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INVESTORS, STATES, AND STAKEHOLDERS: POWER ASYMMETRIES IN INTERNATIONAL INVESTMENT AND THE STABILIZING POTENTIAL OF INVESTMENT TREATIES

by
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Critics of investment treaties contend that these treaties give investors excessive rights vis-à-vis host states, and undermine the latter's ability to regulate to prevent corporate human rights abuses. Some even assert that investors are often now more powerful than host states, in part because of investment treaties. Consequently, calls for reform of international investment law often focus on modifying treaties to diminish investor rights or expand host state regulatory authority. This Article argues that, contrary to common perception, investors have a genuine need for treaty protections, and these do not unduly hinder host state regulatory prerogatives. Investment-related human rights abuses occur not because investment treaties deter host states from regulating, but because host states are sometimes disinclined to regulate—and may even commit abuses in their own right—as a result of financial considerations and other factors unrelated to treaty protections. Indeed, host states sometimes enter into an effective alliance with investors, resulting in a power

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asymmetry to the detriment of local stakeholders far greater than any that may exist between investors and states. This Article explains how investment treaties could and should be modified to buttress the position of local stakeholders—just as they presently do that of investors—empowering stakeholders to protect their own human rights, without the need to rely on their governments to do so on their behalf.

INTRODUCTION

In recent decades, countries around the world have concluded an elaborate network of investment treaties,[1] which are designed to stimulate foreign investment by offering protections to covered investors from one treaty party who undertake investments in the territory of another.[2] Governments are eager to promote foreign investment in this manner because they believe it brings substantial benefits: not only to the investors—typically multinational enterprises (MNEs)[3]—but also to investors'

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[1] The term "investment treaty" as used herein refers to international agreements that focus on investment (such as bilateral investment treaties (BITs)), as well as trade or sectoral agreements that include an investment chapter (such as free trade agreements or the Energy Charter Treaty). *E.g.*, Energy Charter Treaty, pt. III, *opened for signature* Dec. 17, 1994, 2080 U.N.T.S. 95.

[2] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 22–23 (2008) (observing that when the host state signs a treaty with the investor's home state and accepts obligations toward foreign investors, it does so "in return for a certain new opportunity: the chance to better attract new foreign investments, which it would not have acquired in the absence of a treaty"); ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT §§ 1.44, 1.48 (2009) (describing the network of investment treaties and their purpose and citing studies that indicate a correlation between investment treaties and increased investment flows, but explaining that "the existence of a causal relationship and the strength of that relationship remain disputed").

[3] In a narrow sense, the term "MNE" refers to a business entity that owns or controls income-generating assets in more than one country. *See* DAVID K. EITEMAN ET AL., MULTINATIONAL BUSINESS FINANCE 2 (9th ed. 2001) (defining MNE as an enterprise "that has operating subsidiaries, branches, and affiliates located in foreign countries"). The term is sometimes also used more broadly to refer to a family of related business entities organized in multiple countries, or any member thereof. *See* Robin F. Hansen, *Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the* Prestige *Oil Spill*, 26 BERKELEY J. INT'L L. 410, 414 (2008) (observing that the term "MNE" can encompass "a series of related

home states, the states that host their investments, and both countries' citizenries generally.[4] Among other things, foreign investment can generate governmental revenues and is widely believed to promote economic development.[5] In the process it can provide employment opportunities for host state nationals, expand their access to education and health care, and otherwise raise local standards of living.[6] In addition, foreign investors sometimes employ more advanced and environmentally-friendly technology and business practices.[7] In short, under the right circumstances foreign investment can be in the interest of investors, states, and local stakeholders[8] alike.

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corporations . . . [i]ncorporated under various countries' national laws," and describing MNEs as "the global economy's main agents of foreign direct investment (FDI)"). The term is used in this Article in the broader sense. MNEs are sometimes referred to alternatively as transnational corporations (TNCs) or multinational corporations (MNCs).

[4] *See* Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 496–97 (2009) ("[B]oth capital-importing and capital-exporting countries derive benefits from increased flows of foreign investment. Apart from the transfer of technology connected to foreign investment, the creation of employment, additional tax revenue, etc., investment treaties create a legal infrastructure for the functioning of a global market economy . . . [which] leads to the efficient allocation of capital, economic growth, and development, and benefits both capital-exporting and capital-importing countries through an increase in overall well-being.").

[5] *Id.*; *see also* KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 83–87 (2010) (explaining how foreign investment promotes economic development according to liberal economic theory).

[6] *See* DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS 228 (2d ed. 2006) ("TNC plants in the global south may provide infirmaries for health care, or improved safety conditions. TNCs, even while paying wages below standards in the global north, may pay wages in developing countries that permit growth, savings, and investment over time."); Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise*, 20 WIS. INT'L L.J. 89, 95 n.26 (2001) (acknowledging that "MNE presence in developing countries provides many benefits to the governments and peoples of those nations," including "employment for the citizens [and] revenue for the economy"); 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, TNCs 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.").

[7] *See* FORSYTHE, *supra* note 6, at 228 ("TNCs export standard operating procedures that are sometimes an improvement over those previously existing in a developing country."); Narula, *supra* note 6, at 758.

[8] The term "stakeholder" is used herein to refer to any individual, group, people, or organization impacted by an investor's activity. For similar uses of the term, see 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."); 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, 1230–31, 1241 (2003) (arguing that indigenous peoples impacted by

Yet foreign investment can also pose risks to the environment and local stakeholders. A number of MNEs have been accused in recent years of causing extensive environmental degradation or otherwise committing—or being complicit in—a multitude of egregious human rights violations in developing countries.[9] Such alleged misconduct has included, *inter alia*, causing massive pollution or deforestation leading to illness, death, and loss of livelihood in indigenous populations;[10] employing forced labor or using violence and intimidation to prevent workers from

petroleum operations carried out by a foreign investor should be considered stakeholders in the project).

[9] *See* Sandra Coliver et al., *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 MNEs have been accused of "direct involvement in human rights violations such as destructive environmental practices [and] abusive sweatshop conditions in the garment industry," as well as "complicity in the actions of government officials or soldiers who actually commit the human rights violations").

[10] *See, e.g.*, George K. Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Economic Equilibrium Between Economic Development and Indigenous Rights*, 33 MICH. J. INT'L L. 627, 650–52 (2012) (describing alleged environmental damage and adverse health and social effects on Canadian First Nations resulting from oil sands development carried out by international and domestic oil companies); 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, 934 (2004) ("TNCs in the extractive industries have caused environmental disasters, threatening the right to adequate food and the right to an adequate standard of living. Royal Dutch/Shell's oil production in Nigeria, and BHP Billiton's copper mining in Papua New Guinea, for example, seriously damaged the environment and the livelihood of peoples in local communities, which depended on fishing and farming."); Shelli Stewart, *A Limited Future: 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 lawsuit alleging that an MNE operating a mine in Indonesia destroyed an indigenous people's natural waterways, deforested the rainforest on which they depended for subsistence, and contaminated their surface and groundwater); Rebecca Tsosie, *Indigenous Peoples and Global Climate Change: Intercultural Models of Climate Equity*, 25 J. ENVTL. L. & LITIG. 7, 10 (2010) (asserting that in recent years governments in Latin America have permitted MNEs to extract timber and mine on the lands of indigenous peoples, and that the resulting "massive deforestation of such lands has led to the wholesale destruction and removal of indigenous communities from their lands, as well as episodes of violence reminiscent of what happened in the United States during the nineteenth century").

forming unions;[11] and launching physical attacks on local communities to suppress resistance to the MNE's operations.[12]

In part because of these risks, treaties designed to promote foreign investment have attracted much criticism in recent years. One of the common charges against investment treaties is that they give investors excessive rights and protections 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.[13] Some even assert that investors are often now more powerful than host states, in part because of investment treaties.[14] Consequently, calls for reform of

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[11] *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) (noting allegations that Rio Tinto discriminated against indigenous workers on the basis of their race and subjected them to "slave-like" conditions); Kinley & Tadaki, *supra* note 10, at 934 (discussing allegations that certain MNEs in South America "have been associated with, or are directly responsible for, the systematic intimidation, torture, kidnapping, unlawful detention, and murder of trade-unionist employees by paramilitaries operating as" the MNEs' agents).

[12] *See, e.g.*, Halpern, *supra* note 11, at 159–61 (discussing a lawsuit against an MNE that operated a mine in Papua New Guinea alleging that the MNE incited the national government to use violence to suppress local opposition to its operations); *see also* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 249–50 (2d Cir. 2009) (summarizing allegations by plaintiffs that Canadian oil company Talisman was aware of, and complicit in, attacks on local communities and forced displacement of civilians living near oil fields).

[13] *See, e.g.*, Barnali Choudhury, *Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights*, 46 ALTA. L. REV. 983, 984 (2009) (arguing that investment treaties "curtail a state's democratic expression by countering its sovereign decision-making authority," such that "[s]tate parties to investment agreements can no longer protect or promote human rights issues without concern that the regulation will be found to constitute an interference with the state's investment treaty obligations"); 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 & n.58 (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").

[14] *See, e.g.*, 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"); Halpern, *supra* note 11, at 145 (asserting that there often exists a "power imbalance between the TNC 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"); 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)

international investment law often focus on modifying investment treaties to diminish investor rights, expand host state regulatory authority, or both.[15]

This Article will argue, however, that investors have a genuine need for treaty protections, that the above-referenced criticisms somewhat overstate the impact of such protections on investor–state power[16] dynamics, and that other investment-treaty drafting innovations would be more effective in promoting human rights than those typically proposed.

