INT’L L. 931, 942 (2004) (discussing a failed bill introduced in the British parliament that “sought to impose social, environmental, and human rights obligations of corporations registered in the U.K. and their directors, with respect to their activities at home or overseas.”); Jonathan Clough, Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses, 33 BROOKLYN J. INT’L L. 899, 902 (2008) (discussing failed bills in the United States and Australia); Peter Muchlinski, Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World, 18 IND. J. GLOBAL LEG. STUD. 665, 687 (2011) (discussing the defeat in 2010 of
enforcement of such legislation is that governments have limited resources and it is more difficult to collect information about firms’ overseas operations than it is to monitor their conduct domestically. It is certainly true that some countries already require corporations within their jurisdiction to make detailed disclosures regarding financial aspects of their overseas operations, and some also regulate overseas conduct to the extent necessary to address wrongs to which they assign a high priority. For example, the United States has extraterritorial legislation seeking to prevent anticompetitive conduct, the use or dissemination of sensitive technology or trade secrets, human trafficking, sex tourism involving children, and bribery of foreign officials. It cannot be denied, however, that monitoring human rights compliance of corporations abroad would impose a significant regulatory burden at a time when governmental budgets are already strained.

Some also contend that legislation requiring corporations to respect human rights abroad would effectively impose the home state’s practices and standards on the host state, and that doing so would be paternalistic or even a form of “cultural imperialism.” Such concerns have not prevented capital-exporting states from imposing their own practices or standards in other contexts, as when they adopt export controls or antitrust regulations having extraterritorial effect. Nevertheless, it is probably true that the relevant standards or practices would have more legitimacy if the host state itself adopted them, either on its own initiative or through their inclusion in an international agreement. For that reason, having the host state impose the relevant human rights obligations unilaterally is not optimal.

Nor are home state courts very well suited to hear claims against MNEs based on human rights violations in other countries. First, all or most of the witnesses and evidence may be located abroad (in the host state), and documentary or testimonial evidence may be in a foreign language, making litigation in a home state court cumbersome in certain respects. Second, such

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38 The common law doctrine of forum non conveniens, which permits courts under some circumstances to dismiss cases based on the inconvenience of the forum and other factors, has often been used as a basis to dismiss
suits can be decidedly awkward for a home state court to adjudicate, because there may be aspects of the case that impugn a foreign government. In particular, such cases often involve contentions that the host state participated in or authorized the alleged human rights violations, and if the home state court upholds these allegations—or even allows the case to go forward for any length of time—it can strain relations with the host state. In host states sometimes lodge formal protests against such proceedings, and these complaints have, on occasion, prompted the U.S. State Department to urge a court in the United States to dismiss the relevant suit. Third, there is the potential risk that home state courts would be biased in favor of the investor, which may be a large employer in the area or otherwise enjoy sizeable goodwill with the adjudicator.

cases brought by foreign plaintiffs alleging human rights abuses. See Kathryn Lee Boyd, The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation, 39 VA. J. INT’L L. 41, 46 (1998) (“Given that the parties will mostly be foreign and that the abuses will occur abroad in human rights cases, this doctrine of convenience, which focuses on the location of the evidence and parties, is a formidable obstacle for plaintiffs. The doctrine’s balance of factors are heavily weighted against human rights plaintiffs.”).

See John B. Bellinger III, The U.S. Can’t Be the World’s Court, WALL STREET J., May 27, 2009, at A19 (asserting that human rights litigation initiated by foreign plaintiffs in the United States “rarely produces monetary awards for plaintiffs,” but “does give rise to diplomatic friction in U.S. relations with foreign governments. Governments often object to their officials and corporations being subject to U.S. jurisdiction for activities taking place in their countries ...”); Donald J. Kochan, No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence, 8 CHAP. L. REV. 103, 130 (2005) (“To the extent private plaintiffs are allowed to sue nation-states or corporations acting in concert with such states for alleged human rights abuses, judicial decisions necessarily make pronouncements regarding the appropriate behavior of foreign countries. This could embroil the United States elected branches in unwanted controversy and remove their negotiating options and discretion on the world stage.”) See also Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) (noting that causes of action in U.S. courts alleging violations of international law by a foreign government carry “potential implications for the foreign relations of the United States,” and asserting that courts should be “particularly wary of imposing on the discretion of the Legislative and Executive Branches in managing foreign affairs ...”).

See Bellinger, supra note 39 (asserting that the South African government contacted the State Department and requested that a case against General Motors, Ford and IBM alleging those companies’ complicity with the apartheid regime be dismissed). See also Presbyterian Church of Sudan v. Talisman Energy, Inc., 01 Civ. 9882 (DLC), 2005 U.S. Dist. LEXIS 18399 *2 (S.D. N.Y. Aug. 31, 2005) (discussing Statement of Interest raising concerns about potential impact on foreign relations in a case alleging that the defendant Canadian oil company aided and abetted human rights violations committed by the Sudanese government); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134, 1140 (C.D. Cal. 2005) (discussing Statement of Interest opposing the litigation and attaching an objection to the suit by the Colombian government in a case alleging that a U.S. oil company committed human rights abuses in cooperation with Colombian armed forces); Doe v. ExxonMobil Corp., 654 F.3d 11, 89 (D.C. Cir. 2011) (discussing Statement of Interest asserting that “adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States,” and could “diminish our ability to work with the Government of Indonesia,” in a case alleging that a U.S. oil company used Indonesian soldiers to commit human rights violations). It bears noting, however, that some contend that such expressions of concern over foreign policy implications may be mere cover for a desire to protect politically-powerful defendant corporations. See Beth Stephens, Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation, 17 HARV. HUM. RTS. J. 169, 170 (2004).