Contrary to common perception, after signing an investment treaty the host state retains broad leeway to promote human rights or otherwise regulate in the public interest, should it decide to do so.[17] Investment-related human rights abuses occur not because investment treaties unduly empower investors or restrain host states from protecting human rights (at least as a general matter), but because host states are sometimes not *inclined* to protect human rights, due to their financial interest in promoting development projects and other factors unrelated to treaty protections. Indeed, host states may be perfectly willing to look the other way when investors violate human rights, or even commit violations in their own right.[18]

(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").

[15] *See, e.g.*, Choudhury, *supra* note 13, at 1003 (endorsing treaty amendments to reduce the scope of investor protections or exempt from liability host state measures designed to promote human rights); Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements*, 49 COLUM. J. TRANSNAT'L L. 670, 686, 712–13 (2011) (noting that some treaties contain exception provisions that allow states to deviate from treaty standards to promote the public interest, and recommending that "states interested in furthering a human rights agenda in the area of foreign investment" include broad, self-judging provisions of this nature, so as to give host states additional regulatory leeway); Sheffer, *supra* note 13, at 520 ("States should reform BITs to remove, or at least limit, encumbrances on a State's regulatory power to protect human rights.").

[16] The term "power" as used herein refers 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 power is "the capacity of a participant to deploy resources to influence or coerce other participants into complying with its preferred outcome").

[17] This point is discussed in detail *infra* Part III.A.

[18] *See* LUKE ERIC PETERSON & KEVIN R. GRAY, Int'l Inst. Sustainable Dev., INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND IN INVESTMENT TREATY ARBITRATION 16 (2005), *available at* 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

Moreover, there is a power asymmetry in international investment that is of at least as much concern as any that may exist in particular cases between investors and host states: namely, an asymmetry between local stakeholders, on the one hand, and an effective alliance that sometimes exists between the investor and the host state, on the other. Such stakeholders may consist, for example, of an indigenous people on whose lands an oil, mining, logging, or hydroelectric project is carried out; consumers who depend on the investor to provide an important service such as water treatment and distribution; or host state nationals who work for the investment. For a foreign investment to succeed, the investor will need the cooperation of such stakeholders, or will at least need to avoid (or suppress) active resistance. And in many cases the investor has an inherent power advantage resulting from its disproportionate resources and sophistication, which may be further buttressed by entitlements and support provided by host state authorities.[19] As previously noted, host states can have a strong financial incentive to promote foreign investment, and are sometimes inclined to support an investor's activities even in the face of opposition by local stakeholders.[20]

A situation therefore sometimes exists in which foreign investors have disproportionate resources and rights vis-à-vis local stakeholders, but only limited obligations or risk exposure running in the other direction—a dynamic that presents an inherent risk of exploitation and abuse. Moreover, investment treaties presently do nothing to address this power asymmetry, because they deal exclusively with the relationship between the investor and the host state.

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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.").

[19] *See* U.N. Econ. and Soc. Council, Permanent Forum on Indigenous Issues, *Study on Indigenous Peoples and Corporations to Examine Existing Mechanisms and Policies Related to Corporations and Indigenous Peoples and to Identify Good Practices*, ¶¶ 9–10, U.N. Doc. E/C.19/2011/12 (Mar. 10, 2011) [hereinafter ECOSOC Indigenous Peoples Study] ("Historically, indigenous peoples' relationship with corporations that operate on their lands and territories has been one of conflict; these entities have violated and ignored the individual and collective rights of the indigenous peoples, who have suffered the negative consequences of corporate practices in the extractive and energy industries. Negotiations between the two parties have been limited, with corporations usually being in a position of strength. . . . [I]n many cases, States and their officials have favoured corporate interests to the detriment of indigenous peoples' interests, stating that this is in the national and public interest.").

[20] *See* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 766 (9th Cir. 2011) (case alleging that multinational oil company urged the Papua New Guinea government to suppress resistance by local communities to its operations, and provided the military with helicopters and vehicles to carry out the operations); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247 (2d Cir. 2009) (case alleging that the Sudanese military used violence to suppress opposition to oil activities by a multinational consortium of oil companies).

This need not be the case. This Article will show that investment treaties could be crafted to confirm certain fundamental human rights obligations of investors and provide local stakeholders with an effective avenue of redress against them for any violations—if only the political will existed to employ them in this manner. Were this to occur, investment treaties could have an important stabilizing effect on relations between investors and local stakeholders, just as they already do with regard to investor–state relations. Reform of this nature would offer substantial additional protection for human rights, without unduly eroding protections for which investors often have a genuine need vis-à-vis host states.

The discussion proceeds as follows. Part I.A explores the impact of investment treaties on investor–state power dynamics and argues that host states generally retain considerable leeway to protect human rights without incurring liability under such treaties, if they choose to do so. Part I.B contrasts these dynamics with investor–stakeholder relations, identifying the sources of the power advantage that investors often have over local stakeholders, and demonstrating that investment treaties fail to address the situation. Part II outlines various legal reforms that could address power dynamics between investors and local stakeholders, and sets forth a normative argument for accomplishing this goal via investment treaties. Part III draws on international legal theory to evaluate the viability of the proposed reforms, determining that they would be very difficult to achieve but are potentially within reach over the long run. Part IV concludes.

I. Power Dynamics in International Investment

A. *Investor–State Relations*

There is no question that foreign investors, particularly large MNEs, can have vast resources at their disposal, sometimes even dwarfing those of the host states in which they operate.[21] Moreover, developing countries often lack the capital or technological know-how to exploit domestic resources or carry out other development projects, which can give MNEs significant bargaining power vis-à-vis host states.[22] To this must be added the fact that government officials in developing countries may lack busi-

[21] Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 Am. U. Int'l L. Rev. 451, 476 (2008) ("[T]he economic powers of MNCs are huge—often far larger than that of the countries with which they are dealing. The annual revenues of General Motors are greater than the GDP of more than 148 countries; while Wal-Mart's revenues exceed the combined GDP of sub-Saharan Africa, excluding South Africa and Nigeria." (footnote omitted)).

[22] Evaristus Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth From Realities*, 19 Fla. J. Int'l L. 1, 31 (2007) (asserting that African countries are beholden to MNEs in the extractive industries because of their wealth and technological know-how).

ness or technical sophistication, or be susceptible to bribery.[23] Under the circumstances, the risk may exist that the MNE will take advantage of the host state when negotiating the terms of its investment, or keep the host state from regulating it effectively during the lifetime of the investment.[24]

Nevertheless, it must also be acknowledged that host states can have significant leverage of their own against foreign investors. After all, host states are sovereigns, and sovereignty entails the power to regulate everyone within the sovereign's territory as well as a monopoly on the legitimate use of force.[25] The investor may be an MNE with sizeable resources

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[23] *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 420 (2d ed. 2010) ("A local government official in a developing country who earns a salary equivalent to several hundred dollars per month may be in a position to decide whether to approve a foreign investment project involving tens of millions of dollars—or more—by one of the world's leading companies."); LORENZO COTULA, INT'L INST. ENV'T & DEV., INVESTMENT CONTRACTS AND SUSTAINABLE DEVELOPMENT: HOW TO MAKE CONTRACTS FOR FAIRER AND MORE SUSTAINABLE NATURAL RESOURCES INVESTMENTS 5 (2010), *available at* http://pubs.iied.org/pdfs/17507IIED.pdf ("[I]n many lower- and middle-income countries, contract negotiations are often affected by imbalances in negotiating capacity between investors and governments. Besides differential access to skills and expertise, other factors may put the host government in an unfavourable position during the negotiation: high staff turnover in key government agencies, inadequate preparation, poor use of the expertise available in the country and corruption."); Stiglitz, *supra* note 21, at 477 ("[S]ometimes MNCs engage in corruption (bribery): The developing countries with which they deal are often weak, and salaries of government officials are generally very low, making these countries particularly susceptible to corruption.").

[24] GLOBAL WITNESS, HEAVY MITTAL? A STATE WITHIN A STATE: THE INEQUITABLE MINERAL DEVELOPMENT AGREEMENT BETWEEN THE GOVERNMENT OF LIBERIA AND MITTAL STEEL HOLDINGS NV 7 (2006), *available at* http://www.globalwitness.org/sites/default/files/pdfs/mittal_steel_en_oct_2006_high_res.pdf (discussing a contract between a local subsidiary of a Dutch mining company and the government of Liberia, which included a number of features that were arguably unfair to the government and inconsistent with industry norms—allegedly the product of significant bargaining power inequality); Cheng, *supra* note 14, at 492–93 ("Multinational corporations can be more powerful than the states in which they invest, and may be able to impose imbalanced bargains." (footnote omitted)); Larissa van den Herik & Jernej Letnar Cernic, *Regulating Corporations Under International Law: From Human Rights to International Criminal Law and Back Again*, 8 J. INT'L CRIM. JUST. 725, 728 (2010) ("In situations where a multinational corporation outweighs a developing host state in terms of economic power, that state may not be inclined to regulate a corporation too stringently."); Oshionebo, *supra* note 22, at 31 (asserting that the financial power of MNEs operating in the extractive industries in Africa allows them to influence regulatory laws and "promote a culture of non-enforcement of laws").

[25] *See* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1986) (outlining the scope of states' jurisdiction to regulate under international law); Barnhizer, *supra* note 16, at 157–58 (alluding to "the ability of the state, through its agents, to coerce individual actors within the polity into obeying the sovereign's commands," and noting that an attribute of sovereignty is the "right to enforce individual compliance through the state's monopoly on the legitimate use of force"); Yaraslau Kryvoi, *Counterclaims in Investor–State Arbitration*, 21 MINN. J. INT'L L. 216, 225

at its disposal, but it has no way of resisting if the host state ultimately decides to pass laws or decrees adverse to the investment and employ its police, military forces, and courts to enforce them.[26] And the host state may be inclined to do precisely that, particularly after the MNE has completed its initial capital investment and the host state no longer needs the MNE's capital and expertise as much as it did at the outset.[27]

Indeed, it was precisely to address the inherent power asymmetry in favor of host states resulting from their sovereign status that investment treaties were devised in the first place.[28] Foreign investors have long had various protections under international law designed to shield them from abusive treatment at the hands of the host state, but often had no effective means of enforcing host state obligations before the advent of investment treaties.[29] Investment treaties confirm and enhance those preexisting host state obligations and establish arbitration mechanisms that allow a covered investor to enforce the same by bringing claims directly

(2012) ("Only States have a monopoly on using force to regulate activities of all economic actors in their own territory.").

[26] John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 19 n.85 (2008) ("It has been suggested that multinational corporations are now more powerful than some governments. . . . Those making this argument tend to look only at economic size, not at indicia of power like armies, police forces, prosecutors, and courts, which governments generally have and corporations generally do not.").

[27] *See* DOLZER & SCHREUER, *supra* note 2, at 3–5 (discussing the risk that the bargaining power dynamics will shift in favor of the host state after the investor has completed its major capital investments, clearing the way for the state to expropriate the investment or take other adverse action); Hansen, *supra* note 3, at 447 (same); Moshe Hirsch, *Investment Tribunals and Human Rights: Divergent Paths*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 97, 108 (P.M. Dupuy et al. eds., 2009) (asserting that during most stages of the implementation of the investment the superior position of the host state is "glaring" by virtue of its unilateral ability to influence the content of the law).

[28] Andrea K. Bjorklund, *The Necessity of Sustainable Development?*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 373, 374 (Marie-Claire Cordonier Segger et al. eds., 2011) (noting that investment treaties are "designed to counteract the advantage States have in their unilateral ability to regulate and to legislate in ways injurious to foreign investors"); Hirsch, *supra* note 27, at 98–99 ("States are in a superior position vis-à-vis individuals and foreign investors. Thus, for example, states may unilaterally change the domestic law applicable to these non-state actors . . . . Consequently, legal rules and institutions developed . . . to compensate the inferior position of individuals and investors under the domestic law by enhancing legal protection at the international level."); Kryvoi, *supra* note 25, at 225 ("Historically, the main aim of investment treaties . . . was to moderate the exercise of sovereign power by host States.").

[29] Foster, *supra* note 10, at 671–72; *see also* DOLZER & SCHREUER, *supra* note 2, at 220 ("The gaps left by the traditional methods of dispute settlement (diplomatic protection and action in domestic courts) has led to the idea of granting direct access to the investors concerned to effective international procedures, especially arbitration.").

against the host state in a neutral international forum, without having to rely on its own government to protect its interests.[30]

Critics of investment treaties seemingly do not dispute that host states have certain advantages over investors, but suggest that these treaties go too far in their effort to protect investors, granting them more rights than they need and failing to impose any corresponding obligations.[31] There is certainly room for argument that investment treaties (especially older-generation ones) give investors more protection than is appropriate, and a good case can be made for balancing investor protections with corresponding obligations in the text of investment treaties.[32] Nevertheless, as will be seen, investors have *other* sources of obligations, and the host state's enforcement of the same would not normally violate an investment treaty. Moreover, even if the host state's treatment of an investor would violate a treaty standard, the treaty may include an exception provision relieving the host state of liability. In addition, the host state's status as a sovereign may in any event deter the investor from filing a treaty claim or allow the state to avoid collection on any potential award in the investor's favor. For all these reasons, while investors may at times enjoy a certain power advantage vis-à-vis the host state, this advantage is often only ephemeral, and is rarely, if ever, the result of an investment treaty.

1. Investors Typically Have Obligations Under Investment Contracts or Domestic Law, Which the Host State Generally Can Enforce Without Violating an Investment Treaty

When an investor undertakes an investment, it often assumes a multitude of obligations toward the host state or local stakeholders.

Contracts are one source of such obligations. In some cases the investor cannot undertake the investment without first signing a contract with the host state or a state-owned enterprise, as when the government owns the natural resources to which the investor seeks access or is the cli-

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[30] Foster, *supra* note 10, at 671–72; *see also* VANDEVELDE, *supra* note 5, at 58 ("For the first time, investors had an effective remedy for unlawful actions by host states that injured their investments that did not depend upon local courts in the host state or action by their home state.").

[31] *See, e.g.*, Choudhury, *supra* note 13, at 984 ("Investment arbitration's primary focus on investment rights has . . . shifted the boundary between the public good and private interest in favour of the private interests of investors . . ."); Sheffer, *supra* note 13, at 510–11 (arguing that the traditional power imbalance in favor of states has diminished, and therefore umbrella clauses—a common feature of investment treaties requiring host states to observe obligations vis-à-vis investors—"are no longer necessary to insulate and protect investors").

[32] See Mary E. Footer, *Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment*, 18 MICH. ST. J. INT'L L. 33, 37–39 (2009) for an explanation of the difference between various "generations" of investment treaties and an argument that earlier generations failed to delimit investor protections sufficiently. See Part II.B, *infra*, for an argument that investment treaties should articulate human rights obligations of covered investors.

ent for whom the investor will build a dam or other infrastructure.[33] This act of contracting presents the host state with an opportunity to impose obligations on the investor for the benefit of the environment or local populations, if it is minded to do so.[34] The host state may also have a default domestic legal framework in place that imposes similar obligations on companies operating within their territory, including, for example, environmental regulations, product liability laws, labor laws, or special protections for indigenous peoples.[35]

It is widely recognized under international law generally, and in investment treaty jurisprudence specifically, that the host state is free to enforce such obligations of the investor without incurring international liability.[36]

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[33] Lillian Aponte Miranda, *The Hybrid State–Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135, 154–55 (2007) (observing that when an MNE undertakes an investment, it often must contract with the host state "to obtain rights over the lands or resources necessary to pursue its business, whether it constitutes logging, mining, oil drilling or the construction of a pipeline or dam" and describing the types of contracts that MNEs and host states typically conclude).

[34] *See* ERNEST E. SMITH ET AL., MATERIALS ON INTERNATIONAL PETROLEUM TRANSACTIONS 673–77 (2d ed. 2000) (explaining that it is increasingly common for host states to include language in investment contracts with multinational oil companies aimed at "assuring critics that special protection will be afforded natural areas and indigenous populations" and providing sample contractual language); MINING LAW COMM., INT'L BAR ASS'N, MODEL MINE DEVELOPMENT AGREEMENT (2011), http://www.mmdaproject.org/presentations/MMDA1_0_110404Bookletv3.pdf (a template prepared by a committee of the International Bar Association to serve as a basis for negotiating mining contracts that incorporate environmental, social and cultural controls, featuring sample language from existing agreements); Kyla Tienhaara, *Foreign Investment Contracts in the Oil & Gas Sector: A Survey of Environmentally Relevant Clauses*, INV. TREATY NEWS (Oct. 7, 2011), http://www.iisd.org/itn/2011/10/07/foreign-investment-contracts-in-the-oil-gas-sector-a-survey-of-environmentally-relevant-clauses/ (identifying a multitude of environmental issues sometimes addressed in contracts between multinational oil companies and host states, but asserting that the language employed is not always sufficiently rigorous).

[35] *See* Isabella D. Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community*, 19 AM. U. INT'L L. REV. 1265, 1294 (2004) ("A large range of substantive national laws relate directly to issues of corporate social responsibility, such as labor standards, health and safety regulations, consumer protection, factory emission requirements, anti-trust provisions, product liability, and many others."); Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 60–92 (1999) (summarizing special protections for indigenous peoples in the national laws of several different countries).

[36] *See* PETERSON & GRAY, *supra* note 18, 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 cannot be successfully challenged in treaty arbitration); *see also* 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 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

Moreover, many tribunals have recognized that after an investment is made the host state is free to enact *new* laws and regulations that adversely impact the investment, so long as they are generally applicable, adopted in good faith for a public purpose, and the state has not somehow assured the investor that it would not adopt such measures.[37] In fact, even if the host state *has* made such assurances, the investor should not be able to state a successful treaty claim based on those assurances if they were inconsistent with the host state's human rights obligations or other obligations under international law. Simply put, an investor is in no position to rely on a promise by the host state to violate its international commitments.[38]

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,[39] in bad faith,[40] expropriatory (but not based

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the alien to abandon the property to the state or sell it at a distress price" (citation omitted)).

[37] *See, e.g.*, Methanex Corp. v. United States of Am., NAFTA/UNCITRAL Arb., Final Award, pt. IV, ch. D, ¶ 7 (Aug. 3, 2005), 16 ICSID Rep. 33, 197 (2012) ("[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 Enters. Six Nations, Ltd. v. United States of Am., NAFTA/UNCITRAL Arb., Award, ¶¶ 141–42 (Jan. 12, 2011), http://www.state.gov/documents/organization/156820.pdf (asserting that "legitimate expectations of the kind protected by NAFTA" can "arise through targeted representations or assurances made explicitly or implicitly by a state party," but rejecting the investor's claim because the host state had made no such representations, and therefore the investor should have anticipated the enactment of new regulations).

[38] Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International 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." (footnote omitted)); *cf.* Choudhury, *supra* note 15, at 684 ("[W]hile the state must treat the investor and the investment fairly, the investor should also treat the state fairly—for example, by respecting its people's human rights.").