Andrew T. Guzman, Arbitrator Liability: Reconciling Arbitration and Mandatory Rules, 49 DUKE L.J. 1279, 1286 (2000) (“Just as individual states in the United States may be perceived to favor in-state litigants over those from out of state—a concern that gave rise to diversity jurisdiction in the United States—litigants in an international transaction may fear that foreign courts will be biased in favor of local parties.”); Erin Ann O’Hara, Exploring the Need for International Harmonization: The Jurisprudence and Politics of Forum-Selection Clauses, 3 CHI. J. INT’L L. 301, 310 (2002) (noting the common concern on the part of foreign parties that courts will be biased in favor of a local party).
As for host state laws and institutions, it would certainly be worth attempting to strengthen them, but the factors that currently inhibit host states’ effective regulation of MNEs would be exceptionally difficult to address. Take, for example, the dependency that many developing country governments have on revenues from MNE-implemented resource extraction projects. It may be impossible for these governments to wean themselves from those revenues so long as the country bears a large foreign debt burden, which many developing countries do.  And while it might be possible for the host state to make some progress toward that end by increasing taxes or reducing public spending, such a strategy could entail major political and social costs, and any regime that attempts it risks losing power. Similarly, corruption in developing countries—another factor that can inhibit effective regulation of MNEs—is unlikely to disappear anytime soon, considering that it remains prevalent despite years of concerted international efforts to combat it.

In fact, even if a particular host state has both the means and the inclination to enforce the human rights obligations of foreign investors, its courts may not be well suited to hear the claims. After all, such a dispute has a distinctly international component (involving the alleged violation by a company from one country of the international human rights of the nationals of another), and can present foreign relations risks. In such cases, the investor can be expected to mount an aggressive defense and may contend that it is being unfairly persecuted in the host state and ask its home state to come to its aid, thereby creating tensions between the two countries. The investor may claim in particular that its treatment by host state authorities was unfair and inequitable, or otherwise contrary to treaty standards.

This is precisely what has happened in one of the few cases in which local stakeholders have obtained a large judgment in a host state court against a prominent MNE—the recent Lago Agrio litigation in Ecuador. The claimants in this case were inhabitants of the Ecuadorian rainforest who have allegedly experienced cancer and other serious illnesses as a result of pollution from oil operations carried out by U.S. oil company Texaco. After a lengthy proceeding, the Ecuadorian court issued an $18.2 billion judgment against Chevron (Texaco’s successor-in-interest). Even before that verdict issued, however, Chevron initiated arbitration against Ecuador under the U.S.-Ecuador BIT, contending that the court proceedings were not bona fide enforcement of Ecuadorian law or human rights obligations, but—to the contrary—were biased, contaminated by corruption, and otherwise improper.

One might hope that the Lago Agrio saga is unique, but this may not be the last time that an investor accesses a treaty forum to challenge host state efforts to enforce human rights obligations. Such claims are rather likely, in fact, given the incentive an investor accused of human rights violations has to avoid or delay accountability, and the risk that proceedings in the courts of a developing nation will involve sufficient irregularities as to give the investor’s claim some colorability. Yet duplicative proceedings arising from the same set of facts at both the domestic and international levels necessarily entail time and cost inefficiencies—a result that is particularly unfortunate if victims are poor and suffering from serious illnesses, and therefore may not survive to enjoy the fruits of any delayed recovery.

Foster, supra note 29, at __.
[To be added.]
In light of all the factors discussed above, a good argument can be made that in cases involving an alleged violation by a foreign investor of the human rights of local stakeholders, it would be better for the dispute to be heard in a neutral international forum, or at least that stakeholders should have the option to seek relief in such a forum. Not only would this be more efficient, but both parties would be more likely to secure a fair and unbiased adjudication of the claims in light of the neutral nature of the forum. Moreover, such a proceeding would be less likely to generate foreign relations friction, because neither home nor host state would have to pass judgment on the other or any of its nationals.

B. States Should Take Steps to Facilitate Arbitration Claims by Local Stakeholders Against Corporate Human Rights Violators in an International Forum

If states were inclined to address the power asymmetry between investors and local stakeholders by providing the latter with access to a neutral international forum to bring claims against the former, one form of dispute resolution that should be considered is arbitration—the same method currently used to hear investor-state disputes under investment treaties. 45 Arbitration would be available only if investors agreed to arbitrate, but it might be possible to induce them to do so by conditioning governmental benefits on such agreement in either the home state or the host state.46

While there are any number of contexts in which governments could seek to incentivize investors to agree to arbitrate with local stakeholders, one that would be particularly logical is in the text of an investment treaty. Specifically, treaties could be drafted so that each party’s investors could not secure protection thereunder unless they acknowledged certain human rights obligations toward local stakeholders and agreed to arbitrate with them concerning alleged violations. The Subsections that follow explain how treaties could be drafted in this regard, and articulate a normative argument in favor of this approach.