[39] *See, e.g.*, Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, ¶ 181 (Dec. 16, 2000), 7 ICSID Rep. 341 (2005) (holding that Mexico violated the investment chapter of the North American Free Trade Agreement by giving more favorable treatment to similarly-situated Mexican-owned companies than it gave to the company owned by the claimant U.S. investor).

on a generally-applicable regulatory measure),[41] or contrary to a commitment to the investor that the host state was free to make without violating its international obligations.[42] And there are strong policy reasons for imposing liability on host states for such conduct. Namely, doing so encourages host states to strive for an environment free of discrimination and arbitrariness, in which the rule of law prevails and property rights are reasonably secure—conditions widely viewed as vital for attracting foreign investment and achieving economic development.[43]

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[40] *See, e.g.*, Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶¶ 324–25, 418, 442 (July 14, 2006), 14 ICSID Rep. 374 (2009) (holding that Argentina violated the fair and equitable treatment provision of the U.S.–Argentina BIT when provincial authorities blamed problems with the operation of a water concession on the investor, which were attributable to errors and omissions by those same authorities).

[41] *See, e.g.*, ADC Affiliate Ltd. v. Republic of Hung., ICSID Case No. ARB/03/16, Award, ¶¶ 11, 218–19, 304 (Oct. 2, 2006), 15 ICSID Rep. 539 (2010) (holding that Hungary violated the expropriation provision of the Cyprus–Hungary BIT when it terminated, without justification or compensation, the claimant's contractual right to operate an airport terminal, and then sold the same rights to another investor); *see also* Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475, 511, 513 (2008) (asserting that "[t]he big news from the NAFTA investor–state arbitrations has been the startling lack of success of investors making expropriation claims," in part because tribunals have generally adopted an interpretation of expropriation that "excludes a wide variety of governmental restrictions on investments, including those that have a significant effect on the investor's income stream").

[42] *See, e.g.*, Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 235 (July 30, 2010), http://italaw.com/documents/SuezVivendiAWGDecisiononLiability.pdf. In this case, the tribunal held that Argentina violated the investment treaty obligation of fair and equitable treatment when it abrogated express written commitments to foreign investors who had invested in a water treatment concession relating to the tariffs that the company would be able to charge its customers. *Id.* ¶¶ 174–228. The tribunal rejected an argument made by NGO *amici curiae* to the effect that if Argentina had upheld these commitments it would have compromised customers' human rights by restricting their access to water. *Id.* ¶¶ 256–62. The tribunal concluded that there was no inconsistency between Argentina's obligation to ensure its citizens' access to water and its contractual commitments. *Id.* ¶ 262. To the contrary, Argentina's decision to bring in foreign investors to operate the water concession may have been intended to make the right to water more effective for larger numbers of Argentine inhabitants as the service was expanded through their efforts. *Id.* ¶ 255. The tribunal also noted that if Argentina had been concerned about adverse impacts of its contractual obligations on the right to water, it could have allowed the companies in which the claimants invested to charge the promised tariffs while offering governmental subsidies to consumers who could not afford them. *Id.* ¶ 235. Or, in the alternative, Argentina could have exempted the companies from certain of their contractual obligations, which could only be financed through higher tariffs. *Id.* Argentina declined both of those options, preferring instead to hold the companies to their contractual obligations, while abrogating its own. *See id.*

[43] *See* VANDEVELDE, *supra* note 5, at 113 ("Empirical evidence suggests that establishing the rule of law contributes to economic development. In general, improvements in the quality of governance, which includes establishment of the rule of law, have been found to attract greater quantities of foreign direct investment.");

To be sure, there have been cases in which tribunals have arguably adopted overly expansive interpretations of investment treaty standards,[44] but such interpretations are increasingly being rejected by tribunals or even foreclosed altogether.[45] Among other things, states increasingly include in their investment treaties restrictive definitions of treaty standards.[46] In addition, as discussed immediately below, states now often include exception provisions that allow host states to contravene treaty standards in particular contexts without incurring liability. Both of these trends are helpful in avoiding interpretations or applications of treaty standards that could inhibit effective regulation of MNEs.

2. Treaties Increasingly Contain Exception Provisions That Allow the Host State to Contravene Treaty Standards Without Incurring Liability

While host states always retain considerable leeway to regulate for the public interest after signing an investment treaty, some treaties contain special exceptions, carve-outs, or reservations (collectively "exception provisions") that give host states particularly broad flexibility, allowing them to avoid liability for measures that are inconsistent with standards of protection set forth in the treaty.

Notably, some investment treaties exempt the host state from liability for measures taken for specified public purposes, such as protection of

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Brower & Schill, *supra* note 4, at 496–97; O. Lee Reed, *Law, the Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 AM. BUS. L.J. 441, 444–46 (2001) (observing that it is often asserted in the United States and around the world by politicians, business and finance leaders, business groups, and others that the rule of law and the recognition of property rights "constitute a necessary foundation for economic development, investment, trade, and securities markets," and contending that "[p]erhaps the single most important step that countries can take to maximize growth and make themselves attractive to global business interests is to institute the rule of law.").

[44] *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. 1095 (2012) (arguing that certain tribunals have interpreted the "protection and security" and "fair and equitable treatment" treaty standards more expansively than is justified in light of the plain language of the relevant treaties, the treaties' purpose, relevant rules of international law, and pertinent drafting and negotiating history).

[45] *See, e.g.*, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1575–82 (2005) (explaining that, following certain arbitral decisions that offered an interpretation of the fair and equitable treatment standard disfavored by the NAFTA parties, the NAFTA parties adopted a joint interpretive statement that has imposed a narrower interpretation on tribunals); Ratner, *supra* note 41, at 478, 512–13 (noting that the broad definition of "expropriation" articulated by the tribunal in an early NAFTA arbitration, *Metalclad v. Mexico*, provoked the ire of "NGOs and academics [who] accused the panel of sacrificing a state's environmental goals to the benefit of foreign investors," but that subsequent tribunals have generally employed narrower definitions).

[46] Foster, *supra* note 44, at 1149–50.

the environment, public health, or the state's essential security interests.[47] Some such provisions require that the challenged measure be "necessary" to achieve a specified public purpose, others merely that it be "directed to" the same.[48] However they are worded, such provisions are becoming increasingly common as states become more concerned about retaining their regulatory flexibility vis-à-vis foreign investors.[49]

Some treaties also contain provisions that carve out from their coverage in whole or in part particular *types* of governmental measures. For example, a number of treaties limit the claims that may be brought in relation to *taxation* measures, or give the treaty parties a right to "veto" treaty claims relating to such measures.[50] Such provisions can be particularly useful when a state is seeking to regulate foreign investment to protect the environment or human rights. To begin with, taxes can provide the resources that the host state needs to regulate corporate conduct effectively. In addition, if the host state is obliged to compensate an investor for measures taken in the public interest—such as expropriating a particular piece of property to establish a nature preserve—then the state

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[47] *See* Choudhury, *supra* note 15, at 688–96 (providing examples of exception provisions and highlighting the types of public purposes contemplated); Andrew Newcombe, *General Exceptions in International Investment Agreements*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 355, 358 (Marie-Claire Cordonier Segger et al. eds., 2011) (noting that although some treaties contain general exceptions modeled on GATT Article XX, it is more common to include narrower exceptions for measures taken for such purposes as essential security interests or public order); Marie-Claire Cordonier Segger & Andrew Newcombe, *An Integrated Agenda for Sustainable Development in International Investment Law*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 101, 127 (Marie-Claire Cordonier Segger et al. eds., 2011) (noting that some investment treaties contain "general exceptions, modeled on the general exceptions found in trade agreements such as GATT Article XX, for important sustainable development related public policy priorities such as health, the environment, and the conservation of natural resources").

[48] Choudhury, *supra* note 15, at 687 ("At one end of the spectrum, exception provisions dictate that the relationship between the measure and the objective be 'necessary'—likely the most stringent standard for the required relationship. Alternatively, treaties can prescribe a much less stringent standard for the required relationship. Thus, the Bilateral Investment Treaty (BIT) between China and Singapore stipulates that measures must be 'directed to' while the Switzerland-Chad BIT simply requires that measures be 'taken for reasons of.' Provisions with these forms of 'looser' wording generally facilitate the ability of states to rely on exception provisions." (footnotes omitted)).

[49] *Id.* at 684–85 ("The inclusion of these types of provisions indicates states' growing interest in ensuring that investment protection does not come at the expense of their regulatory powers with respect to key public policy goals.").

[50] *See* Abba Kolo, *Tax "Veto" as a Special Jurisdictional and Substantive Issue in Investor–State Arbitration: Need for Reassessment?*, 32 SUFFOLK TRANSNAT'L L. REV. 475, 475–76 (2009) ("[W]hilst accepting supranational control/discipline over state conduct in many other areas, states party to most modern investment treaties and instruments have either carved out taxation all together from the treaty . . . or restricted the applicability of some of the treaty disciplines to certain types of taxes.").

may be able to recoup those amounts over time by taxing the investor's profits on its remaining operations.[51]

Investment treaties sometimes also contain language pursuant to which the treaty parties reserve their right to enact or maintain certain categories of regulations that they view as particularly important or sensitive. For example, some treaties explicitly reserve the parties' right to provide more favorable treatment to historically-disadvantaged peoples or ethnic groups within their territories, without incurring liability to foreign investors under a non-discrimination obligation in the treaty.[52] Similarly, the investment chapter of the U.S.–Chile Free Trade Agreement designates as "reserved" entire categories of social and environmental regulations.[53] In like fashion, certain U.S. bilateral investment treaties (BITs) contain a provision by which the United States reserves the right to provide more favorable treatment to U.S.-owned companies in the banking and insurance sectors.[54]

These latter provisions may help explain in part why no investors filed treaty claims against the United States based on measures taken in response to the recent global financial crisis, which some have characterized as discriminatory toward foreigners.[55] The alleged discrimination included providing "bailouts" or stimulus funds to companies owned by U.S. nationals, but not to foreign-owned ones.[56] Some would-be claimants

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[51] Cordonier Segger & Newcombe, *supra* note 47, at 118 ("Despite the obligation to pay compensation for expropriation, it bears emphasizing that a State retains its sovereign capacity to redistribute resources through taxation and social programs. International authorities are clear that a significant tax burden can be imposed on foreign investment. Taxes of 50% to 60% are common in some States.").

[52] *See, e.g.*, Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42 COLUM. HUM. RTS. L. REV. 797, 869–70, 873 (2011) (describing several treaties in which one or more states have expressly reserved the right to provide more favorable treatment to their indigenous peoples and noting that "recent South African BITs expressly allow the application of government measures 'designed to promote the achievement of equality or to advance the interests of the previously disadvantaged.'" (quoting LUKE ERIC PETERSON, SOUTH AFRICA'S BILATERAL INVESTMENT TREATIES: IMPLICATIONS FOR DEVELOPMENT OF HUMAN RIGHTS 11 (Friedrich-Ebert-Stiftung, Dialogue on Globalization No. 26, 2006), *available at* http://library.fes.de/pdf-files/iez/global/04137-20080708.pdf)).

[53] Cordonier Segger & Newcombe, *supra* note 47, at 128.

[54] Anne van Aaken & Jürgen Kurtz, *Prudence or Discrimination? Emergency Measures, the Global Financial Crisis and International Economic Law*, 12 J. INT'L ECON. L. 859, 891 n.160 (2009).

[55] *See id.* at 863–70, 884–89 (describing governmental responses to the financial crisis in various countries that involve an element of discrimination in favor of domestic-owned companies, and asserting that such measures arguably violate the "national treatment" obligation found in many investment treaties); *see also* Julia Hueckel, Comment, *Rebalancing Legitimacy and Sovereignty in International Investment Agreements*, 61 EMORY L.J. 601, 603 (2012) (noting that "the U.S. response to the financial crisis of 2008 raised concerns that the United States could be exposed to liability under [investment treaties]," but that "these worries have proven baseless").

[56] Van Aaken & Kurtz, *supra* note 54, at 863–70.

may have decided not to pursue arbitration based on the concern that their claims would be defeated by the reservation provisions in the relevant treaties relating to the financial services sector.[57]

It must be acknowledged that some treaties lack significant exception provisions and therefore do not give host states as much regulatory flexibility as they could.[58] Nevertheless, as will be seen, host states do not necessarily *need* exception provisions to avoid liability for deviating from treaty standards.

3. Host States Can Sometimes Deter Treaty Claims or Avoid Collection on Treaty Awards Even When Their Conduct Violates the Treaty

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 conduct is contrary to a treaty standard and not exempted from liability by an exception provision, the investor may be too intimidated by the sovereign power of the host state to file a treaty claim.[59] Investors know that if they initiate treaty arbitration the host state could retaliate by taking even more hostile action, up to and including expelling the investor from the country altogether.[60] The investor therefore must multiply its likelihood of success in a treaty arbitration against its potential recovery (minus, of course, the likely costs of the arbitration), 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.[61] When making this calculation, the investor must take into account the reality that even if the investor obtains an award in its favor it may be

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[57] *Id.* at 891 (describing reservations provisions relating to the financial services sector and asserting that they "are likely to offer safe harbor for state conduct otherwise in breach of an investment treaty obligation").

[58] *E.g.*, Robert M. Ziff, *The Sovereign Debtor's Prison: Analysis of the Argentine Crisis Arbitrations and the Implications for Investment Treaty Law*, 10 RICH. J. GLOBAL L. & BUS. 345, 368–69 (2011) (noting that although Argentina's BIT with the United States contains an exception provision that has allowed Argentina to escape liability in a number of cases, its treaties with several other countries lack comparable provisions).

[59] 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.").

[60] *See* Gus van Harten, *Investment Rules and the Denial of Change*, 60 U. TORONTO L.J. 893, 901 (2010) (book review) (noting that host states who are parties to investment treaties "can retaliate in various ways against foreign investors who bring claims").

[61] Katia Fach Gómez, *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).

difficult or impossible to collect on it.[62] For example, Argentina has incurred liability in excess of $400 million in treaty arbitrations, yet the claimants have collected little or nothing on those awards to date.[63]

This dynamic may explain why so few investors brought arbitration claims against Venezuela and Bolivia when those countries forced foreign oil companies to cede majority control of their operations, reportedly without paying fair market value for the ceded equity stakes.[64] Accepting the terms offered by the government may have seemed preferable to being expelled from the country and pursuing an uncertain recovery in arbitration.

In light of all these factors, there seems little basis to conclude that investment treaties result in any significant and enduring power asymmetry in favor of investors, although they certainly do provide investors with an option of last resort when relations with the host state break down irreparably.

B. Investor–Stakeholder Relations

Whereas foreign investors have an inherent disadvantage in their relations with host states based on the latter's status as a sovereign (which may or may not be offset by other factors in investors' favor), they face no comparable disadvantages in their relations with local stakeholders. As will be developed in more detail in the Parts that follow, investors sometimes have greatly disproportionate financial resources and other sources of bargaining power over local stakeholders, coupled with a multitude of rights and privileges enshrined in contracts with the host state or host state law. Moreover, the investor's position is sometimes augmented by the resources of the host state, with which it may effectively form an alliance due to their commonality of interest.

1. Investors Sometimes Enjoy a Power Advantage Relative to Local Stakeholders by Virtue of Their Own Disproportionate Resources, Legal Entitlements, and an Effective Alliance with the Host State

An inherent power asymmetry in investor–stakeholder relations can result from the vast resources at the disposal of corporate investors, with which local stakeholders can rarely compete. Today many investments are carried out by large MNEs, whose financial resources greatly exceed

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[62] *See* Witten, *supra* note 59, at 77 ("Even if a favorable arbitral decision is rendered, an award can be difficult to collect, and the process can take years.").

[63] *Come and Get Me: Argentina Is Putting International Arbitration to the Test*, ECONOMIST, Feb. 18–24, 2012, at 38.

[64] *See* A.F.M. Maniruzzaman, *The Issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry*, 5 TEX. J. OIL, GAS & ENERGY L. 79, 84–85 (2009–2010) (discussing the steps taken by the governments in Venezuela and Bolivia to obtain majority state ownership of oil ventures, and noting that "[f]aced with the prospect of losing access to one of the world's largest oil reserves, many foreign companies such as French Total, S.A., Norwegian Statoil, the U.K.'s BP, and American Chevron . . . bowed down to the government's demands").

those of local stakeholders.[65] The MNE can potentially use those resources to secure consent or acquiescence to its activities by local stakeholders, whether or not those activities are in their interest. For example, MNEs have sometimes been accused of securing "consent" from indigenous communities to development projects on their lands by providing gifts or bribes to prominent community members, in the knowledge that others will likely defer to those members' views.[66] In addition, the investor necessarily has superior information about the project it aims to implement, and—were it minded to withhold information about likely adverse impacts—stakeholders may have no independent means of ascertaining the truth.[67]

This initial power asymmetry inherent in the disparate relative resources of foreign investors and local stakeholders may be compounded by rights and privileges conferred upon the MNE by the host state or international law.

As noted above in Part I.A.1, it is common for MNEs to enter into investment contracts with host states or state-owned entities, granting the MNE the right to exploit specific natural resources, construct a dam or other infrastructure, or provide services to the public. In many cases the host state will grant the investor such rights without having first consulted with or obtained consent from local stakeholders, notwithstanding significant impacts that the investment is likely to have on them.[68]

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[65] For an example of such a disparity in resources, see AMNESTY INT'L, DON'T MINE US OUT OF EXISTENCE: BAUXITE MINE AND REFINERY DEVASTATE LIVES IN INDIA 5 (2010), *available at* https://www.amnesty.org/en/library/info/ASA20/001/2010/en (noting that between 2002 and 2008, mining companies invested approximately $46.3 billion in mining projects in the Indian state of Orissa, whereas a high percentage of indigenous persons impacted by those projects earn less than $330 per year).

[66] *See, e.g.*, Joji Cariño, *Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice*, 22 ARIZ. J. INT'L & COMP. L. 19, 37–39 (2005) (asserting that multinational mining companies have used bribery of indigenous community elders to gain support for extraction projects in the Philippines, including providing them with lavish outings to night clubs, lucrative employment, and cash); Heather G. White, *Including Local Communities in the Negotiation of Mining Agreements: The Ok Tedi Example*, 8 TRANSNAT'L LAW. 303, 343–44 (1995) (alleging that a multinational mining company deliberately induced local landowners in Papua New Guinea to sign an agreement that was not in their best interest by flying them to Australia and providing them with alcohol and prostitutes).

[67] *See* Cariño, *supra* note 66, at 35–36 (asserting that mining companies in the Philippines have sometimes used meetings purportedly intended as opportunities for frank disclosure and bilateral consultation as "platforms for the exclusive presentation of company information and propaganda," and that indigenous stakeholders generally have no opportunity to "inspect similar mines or independently assess the record or practice of the company making proposals").