1. Investment Treaties Could Be Crafted to Confirm Investor Human Rights Obligations and Secure Their Consent to Arbitrate with Local Stakeholders

Although to date investment treaties have focused exclusively on the promotion of investment and the protection of investors, they could be drafted to encourage corporate social responsibility (CSR) as well. The Norwegian government recognized this possibility in a Draft Model BIT it released in 2007, which contained a provision that would have required the parties to “encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact.”47 Norway ultimately abandoned this draft and suspended its efforts to conclude new investment treaties, following criticisms by nongovernmental organizations (NGOs) and other groups that that the draft did not go far enough to preserve host state regulatory authority over foreign investors, and by businesses that the investor protections were not sufficiently robust.48

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45 Foster, supra note 21, at __. See also Guzman, supra note 41 (noting that an advantage of arbitration is that it provides a neutral forum and can therefore avoid the bias that could exist in a court in favor of a local party).
46 Foster, supra note 21, at __.
Nevertheless, this draft underscored the fact that investment treaties could be drafted to promote CSR on the part of investors, if the political will existed to do so.

In fact, some commentators have noted that investment treaties could go beyond the relatively weak language of the Norwegian Draft Model BIT, which would have required only that the parties “encourage” CSR. Specifically, treaties could make human rights principles binding on covered investors, and even establish a dispute resolution mechanism whereby victims of investor human rights violations could pursue redress directly against the corporate wrongdoer.

None of these commentators has explained in any detail how investment treaties could be drafted to accomplish these ends, but it must be kept in mind that investors are private actors, and, as such, cannot be parties to a treaty and arguably cannot incur obligations directly thereunder. Presumably, therefore, the treaty would oblige the states who are parties to the treaty to impose the relevant obligations on investors. For example, the treaty could provide that each party would (i) enact laws or regulations obliging investors from the other to comply with the specified human rights when acting within its territory, and (ii) provide effective remedies to any individuals or groups whose rights the investor may violate. The treaty could provide further that any protections set forth in the treaty for the benefit of investors (or at least any that go beyond customary international law) would be conditional upon an agreement by the investor to arbitrate with local stakeholders in a neutral international forum. In other words, in order to be eligible to receive the benefits provided by the treaty—including the right to bring claims against the host state to enforce the treaty standards—the investor would have to agree to abide by the specified human rights and submit itself to the jurisdiction of an arbitral tribunal sited in a neutral third country in relation to claims by local stakeholders.

Furthermore, the treaty could provide that any arbitral tribunal empaneled under the treaty’s dispute resolution mechanism would be authorized to decide whether the investor had respected the specified human rights and, if not, award compensation or injunctive relief. Importantly, the investor should not be able to avoid liability even if a court or other authority in the host state has endorsed or authorized the investor’s wrongful conduct. This is because each treaty party would owe an international obligation toward the other to ensure the investor’s compliance with the relevant human rights norms, and a determination by a domestic organ regarding the state’s own international obligation is not binding on an international tribunal. This would be a key

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49 See Weiler, supra note 30, at 437-38 (advocating the incorporation of investor human rights obligations into investment treaties and the establishment of an arbitration mechanism for enforcing the same); Mary E. Footer, BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment, 18 MICH. ST. J. INT’L L. 33, 61 (2009) (observing that “soft law approaches to ICSR [international corporate social responsibility] … could be made to bite if incorporated into bilateral treaty instruments”). C.f., Alex Wawryk, Regulating Transnational Corporations Through Corporate Codes of Conduct, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 53, 56 (Jedrzej George Frynas & Scott Pegg eds., 2003) (noting, without discussing investment treaties specifically, that corporate codes of conduct could be made binding through their incorporation into an international treaty).

50 Weiler, supra note 30, at 438.

51 Wawryk, supra note 49 (noting that two major advantages of incorporating CSR standards into a treaty would be “that a treaty can create a legal basis for international administration and enforcement of the code, and a treaty formally binds the parties to give effect to the code through good faith implementation and enforcement.”).

advantage of imposing investor human rights obligations via an international instrument and making the same enforceable in an international forum, rather than relying on domestic laws and institutions.

At the same time, the treaty could make clear that the tribunal would not have jurisdiction to award monetary or other relief against the host state in connection with any human rights violations—a condition that may be necessary to convince capital-importing states to sign on.

2. Providing Local Stakeholders with Protections Under Investment Treaties Would Be an Effective Way of Fulfilling the Parties’ Human Rights Obligations and a Natural Parallel to the Protections Already Accorded to Investors

Providing local stakeholders with protections under an investment treaty would be natural and logical in many respects.

To begin with, it would be an effective way of fulfilling the parties’ human rights obligations. As noted previously, host states are obliged to ensure that third parties (including corporations) respect the human rights of their nationals, which requires not only that they pass laws obliging private actors to comply with human rights norms, but also that they provide victims of violations with effective remedies against them. In light of the realities facing many capital-importing states, the best way to fulfill the latter obligation may be to give their nationals access to adjudicative mechanisms divorced from their own national judicial systems. And the home state’s act of entering into a treaty that imposes human rights obligations on its nationals would be fully consistent with its undisputed authority under international law to regulate its nationals’ activities abroad.53

In fact, an investment treaty could be a relatively painless way for the parties to impose these obligations on investors, because these investors would be receiving benefits and protections in the same instrument, which may help soothe the sting of the additional risk exposure.