[68] *See, e.g.*, Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 148, 185 (Nov. 28, 2007), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf (holding that Suriname violated the rights of the Saramaka indigenous people by granting foreign companies the right to mine or log on the

International law likewise provides foreign investors with certain benefits and protections vis-à-vis host state nationals, including the obligation of the host state to provide "protection and security," which is enshrined in customary international law and confirmed in most investment treaties.[69] This duty requires, *inter alia*, that the host state use due diligence in protecting the investor against injuries from host state nationals and provide redress to the investor for any violations of its rights by its nationals.[70]

Whatever rights and privileges MNEs derive from these various domestic and international sources are then potentially subject to enforcement by host state authorities, whose interests—as previously discussed—are often aligned with those of the MNE. Indeed, the host state's financial incentive to support the investment may be strong enough to ensure that governmental authorities uphold the MNE's purported legal rights notwithstanding any challenges by local stakeholders,[71] and perhaps even resort to military force to quash local opposition to the MNE's activities.[72]

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lands of the Saramaka indigenous people without adequate prior disclosure and consultation); ECOSOC Indigenous Peoples Study, *supra* note 19, ¶ 33 (asserting that agreements between host states and MNEs relating to natural resource extraction are sometimes kept secret from impacted indigenous peoples, and that even if consultation occurs "indigenous peoples often have limited time to negotiate; legal representation is often inadequate; and Government involvement does not always align with indigenous interests"); Cariño, *supra* note 66, at 31 ("In the competitive world of mining, one of the attractions of the Philippine Mining Code is the offer of one-stop access: agreements made between the company and the central government bypass local government, not to mention indigenous communities."); Michelle Mech, *A Comprehensive Guide to the Alberta Oil Sands: Understanding the Environmental and Human Impacts, Export Implications, and Political, Economic and Industry Influences*, GREEN PARTY OF CANADA, 28–31 (2011), http://www.greenparty.ca/sites/greenparty.ca/files/attachments/a_comprehensive_guide_to_the_alberta_oil_sands_-_may_20111.pdf (discussing several instances in which governmental authorities in Alberta have authorized oil companies to develop oil resources on lands over which First Nations claim treaty rights without consulting them, despite reported adverse health, social, and environmental impacts).

[69] Foster, *supra* note 44, at 1097–99.

[70] *Id.*

[71] *See, e.g.*, Cariño, *supra* note 66, at 30–31 (noting that the B'laan indigenous people of the Philippines brought a lawsuit seeking to block a proposed copper mine to be implemented by an Australian mining company and initially obtained court rulings in their favor, but asserting that the initial decisions were reversed following pressure by the Executive Branch, which was eager to obtain the financial benefits of the proposed project); Miranda, *supra* note 33, at 154–56 (asserting that when "[t]he state and corporation share a common economic goal such as the extraction of natural resources or the execution of a large-scale development project . . . [t]he corporation exercises considerable control or influence over government acts and omissions"); Mech, *supra* note 68, at 5–10, 28–36, 63–65 (observing that the development of the Alberta Oil Sands by MNEs is proceeding rapidly despite numerous and ongoing protests and lawsuits by adversely-impacted First Nations, and citing evidence of industry influence on governmental policy).

[72] *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 249–50 (2d Cir. 2009) (discussing alleged attacks on local communities and forced

This is not to suggest that host states *always* side with foreign investors, but when a particular government does so—and effectively couples its power with that of the MNE—the results for local stakeholders can be troubling.

2. Meanwhile, Investor Obligations Toward Local Stakeholders Are Often Unenforceable as a Practical Matter

To be sure, foreign investors do not simply have *rights* vis-à-vis local stakeholders; they also have *obligations*. Nevertheless, local stakeholders may have no better prospects for enforcing those obligations than they do avoiding enforcement of the investor's purported affirmative rights.

a. Obligations Under Domestic Law

Contracts can be one source of obligations owed by foreign investors toward local stakeholders. For example, the investor may have entered into an agreement with local stakeholders if they have a recognized property interest in the land where the project will be carried out,[73] or may have concluded a contract with the host state that imposes certain obligations on the investor for the benefit of local stakeholders.[74] Such a contract may require, for example, that the investor share a portion of the proceeds from the project with impacted local communities, or take particular steps designed to minimize adverse impacts of the project.[75]

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displacement of civilians living near oil fields in an effort to facilitate extractive operations by a consortium of foreign oil companies); Special Rapporteur on the Situation of Human Rights & Fundamental Freedoms of Indigenous People, *Observations on the Situation of the Indigenous Peoples of the Amazon Region and the Events of 5 June and the Following Days in Bagua and Utcubamba Provinces, Peru*, 4–8, Human Rights Council, U.N. Doc. A/HRC/12/34/Add.8 (Aug. 18, 2009) (by S. James Anaya) (discussing an incident in which Peruvian armed forces fired on crowds of indigenous individuals who were protesting the expansion of extractive operations by foreign oil and mining companies); Robert Dufresne, *The Opacity of Oil: Oil Corporations, Internal Violence, and International Law*, 36 N.Y.U. J. INT'L L. & POL. 331, 336–37 (2004) (discussing alleged violence by Nigerian authorities against local stakeholders opposed to a foreign oil company's extractive operations); Halpern, *supra* note 11, at 160 (discussing alleged attacks by the Papua New Guinea government against local stakeholders in an effort to suppress opposition to an MNE's mining operation).

[73] By way of example, Australia recognizes certain aboriginal groups as having a form of "native title" to lands they have traditionally occupied, and mining companies frequently conclude agreements with such groups prior to undertaking mining projects on their lands. Marcia Langton & Odette Mazel, *Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom*, 26 J. ENERGY & NAT. RESOURCES L. 31, 41–42, 44 (2008).

[74] This phenomenon is discussed *supra* Part I.A.1.

[75] *See* COTULA, *supra* note 23, at 51–66 (discussing various environmental and social protections that are sometimes included in contracts between investors and host states). *See generally* Juliette Bennett, *Conflict Prevention and Revenue-Sharing Regimes*, U.N. GLOBAL COMPACT (May 2002), http://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/RevenueSharingRegimes.pdf (discussing various types of revenue-sharing arrangements sometimes provided for in contracts between investors and host states).

In addition, the host state's domestic law may impose obligations on the investor, such as environmental laws regulating pollution emissions, criminal or tort laws prohibiting threats or assaults, or labor laws regulating working conditions.[76]

Unfortunately, however, host states sometimes fail to hold MNEs accountable for violating their obligations toward local stakeholders, for reasons unrelated to whatever protections may be provided to the investor by an investment treaty. Not only may the host state have a financial incentive in the success of the MNE's project (thereby making it reluctant to take any action that would reduce its profitability),[77] but it may lack the institutional capacity or resources to regulate the MNE effectively.[78] Corruption can be another factor contributing to the host state's failure to enforce domestic laws against the MNE—particularly when the MNE has large sums of money that can be channeled into bribes and the relevant officials are subsisting on modest public-servant incomes.[79]

b. Obligations Derived from Voluntary Codes of Conduct

Investors may also owe self-imposed obligations toward local stakeholders. Many MNEs have adopted their own internal codes of conduct, which typically address the interests of local stakeholders to one extent or another.[80] In addition, some have pledged themselves to follow nonbinding standards promulgated by others, such as the OECD Guidelines

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[76] *See* Bunn, *supra* note 35, at 1293–94; Sukanya Pillay, *Absence of Justice: Lessons from the Bhopal Union Carbide Disaster for Latin America*, 14 MICH. ST. J. INT'L L. 479, 502 (2006) (noting that domestic laws typically criminalize torture, murder, and other wrongs simultaneously addressed by international human rights law).

[77] Mech, *supra* note 68, at 32–35 (asserting that the Canadian government has a growing dependence on oil revenue and citing evidence of government regulators' failure to enforce pollution regulations).

[78] *See* Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 538 (2009) ("Developing countries are often inadequate regulators due to insufficient capability or willingness. . . . Even though most have satisfactory laws on the books in such areas as labor rights . . . their lack of monitoring and enforcement capacities undermines the effectiveness of these laws."); Stiglitz, *supra* note 21, at 478 ("[S]ometimes MNCs take advantage of the lack of administrative capacities and technical expertise in developing countries to get away with things that they could not get away with in developed countries.").

[79] *See* CHOW & SCHOENBAUM, *supra* note 23, at 421 (asserting that some MNEs in developing countries "like an environment of corruption and seek out opportunities to make bribes and gifts and to lure government officials into improper situations to secure an advantage"); Stiglitz, *supra* note 21, at 477 (discussing the phenomenon of MNE bribery of foreign officials in developing countries).

[80] *See* Kinley & Tadaki, *supra* note 10, at 953–54 ("One would be hard-pressed to find any major corporation today that did not make some claim to abiding by a code of conduct that comprised, at least in part, adherence to human rights standards. . . . Although the contents of individual corporate codes differ significantly, labor and environmental issues are most frequently addressed.").

for Multinational Enterprises or the U.N. Global Compact.[81] In light of the voluntary nature of these standards, though, there is generally no effective way for local stakeholders to enforce them.[82]

c. Obligations Derived from International Human Rights Law

Foreign investors also owe obligations toward local stakeholders that are derived from international human rights law. As discussed below, however, these are likewise often unenforceable as a practical matter.

i. The Nature and Extent of Corporate Human Rights Obligations

Ironically, human rights law—an area of international law that now serves as a source of obligations *owed by* foreign investors—has a close historical affinity to international norms that have long imposed obligations on host states *for the benefit of* foreign investors.[83] In fact, modern human rights law can be seen as an extension (to host state nationals) of the protections that host states traditionally have been obliged to accord to foreigners, whether under customary international law or by treaty.[84] States have long had a duty under international law to refrain from harassment or arbitrary detention of foreigners, to protect them against injuries by third parties, and to give them equal protection before the law and access to remedies to uphold their rights.[85] Until comparatively recently, however, international law said little or nothing about how a state treats its own nationals. This changed with the advent of modern human rights law in the wake of World War II, when the international community took several steps to acknowledge an obligation on the part of states to accord analogous protections to their own citizens.[86]

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[81] *See* Patrick Macklem, *Corporate Accountability Under International Law: The Misguided Quest for Universal Jurisdiction*, 7 INT'L L. FORUM 281, 283 (2005) (discussing this trend and giving the OECD Guidelines and U.N. Global Compact as examples); *see also* OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 88 (2011 ed.), *available at* http://www.oecd.org/daf/inv/mne/48004323.pdf; U.N. GLOBAL COMPACT, http://www.unglobalcompact.org/index.html.