Taking this step would also avoid the unseemliness of granting special protections to investors without articulating investor human rights obligations in the same instrument, because the court belongs to a different legal order.

53 For examples of the view that it is unfair to grant investors protections under investment treaties without articulating investor human rights obligations in the same instrument, see UN Commission on Human Rights, Human Rights, Trade and Investment, Report of the High Commissioner, July 2003, 4 (asserting that states should consider amending investment treaties to “[p]romot[e] investors’ obligations alongside investors’ rights,” because “there is a need to balance the strengthening of investors’ rights in investment liberalization agreements with the clarification and enforcement of investors’ obligations toward individuals and communities.”); Sukanya Pillay, Absence of Justice: Lessons From the Bhopal Union Carbide Disaster for Latin America, 14 Mich. St. J. Int’l L. 479, 508 (2006) (criticizing the fact that “investors are protected by [investment treaties] and have standing to pursue legal remedies” thereunder, while these treaties do not “grant standing to aggrieved local populations or indigenous groups, nor do they seemingly consider the effects of higher international human rights law such as jus
Finally, this approach would promote adjudicative efficiency by making it possible for multiple different disputes relating to the investment to be resolved in a single proceeding. Namely, a single tribunal could hear any disputes that might arise between the investor and the host state relating to the investment, as well as any disputes between local stakeholders and the investor relating to the specified human rights.

3. Any Investor Human Rights Obligations Articulated in Investment Treaties Should Be Clearly and Narrowly Defined

While there would be certain advantages to articulating investor human rights obligations in investment treaties, it would be important to define these obligations clearly and narrowly. If they were defined too vaguely, then investors would have difficulty evaluating their risk exposure and deciding whether and how to invest. And if they were defined too expansively, then investors may be deterred from undertaking investments that pose only minimal risks to local stakeholders.

In an effort to achieve this balance, treaties could be drafted so as to focus on human rights that are widely viewed as “fundamental,” or that otherwise enjoy near universal acceptance, because no investor could legitimately dispute their existence or its obligation to respect them.\(^{55}\)

The human rights that are generally regarded as “fundamental” can be divided into three categories: those relating to the safety of persons, those relating to labor, and those relating to non-discrimination.\(^{56}\) The first category includes freedom from torture, inhumane and degrading treatment, arbitrary detentions, extrajudicial killings, enforced disappearances, rape and sexual slavery, genocide, war crimes, and crimes against humanity.\(^{57}\) The second includes freedom from forced labor and the worst forms of child labor, at a minimum,\(^{58}\) though some argue that freedom of association and the right to bargain collectively are also fundamental rights.\(^{59}\) The third includes freedom from discrimination on the basis of gender, race, color, language, religion, opinion, national, ethnic or social origin, nationality, age, economic status, property, or birth.\(^{60}\)

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\(^{55}\) See Muchlinski, supra note 34, at 655 (“At a moral level, it would appear that there exists a widening consensus that MNEs should observe fundamental human rights standards. This can be supported by reference to the fundamental need to protect from assaults against human dignity regardless of whether their perpetrators are state or non-state actors.”).

\(^{56}\) Černič, supra note 26, at 17.

\(^{57}\) Černič, supra note 26, at 60; Kinley & Tadaki, supra note 34, at 969 (asserting that “core” human rights include prohibitions on “war crimes, genocide, crimes against humanity, arbitrary killing, torture, and other cruel, inhuman, or degrading treatment or punishment.”).

\(^{58}\) Černič, supra note 26, at 67.


\(^{60}\) Černič, supra note 26, at 70; Rebecca E. Zietlow, Free at Last! Anti-subordination and the Thirteenth Amendment, 90 B.U.L. REV. 255, 264 (2010) (“[T]he rights to be free of race based segregation, gender discrimination, and other discrimination based on immutable characteristics, are fundamental human rights.”) Natsu Taylor Saito, The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for Ongoing Abuses of Human Rights, 10 ASIAN L.J. 13, 34 (2003) (“One of the most fundamental of all human rights is to be free from discrimination based on race, ethnicity, national origin, religion and gender.”).
All of these rights enjoy near-universal acceptance among states, and are routinely referenced in or incorporated into corporate codes of conduct.\(^\text{61}\)

It would also be advisable for the treaty to recognize an obligation by covered investors to respect the internationally-recognized rights of indigenous peoples. Indigenous peoples are the most vulnerable of all stakeholders to adverse impacts of development projects, due to their frequent political marginalization, spiritual connection to the land, and, in some cases, their dependence on traditional means of subsistence.\(^\text{62}\) The international community recently recognized this, in 2007, when the U.N. General Assembly overwhelmingly endorsed an instrument known as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).\(^\text{63}\) UNDRIP articulates a number of rights of indigenous peoples, some of which can be violated by a private actor at least as readily as by the state. These include the rights to maintenance and protection of cultural sites, compliance with international and domestic labor laws, maintenance of their means of subsistence and free engagement in traditional economic activities, and conservation of traditional medicines and their environment.\(^\text{64}\) Given the overwhelming endorsement of UNDRIP by the international community, investors could not legitimately claim surprise or prejudice if an investment treaty memorialized an obligation on their part to respect the above rights.