[82] August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 37, 52 (Philip Alston, ed. 2005) ("The supervisory and/or enforcement structures of many TNC-adopted codes are either non-existent or very weak."); Halpern, *supra* note 11, at 165 ("[T]here exist no methods of legal enforcement for voluntary codes and there is an inherent fallacy in allowing a TNC, or any actor, to be the sole monitor of its own compliance.").

[83] *See* Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 51 (2008) (asserting that "modern legal principles governing trade, investment, and human rights all share the same origin: the protection and treatment of aliens").

[84] *Id.*; *see also* Foster, *supra* note 44, at 1097–98.

[85] *See* Foster, *supra* note 44, at 1097–98.

[86] *See* 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, pt. VII, intro. note, at 144 (1987) ("International law has long held states responsible for 'denials of justice' and certain other injuries to nationals of other states. Increasingly, international human rights agreements have created obligations and responsibilities for states in respect of all individuals subject to their jurisdiction, including their own

An initial acknowledgement in this regard came in 1945, with the adoption of the United Nations Charter.[87] Article 1(3) of the Charter provides that one of the purposes of the United Nations is the achievement of "international cooperation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[88] Article 55 provides further that, "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations," the United Nations "shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[89] Article 56 adds a pledge by all U.N. Members "to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."[90]

Subsequently, in 1948, the U.N. General Assembly adopted a more elaborate statement of human rights known as the Universal Declaration of Human Rights (UDHR).[91] The UDHR articulates numerous civil, political, economic, social and cultural rights, and proclaims them to be universal, in the sense that "[e]veryone is entitled to" these rights, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[92] Among the civil and political rights articulated in the UDHR are the right to life, liberty, and security of person; freedom from slavery or servitude; freedom from torture or cruel, inhuman, or degrading treatment or punishment; equality before the law and freedom from discrimination; the right to an effective remedy for acts violating fundamental legal rights; the right to own property and to not be arbitrarily deprived

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nationals, and a customary international law of human rights has developed and has continued to grow."); Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621, 633 (2002) (noting that "[t]here exist today more than 100 multilateral and bilateral international treaties on the protection of human rights" and that in various ways "all 189 UN member states have committed themselves to inalienable human rights as part of general international law.").

[87] U.N. Charter art. 55.

[88] *Id.* art. 1(3).

[89] *Id.* art. 55(c).

[90] *Id.* art. 56.

[91] Universal Declaration of Human Rights, GA Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; *see also* HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 135 (3d ed. 2008) (explaining that the U.N. General Assembly adopted the UDHR in 1948 "with 48 states voting in favour and eight abstaining—Saudi Arabia, South Africa and the Soviet Union together with four East European states and a Soviet republic whose votes it controlled").

[92] UDHR, *supra* note 91, art. 2.

of the same; and freedom of thought, conscience, and religion.[93] Among the economic, social, and cultural rights mentioned are the rights to just conditions of work; to form and join trade unions; to rest and leisure; to a standard of living adequate for health and well-being; and to free participation in the cultural life of the community.[94]

Although the UDHR was not intended as a binding agreement, it is now widely regarded as expressing principles of customary international law, and it has inspired other human rights instruments that clearly *do* have a binding character.[95] Two such instruments are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which were adopted by the U.N. General Assembly in 1966 and entered into force in 1976.[96] The UDHR has also inspired a number of *regional* human rights instruments that articulate similar rights.[97] In addition,

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[93] *Id.* arts. 3–8, 17–18.

[94] *Id.* arts. 23–25, 27.

[95] *See* STEINER ET AL., *supra* note 91, at 152 ("The countless references to and invocations of the Declaration as the fountainhead or constitution or grant statement of the human rights movement has its effect on how it is viewed—perhaps as shy of 'binding', but somehow relevant to norm formation and influential with respect to state behavior as so-called 'soft law'. Moreover, broadly supported arguments have developed for viewing all or parts of this Declaration as legally binding, either as a matter of customary international law or as an authoritative interpretation of the UN Charter." (citation omitted)); Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 787 (2006) ("Although the Universal Declaration was adopted as a nonbinding UN General Assembly resolution and was intended, as its preamble indicates, to provide 'a common understanding' of the human rights and fundamental freedoms mentioned in the Charter, it has come to be accepted as a normative instrument in its own right. Together with the Charter, the Universal Declaration is now considered to spell out the general human rights obligations of all UN member states." (quoting UDHR, *supra* note 91, pmbl.)); Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 13, 223 (1989) ("Although the Universal Declaration was originally not intended to be law, there has been an increasing disposition to attribute legal character to many if not all of its provisions . . . .").

[96] International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]; *see also* G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6313, at 49 (Dec. 16, 1966) (adopting and opening for signature both covenants and an optional protocol to the ICCPR).

[97] *See* Hao Duy Phan, *A Blueprint for a Southeast Asian Court of Human Rights*, 10 ASIAN-PACIFIC L. & POL'Y J. 384, 393 (2009) (discussing various African human rights instruments and explaining that "[t]he substantive rights provided in these instruments are all inspired by the Universal Declaration of Human Rights"); W. Michael Reisman, *Aftershocks: Reflections on the Implications of September 11*, 6 YALE HUM. RTS. & DEV. L.J. 81, 90 (2003) ("With minor variations, regional human rights treaties in Europe and the Americas have adopted the principles and even the language of the Universal Declaration."); *see also* African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217; Convention for the Protection of

states have adopted several specialized international human rights agreements to address in greater detail the protection of individuals and groups who are particularly vulnerable to discrimination or abuse, including indigenous peoples, women, and children.[98]

If a state is a party to one of the above human rights agreements, then it is legally obliged to respect the rights articulated therein and to ensure that those within its jurisdiction do so as well, including corporations.[99] This means that the state must pass legislation and take other measures obliging corporations to respect human rights,[100] as well as provide remedies to victims of corporate human rights violations.[101]

In fact, some argue that private actors owe broad human rights obligations *directly* under human rights instruments or customary interna-

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Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953); American Declaration on the Rights and Duties of Man, Ninth Int'l Conference of American States, Mar. 30–May 2, 1948, 43 AM. J. INT'L L. 133 (Supp. 1949).

[98] *See* Daniel Barstow Magraw & Lauren Baker, *Globalization, Communities and Human Rights: Community-Based Property Rights and Prior Informed Consent*, 35 DENV. J. INT'L L. & POL'Y 413, 415 (2007) (listing specialized human rights agreements focused on indigenous peoples, racial discrimination, discrimination against women, children, and disabled persons, respectively); Eric Rosenthal & Clarence J. Sundram, *International Human Rights in Mental Health Legislation*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 469, 473–74 (2002) ("[A] number of specialized conventions have been established through the United Nations to provide the detailed and specific provisions needed to protect the rights of people who may be particularly vulnerable to discrimination and abuse—including women, children, workers, and people subject to custody or detention." (footnotes omitted)); Prudence E. Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?*, 10 GEO. INT'L ENVTL. L. REV. 309, 315–16 (1998) (listing specialized human rights treaties).

[99] *See* STEINER ET AL., *supra* note 91, at 1388 ("The human rights obligations assumed by each government require it to use all appropriate means to ensure that actors operating within its territory or otherwise subject to its jurisdiction comply with national legislation designed to give effect to human rights."); *see also* U. N. Human Rights Comm., Int'l Covenant on Civil and Political Rights, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) ("[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but *also against acts committed by private persons or entities* that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities." (emphasis added)).

[100] Reinisch, *supra* note 82, at 53 ("One way to secure human rights against non-state activities is for states, as primary addressees of international human rights law, to legislate and thus to 'translate' international human rights guarantees into the domestic legal order.").

[101] JERNEJ LETNAR CERNIC, HUMAN RIGHTS LAW AND BUSINESS: CORPORATE RESPONSIBILITY FOR FUNDAMENTAL HUMAN RIGHTS 83 (2010) ("Several international human rights law instruments include the obligation to afford an effective remedy for human rights violations and to make adequate reparation . . . ."); *see also* ICCPR, *supra* note 96, art. 2 (providing that the parties undertake to "ensure" that any person whose rights are violated "shall have an effective remedy," and that "the competent authorities shall enforce such remedies when granted").

tional law.[102] This was notably the view taken in 2003 by a group of experts who prepared a draft document for the U.N. Commission on Human Rights purporting to outline the human rights obligations of MNEs under international law, entitled the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* ("Draft Norms").[103] The Draft Norms proved controversial, however, and neither the Commission nor its successor, the Human Rights Council, endorsed them.[104] A more widely accepted view is that private actors' direct obligations under international law are quite limited, being found only in international criminal law.[105]

In any event, it is generally accepted that—at a minimum—private actors owe a broad range of human rights obligations *indirectly*, by virtue of the duty of the state in which they operate to ensure their compliance with the same. This was the conclusion reached by John G. Ruggie, whom the U.N. Secretary-General appointed as his Special Representative for Business and Human Rights after the failure of the Draft Norms, with a view toward identifying and clarifying standards of corporate human rights responsibility and accountability.[106] In his final report, Ruggie expressed the view that states are bound to "protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises."[107] He added that, as a by-product of states' responsibility to protect, business enterprises should "[a]void causing or con-

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[102] *See, e.g.*, Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 810–17 (2002).