That having been said, it would be important to provide greater clarity regarding the scope of relevant indigenous rights than is set forth in UNDRIP itself. It should be made clear in particular which groups would qualify as “indigenous” for purposes of the treaty, and investors should be given specific guidance regarding what is required in the way of protecting cultural sites, maintaining indigenous peoples’ means of subsistence and traditional economic activities, and conserving their traditional medicines. Toward that end, it may make sense to draw on (or even incorporate by reference) internationally-recognized definitions and standards dealing with these issues. Potential candidates in this regard include the Akwé: Kon Guidelines for impact assessments relating to development projects on indigenous lands (promulgated by the Secretariat of the Convention on Biological Diversity); International Finance Corporation Performance Standard 7 (a set of performance standards developed by an arm of the World Bank Group for development projects on the lands of indigenous peoples); SA 8000 (a set of labor standards developed by the NGO Social Accountability International); and ISO 14000 and 26000 (standards promulgated by the International Organization for Standardization concerning environmental management systems and social responsibility, respectively).

Whatever human rights such a hypothetical treaty were to incorporate and make enforceable pursuant to its arbitration mechanism, it should make clear that this is without prejudice to other human rights obligations that the investor may have. In other words, the treaty should not purport to provide an exhaustive list of the investor’s human rights obligations, but merely a

\(^{61}\) Cernič, supra note 26, at 67-68, 71.

\(^{62}\) See Foster, supra note 21, at ___; IFC Performance Standard 7 (2012) p. 1 (“Indigenous Peoples, as social groups with identities that are distinct from mainstream groups in national societies, are often among the most marginalized and vulnerable segments of the population. … Indigenous Peoples are particularly vulnerable if their lands and resources are transformed, encroached upon, or significantly degraded. … This vulnerability may include loss of identity, culture, and natural resource-based livelihoods, as well as exposure to impoverishment and diseases.”).


\(^{64}\) Id. arts. 11, 17, 20, 24, 29, and 32. See also Foster, supra note 21, at ___.

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subset to be enforceable via the treaty. In addition, the treaty should make clear that investors are expected not only to respect the specified rights directly, but also to avoid complicity in violations by the host state or other private actors. An MNE is unlikely to commit certain types of human rights abuses directly (such as genocide or torture), but might be complicit in violations by the host state, as where the violations are designed to suppress resistance by local stakeholders to the MNE’s operations.  

Were the treaty to be crafted in the manner proposed, it would by no means cover all potential human rights violations, but would cover the most egregious ones that could be committed or facilitated by private actors. Such an instrument would have provided substantial protection to the victims of the alleged human rights abuses discussed in the Introduction and in my opening remarks at this Forum. In each such case, had the investor’s home state concluded an investment treaty of the nature proposed with the host state, impacted local stakeholders could have brought arbitration claims against the investor for its commission of, or complicity in, the most severe alleged human rights abuses, and could have obtained a monetary award and injunctive relief in their favor. Indeed, the existence of such a remedy may have deterred the alleged human rights abuses in the first place.

IV. Theoretical Perspectives on the Viability of the Proposed Reforms

It is one thing to identify legal reforms capable of addressing the power asymmetry between foreign investors and local stakeholders, and another for states to adopt them. Consequently, before pursuing the reforms proposed herein, it would be advisable for human rights advocates to consider whether they have realistic prospects for being adopted. Toward that end, the Subsections below apply models derived from international legal theory to assess the proposals’ viability.

A number of theories have been developed with a view toward explaining or predicting states’ propensity to accept new international obligations or comply with them once accepted, and can be roughly broken down into interest-based and norm-based theories. Interest-based theories give primacy to the interests of actors involved in shaping foreign policy, while norm-based theories contend that states can also be motivated by ideas or norms constructed through interaction among individuals, groups, and states. The Subparts below evaluate the viability of the proposed reforms under two interest-based theories—known as “realism” and “liberal institutionalism”—respectively—and one norm-based theory, known as “transnational legal process theory.” As will be seen, each of these models suggests that it would be an uphill battle to convince states to adopt these reforms, but that it is not out of the question, particularly over the long term.

A. Realism

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65 See Kinley & Tadeki, supra note 34, at 970 (“[B]usinesses are more likely to be complicit (with their state partner) in the commission of war crimes, genocide, and crimes against humanity, rather than directly to commit those crimes themselves.”); John Gerard Ruggie, Business and Human Rights: The Evolving International Agenda, 101 Am. J. Int’l L. 819, 831 (2007) (“Few companies may ever directly commit acts that amount to international crimes. But there is greater risk of their facing allegations of “complicity” in such crimes.”).  
67 See id. at 477-481.
Realism maintains that states act solely according to their own perceived interests, particularly those of a security or economic nature. This theory predicts further that a state would rarely take action in relation to human rights abuses in other countries, because of the risk that doing so would create foreign relations tension or otherwise undermine the state’s security interests.

If one applies this theoretical framework, at first blush it seems unlikely that home and host states would ever adopt measures to hold MNEs accountable for human rights violations, because any constraints on investment activity could deprive both states of economic benefits associated with foreign investment. It must be kept in mind, however, that the particular measures proposed herein would impose only minimal restrictions on MNE behavior—targeting only violations of the most important human rights—and therefore would not necessarily have a major adverse impact on investment flows. Moreover, notwithstanding realist assumptions, states are sometimes willing to forego economic benefits in order to promote human rights, so long as the lost opportunities are relatively modest.

In addition, states arguably have a security interest in promoting MNE compliance with key human rights obligations. In several cases development projects carried out by foreign investors over the opposition of local stakeholders have triggered or fueled civil wars, and civil wars can spill across borders and undermine regional stability. Among other things, when human rights abuses are directed against members of a particular people or group, there may be a risk that a neighboring country will intervene to protect them—particularly if they share a common ethnicity, language, or religion with the intervening state’s populace. The likelihood of such a civil war or third state intervention may be slim, but if either risk materialized it could clearly be harmful to the security interests of either the home or the host state.

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68 See, e.g., Francesca Bignami, Creating European Rights: National Values and Supranational Interests, 11 Colum. J. Eur. L. 241, 254-55 (2005) (“A realist or ‘power politics’ approach takes sovereign states, intent on protecting themselves from other states in the anarchic international system, as the drivers of international cooperation. In classic realism, state interests are primarily geopolitical and security-related but a more nuanced version can also incorporate preferences for economic well-being and national prosperity. The balance of power among sovereign states determines their relations, including the treaties and other legal instruments they sign.”);

69 Forsythe, supra note 3, at 3 (noting that realism views state sovereignty and non-interference in the domestic affairs of states as core principles of international relations); id. at 154 (asserting that “states have often proven reluctant to speak out on human rights violations by others, fearing interruption of ‘business as usual’—not only on business but also on other important matters like security cooperation.”). See also R.J. Vincent, Human Rights and International Relations 71 (1986) (describing Henry Kissinger as an adherent of realist theory and noting that Kissinger advocated the exclusion of human rights considerations from foreign policy because it could undermine U.S. security interests to give too much attention to Soviet domestic affairs).

70 Forsythe, supra note 3, at 157 (asserting that “[g]overnments are often reluctant to undertake economic sanctions against another states—whether for human rights or other reasons—as they do hurt themselves,” but that they “do sometimes suspend full trade, and also development aid or other types of foreign assistance …”).


72 [cite evidence of conflicts that began as civil wars and later turned into regional conflicts, e.g., Somalia, Rwanda, Congo, and Sierra Leone.]

73 [Authority regarding interventions to be added.]
That there exists a linkage between human rights and security is not a novel notion; it was part of the original inspiration for the modern human rights movement.\textsuperscript{74} For example, language in Article 55 of the United Nations Charter calling for the organization to promote human rights was expressly adopted “[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.”\textsuperscript{75} In other words, the drafters of the U.N. Charter recognized that respect for human rights was necessary to promote stability, peace, and friendly relations at the international level.

Of course, the mere fact that human rights abuses can pose security risks does not mean that states will refrain from committing them or take action to prevent other countries from doing so. Nevertheless, an argument can be made that there is something special about the human rights abuses that the proposed reforms would be designed to address in terms of the threats they pose to foreign relations, and therefore that they deserve particular attention.

First, these abuses pose heightened risks because of their severity (i.e., they involve violations of human rights that are fundamental or directed at uniquely vulnerable peoples). It stands to reason that the more serious the violation, the more likely it would be to trigger a civil war or invite intervention by third countries.

Second, these abuses would be committed directly or indirectly by a foreign actor. And when a bad act is committed by a foreign actor, the ill will that it generates locally may be directed not only against the actor itself, but also against his home country. To see how an act by a foreign private actor can be imputed to his government in the minds of the local population, one need only think of the recent protests and attacks on U.S. embassies throughout the Middle East, some of which were reportedly triggered by anger at a U.S. citizen’s release of a film trailer disparaging the Prophet Muhammad. This risk can be so significant, indeed, that in other contexts the United States has taken aggressive action to prevent misconduct by its nationals abroad that could damage the country’s foreign relations. Notably, this was a key motivation for Congress’ adoption of the Foreign Corrupt Practices Act, which makes it a crime for U.S. companies to bribe foreign officials to obtain or retain business—conduct which, it was feared, would reflect poorly on the United States and could adversely affect the country’s position internationally.\textsuperscript{76} The same logic would suggest that the United States has an interest in preventing U.S. companies from engaging in serious human rights violations abroad, because

\textsuperscript{74} See, e.g., ARTHUR N. HOLCOMBE, HUMAN RIGHTS IN THE MODERN WORLD I (1948) (asserting that suppression of human rights can be an “underlying cause of war” and that this linkage between human rights abuses and security risks gave impetus to the modern human rights movement).

\textsuperscript{75} Charter of the United Nations (1945), Art. 55. See also HOLCOMBE, supra note 74, at 1-2 (asserting that concerns about the security implications of human rights abuses prompted the adoption of Article 55).

\textsuperscript{76} See Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 408 (9th Cir. 1983), cert. denied, 104 S. Ct. 703 (1984):
The FCPA was intended to stop bribery of foreign officials and political parties by domestic corporations. Bribery abroad was considered a ‘severe’ United States foreign policy problem; it embarrasses friendly governments, causes a decline of foreign esteem for the United States and casts suspicion on the activities of our enterprises, giving credence to our foreign opponents. H.R. Rep. No. 640, 95th Cong., 1st Sess. 5 (1977). The FCPA thus represents a legislative judgment that our foreign relations will be bettered by a strict anti-bribery statute.
such violations are at least as likely as bribery of foreign officials to generate resentment and ill will among foreign populations and damage the reputation of the United States.\textsuperscript{77}

Another factor in favor of the proposed reforms from a state-interest perspective is that they would not require one state to criticize or pass judgment over another. Rather, they would establish \textit{private} dispute resolution mechanisms that would operate outside of any country’s judicial system, and would be directed against private actors rather than against states.

In sum, there is arguably room for states to adopt reforms along the lines proposed even under a realist framework that is generally dismissive of human rights initiatives, given that these measures could help promote states’ security interests and would impose only minimal costs or burdens. Realism would seem to predict, however, that measures of this nature would not be assigned a high priority, and would be undertaken only by states that perceive distinct benefits to be derived from curbing MNE human rights abuses\textsuperscript{78}—a perception that seemingly does not exist with sufficient clarity at present.

B. \textbf{Liberal Institutionalism}

Another interest-based theory, known as liberal institutionalism, holds that states act based not on their own interests \textit{per se}, but on the interests of domestic constituencies that wield sufficient political clout within their political systems.\textsuperscript{79} This theory maintains further that democracies are more likely to adopt or comply with human rights instruments than are dictatorships, because their political systems offer more avenues for individuals and groups to be heard.\textsuperscript{80}

Most capital-exporting states are Western democracies, but some, like China, have dictatorial regimes and—as predicted by this model—have been accused of particular insensitivity to the human rights impacts of their corporations operating in developing countries.\textsuperscript{81} And while democratic capital-exporting countries may be more likely candidates to adopt the proposed measures, liberal institutionalism would seem to predict that the reforms would face an uphill battle even there, at least in the short term. After all, one can hardly expect MNEs to promote measures aimed at regulating their own conduct. To the contrary, MNEs have lobbied effectively \textit{against} previous attempts within capital-exporting countries to regulate their conduct extraterritorially, as well as against efforts to adopt binding international standards governing their conduct.\textsuperscript{82} Once again, however, it must be kept in mind that the proposed reforms have

\textsuperscript{77} A similar observation was made by Goler Teal Butcher, as reported in J. Clay Smith, Jr., \textit{United States Foreign Policy and Goler Teal Butcher}, 37 HOW. L.J. 139, 210 (1994) (Appendix III, interview of Goler Teal Butcher) (arguing that “the case can be made very easily that it is in the interest of the United States—for economic reasons, raw material, trade reasons, business reasons, strategic, security, and political reasons—to have the friendship of the people of Africa” by promoting human rights rather than merely corporate interests).

\textsuperscript{78} See \textit{Michael Byers, Custom, Power and the Power of Rules: International Relations and Customary International Law} 152 (1999) (noting the realist assumption that states behave in accordance with their own interests, but asserting that “these interests are interests as States perceive them to be,” and that much depends on “the existence or perception of external threats, be they of a military, economic, environmental or other character”) (emphasis added).

\textsuperscript{79} See Hathaway, \textit{ supra} note 66 at 485.


\textsuperscript{81} [To be added.]

\textsuperscript{82} [To be added.]
been carefully tailored to minimize the burdens on investors and incorporate only human rights enjoying near universal acceptance. Under the circumstances, it could be decidedly awkward for an MNE to openly lobby against their adoption, or at least more so than it was for them to lobby against previous initiatives.

Moreover, MNEs are not the only domestic constituency that would be interested in the proposed measures. Many organizations and individuals in capital-exporting countries are increasingly calling on corporations to meet basic CSR standards, including NGOs, investment firms dedicated to socially responsible investment (SRI), and others. Furthermore, social activists and NGOs have been instrumental in promoting many successful human rights initiatives in the past, from the human rights language in the U.N. Charter and the United Nations Declaration on Human Rights to modern conventions against torture and the use of landmines.

Yet even if NGOs, SRI firms, and social advocates do not presently wield sufficient political influence to counter MNE resistance to the proposed reforms, conditions could evolve over time and result in a shift in the political dynamics. Precisely such a shift occurred historically in connection with the institution of slavery, for example. Once a widely-accepted practice, slavery was ultimately outlawed in one country after another as economic conditions evolved and business interests in many sectors ceased to view it as essential to their prosperity, opening the door to successful campaigning by religious and social groups dedicated to its abolition. In the same way, liberal institutionalism would seem to predict that groups seeking to impose binding CSR obligations on MNEs will have a better chance of prevailing in the political arena if MNEs come to view those obligations as less of a threat to their profitability. There is already some evidence that this shift is occurring, as it becomes increasingly feasible from a technological and economic standpoint to carry out business operations without violating fundamental human rights and those practices gain broader acceptance within the business community—a point to be addressed by Luke Danielson.

As for capital-importing countries, these consist of a mix of democracies and dictatorships, and the political influence of MNEs, local stakeholders, and other domestic constituencies varies


84 Zoe Pearson, Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law, 39 CORNELL INT’L J. 243, 250-51 n. 21 (2006) (arguing that “NGOs have influenced the content of a number of international agreements” and listing several examples, including conventions relating to landmines and torture).

considerably from country to country. It is important to note, however, that even if a particular country is a dictatorship or otherwise has little political pressure to adopt measures promoting MNE compliance with human rights standards, it might be induced to adopt these measures as part of an investment treaty. Capital-exporting states like the United States have had considerable success inducing capital-importing states to sign investment treaties in the past by emphasizing the investment or trade benefits associated with the treaty. By the same token, if capital-exporting states insisted on the inclusion of language designed to protect local stakeholders during treaty negotiations, their counterparty may acquiesce to obtain the proffered benefits for important constituencies within their political system.

C. Transnational Legal Process Theory

As noted previously, norm-based theories reject the view that self-interest alone can explain state behavior, and contend that states can also be motivated by ideas or norms constructed through interaction among individuals, groups, and states. One prominent strain of norm-based thought is transnational legal process theory, a leading proponent of which is Harold Hongju Koh, a law professor and current Legal Advisor to the U.S. State Department. Koh argues that norms can be developed and internalized by states over time through a complicated process involving three separate phases. First, a state or other transnational actor provokes interactions with another transnational actor, with a view toward promoting a particular interpretation of the relevant norm and inducing the other actor to internalize it. Second, this interaction prompts the other actor to interpret or enunciate the norm. Third, the new interpretation is internalized by that actor. As will be seen, there is strong evidence that each of these stages is underway for norms relating to MNE human rights obligations, even if consensus is still lacking regarding the precise extent of those obligations and appropriate legal mechanisms for enforcing them.

With regard to the first two steps, Koh explains that any number of actors can prompt the required interaction and develop new interpretation of norms: actors to which he refers as “transnational norm entrepreneurs.” These can include not only states but also intergovernmental organizations, NGOs, business entities, and individual activists. Many such actors are already involved in provoking interactions and developing new interpretations regarding the scope of corporate human rights obligations and options for enforcing them. At the intergovernmental level there are U.N. bodies such as the Human Rights Council, whose predecessor requested the appointment of Professor Ruggie as the Secretary-General’s Special Representative for Business and Human Rights, and which ultimately endorsed his findings and recommendations. Similarly, other U.N. bodies drafted and adopted UNDRIP and have been
involved in monitoring its implementation. One such body—the U.N. Permanent Forum on Indigenous Issues—has repeatedly urged the private sector to bring its conduct into compliance with UNDRIP.95

Numerous NGOs are likewise involved in formulating views on corporate human rights obligations, monitoring corporate conduct, and advocating options for enforcing corporate human rights obligations.96 Similarly, SRI firms are increasingly involved in monitoring corporate conduct as they seek to avoid investments in companies with poor human rights track records.97 Finally, numerous scholars and activists have written books and articles in recent years arguing that corporations owe human rights obligations to one extent or another, and advocating particular avenues for holding them accountable for violations. By so doing, all of these actors are provoking interactions with MNEs and states, as well as amongst themselves, and are helping to develop new interpretations of corporate human rights norms and appropriate means of enforcing them.

The third stage of Koh’s transnational legal process—norm internalization—refers to the process by which an international norm becomes accepted in society, adopted as governmental policy, and incorporated into the country’s legal system.98 It is clear that norm internalization regarding corporate human rights obligations is still incomplete, but the more norm entrepreneurs promote enhanced expectations for corporate human rights compliance, the more these norms could gain legitimacy, and the more likely that other societal actors will embrace them and demand their adoption by corporations and governments. In addition, as this process continues states may begin to perceive more clearly that it is in their own interest to implement these norms, prompting them to embrace them as governmental policy and incorporate them into domestic laws or international agreements.

In fact, there are a number of factors already in play that could speed Koh’s three stages of transnational legal process with regard to norms relating to corporate human rights accountability. These include:

- improved modes of communication and more frequent exposure of the plight of indigenous and other local stakeholders impacted by development projects, which tend to make constituencies in home and host states alike more cognizant of the need to regulate MNE behavior;
- greater direct experience on the part of domestic constituencies in capital-exporting states with the adverse impacts of development projects, which may lead them to be more sensitive to impacts on foreign populations;

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95 Foster, supra note 21, at __.
96 [To be added.]
97 [To be added.]
98 Koh, supra note 91, at 641.
- enhanced solidarity and cooperation among local stakeholders across national borders, which will likely increase their lobbying power and the effectiveness of their advocacy efforts; and

- increasing sophistication of NGOs and other non-state actors interested in corporate human rights accountability, which may make them more effective at devising new interpretations of the relevant norms and promoting the same.

In short, transnational legal process, like the other international legal theories discussed above, seems to confirm that the reforms outlined herein are potentially viable and could be adopted in due course—particularly if human rights advocates made it a priority to pursue them.

V. Conclusion

As this Article has shown, investment treaties have a profound potential to stabilize relations between the various actors involved in or impacted by international investment. They have already addressed the power asymmetry between investors and host states, and could be called upon to address that between investors and stakeholders as well, if only the political will existed to do so. In fact, investment treaties have many features that make them better suited to address this power asymmetry than alternative solutions focused on domestic laws and institutions.

I would therefore submit that as part of their ongoing efforts to reform international investment law, human rights advocates should give less emphasis to curtailing investor protections and strengthening host state regulatory leeway, and more to empowering local stakeholders to protect their own fundamental human rights, without the need to rely on the host state to do so on their behalf.