[103] *See* Comm'n on Human Rights, Sub-Comm'n on the Promotion & Prot. of Human Rights, *Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2. (Aug. 13, 2003); *see also* Knox, *supra* note 26, at 37 (describing the Sub-Commission and the context in which it prepared the draft Norms, and observing that "[t]he draft Norms set out sweeping human rights duties for corporations that would apply directly, as a matter of international law").

[104] Knox, *supra* note 26, at 1.

[105] *See, e.g.*, *id.* at 2; David Wallach, *The Alien Tort Statute and the Limits of Individual Accountability in International Law*, 46 STAN. J INT'L L. 121, 150 (2010) ("Although there is certainly debate within the academy, the majority of scholars that have directly examined the issue have concluded that international law imposes individual accountability only for violations of international criminal law, not human rights law.").

[106] Press Release, Secretary General, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005); *see also* John H. Knox, *The Human Rights Council Endorses "Guiding Principles" for Corporations*, ASIL INSIGHTS (Aug. 1, 2011), http://www.asil.org/pdfs/insights/insight110801.pdf (describing the context of Ruggie's appointment).

[107] Special Representative of the Secretary-General on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, annex, pt. I.A.1, at 6, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie).

tributing to adverse human rights impacts through their own activities, and address such impacts when they occur," as well as "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[108] The Human Rights Council subsequently endorsed Ruggie's conclusions.[109]

ii. Limits on Enforceability

While investor human rights obligations may be derived from international law, their enforcement is generally left to the domestic arena, and is therefore potentially subject to the same difficulties as enforcement of obligations derived from contracts or domestic law.[110]

Notably, investment treaties are uniformly silent on the human rights obligations of foreign investors, and certainly do not provide local stakeholders with access to any international forum for pursuing redress against investors who may violate human rights.[111] Nor do human rights treaties provide such access. While some human rights treaties create international mechanisms for monitoring *states'* compliance with human rights, and some even authorize individuals or groups to file complaints before a court or commission alleging *state* human rights violations, none give such a body jurisdiction over *private actors.*[112]

Accordingly, the most that a victim of MNE human rights violations could presently accomplish at the international level would be to obtain an award against the state in which the violations occurred, holding it li-

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[108] *Id.* annex, pt. II.A.13., at 14.

[109] Knox, *supra* note 106; *see also* Human Rights Council Res. 17/4, Rep. of the Human Rights Council, 17th Sess., May 31–June 17, 2011, U.N. GAOR, 66th Sess., Supp. No. 53, A/66/53, at 136 (June 16, 2011) (adopting the Guiding Principles).

[110] *See* INT'L COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 77 (2002), *available at* http://www.ichrp.org/files/reports/7/107_report_en.pdf (noting that "enforcing human rights obligations on companies at national level is fraught with difficulties, and in many countries has proved largely ineffective").

[111] Choudhury, *supra* note 13, at 989–90 ("[I]nvestment treaties are curiously silent on the issue of human rights. The treaties neither reference the contracting parties' international human rights obligations nor limit investor rights in accordance with the protection of human rights. Substantive provisions detailing human rights obligations are also absent from investment treaties.").

[112] *See* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 92–94 (2006) (summarizing mechanisms under international human rights agreements for monitoring state compliance or for adjudicating claims against states by victims of alleged human rights violations); Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531, 544 n.72 (Supp. 2002) ("Currently, international bodies with enforcement capabilities, such as the U.N. Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of Human Rights, have enforcement capacity over states but not non-state actors.").

able for failing to ensure compliance by the MNE.[113] That may be unsatisfactory, however, because states sometimes fail to comply with the determinations of human rights bodies, and options for enforcing those determinations are limited or nonexistent.[114] Furthermore, each of the regional human rights treaties necessarily has a limited geographical scope, and individuals and groups in many parts of the world have no access to a human rights court.[115]

Accordingly, there now exists a distinctly asymmetrical situation in which foreign investors enjoy certain *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 local stakeholders that could be enforced in comparable fashion.

II. Options for Expanding Investor Obligations Toward Local Stakeholders and Enhancing Their Enforceability

The Introduction and Part I demonstrate that there often exists a distinct power asymmetry between investors and local stakeholders, which can lead to the former's exploitation or abuse of the latter. They demonstrate further that investment treaties currently fail to address this asymmetry. As M. Sornarajah has observed:

> [International investment] law was developed in the context of flows of investments from developed to developing states. In that

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[113] Jorge Daniel Taillant & Jonathan Bonnitcha, *International Investment Law and Human Rights*, *in* Sustainable Development in World Investment Law 57, 59 (Marie-Claire Cordonier Segger et al. eds., 2011) ("[Human rights] instruments do not normally allow individuals to sue non-State actors directly for a breach of their rights. Hence the individual, whose rights might be violated by a non-State actor, finds that defending his/her rights involves holding the State (not the non-State actor) accountable under an international obligation that does not necessarily bind that non-State actor." (footnote omitted)).

[114] Leonardo A. Crippa, *Cross-Cutting Issues in the Application of the Guatemalan "NEPA": Environmental Impact Assessment and the Rights of Indigenous Peoples*, 24 Am. U. Int'l L. Rev. 103, 119 (2008) (noting that Inter-American human rights bodies have issued several decisions finding Guatemala responsible for human rights violations, but that "[i]n all of these international decisions, there has been a considerable lack of domestic implementation"); Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 Buff. Hum. Rts. L. Rev. 139, 144 (2006) ("The [Inter-American Court of Human Rights] has no formal mechanism for enforcement of judgments; if a state fails to comply with a decision, the IACtHR may only inform and make recommendations to the OAS General Assembly."); Andreea Vesa, *International and Regional Standards for Protecting Victims of Domestic Violence*, 12 Am. U. J. Gender Soc. Pol'y & L. 309, 360 (2004) (asserting that one seeking to invoke a human rights agreement against a state must be aware of "an overarching issue that straddles all human rights systems: enforceability is still a lingering weakness").

[115] *See* The Role of Regional Human Rights Mechanisms, Eur. Parl. Doc. PE 410.206, 11–13 (2010); Foster, *supra* note 10, at 661.

> 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.[116]

By contrast, in certain other contexts involving extreme relational power asymmetries, legal reforms have been adopted at the domestic or international levels 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;[117] in the adoption of laws to protect franchisees from exploitative treatment by franchisors;[118] in the adoption of international conventions to regulate contracts for the carriage of goods at sea and prevent carriers from taking advantage of shippers;[119] and in the adoption of investment treaties to

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[116] Muthucumaraswamy Sornarajah, *Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States*, *in* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 491, 491 (Craig Scott ed., 2001).

[117] *See, e.g.*, John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 196 (2008) (arguing that "[t]he primary goal of antitrust is to protect consumers from paying higher prices to firms that have unfairly gained or maintained market power").

[118] *See, e.g.*, Joseph J. Fittante, Jr. & Meredith Bauer, *Defaults and Terminations: An Unfortunate Reality of a Challenging Economy*, 28 FRANCHISE L.J. 214, 214–18 (2009) (discussing state laws imposing conditions on a franchisor's termination of a franchise relationship, including requiring good cause for termination, providing the franchisee with notice of termination and an opportunity to cure a breach in the franchise agreement prior to termination); Allan P. Hillman, *Public Policy Versus Choice of Law—Is the Best the Enemy of the Good?*, 26 FRANCHISE L.J. 180, 180 (2007) ("[V]arious states have enacted statutes . . . that are 'designed to protect [the] weaker [franchisee] against the unfair exercise of superior bargaining power by [the franchisor].'" (second, third, and fourth alteration in original) (quoting Bush v. Nat'l Sch. Studios, Inc., 407 N.W.2d 883, 887 (Wis. 1987))).

[119] The International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155 [hereinafter Brussels Convention] (entered into force June 2, 1931), addressed bargaining disparity between shippers and carriers. *See* Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 HOUS. J. INT'L L. 609, 655 (1996) ("The [Brussels Convention] and COGSA were originally negotiated on the assumption that there was inequality of bargaining power between carriers and shippers. Shippers were therefore protected by the rule that the bill of lading could increase a carrier's liability, but never decrease liability below the level established by the [Convention]." (footnote omitted)). In the United States, the implementing legislation for the Brussels Convention is the Carriage of Goods by Sea Act ("COGSA"), ch. 229, 49 Stat. 1207 (1936), reprinted in note following 46 U.S.C. § 30701 (previously codified at 46 U.S.C. app. §§ 1300–15). Samuel Robert Mandelbaum, *Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COGSA, Visby and Hamburg Conventions*, 23 TRANSP. L.J. 471, 477 (1996). In 2008, the United Nations General

mitigate the power asymmetry between host states and foreign investors.[120] The question arises whether similar reforms could and should be adopted to reinforce the position of local stakeholders vis-à-vis foreign investors.

The Parts that follow identify several such reforms, all sharing the common goal of expanding and clarifying foreign investors' legal obligations toward local stakeholders and enhancing their enforceability. As will be seen, one possibility that should be given particular attention is employing investment treaties to confirm investors' human rights obligations and provide local stakeholders with access to an international arbitration mechanism for upholding them.

A. Domestic Laws and Institutions Should Be Strengthened, but Cannot Be 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 corporations based therein (or their foreign subsidiaries) comply with human rights norms in their operations abroad, but these have repeatedly failed.[121] One obstacle to the

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Assembly adopted the Rotterdam Rules. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, G.A. Res. 63/122, Annex, U.N. Doc. A/RES/63/122 (Feb. 2, 2009) [hereinafter Rotterdam Rules]. The Rotterdam Rules are intended to consolidate and modernize the Brussels Convention and its amending protocols. *Id.* Annex at pmbl. The Rotterdam Rules have not yet entered into force. *See Status 2008—United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea—The "Rotterdam Rules,"* UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html (listing the countries which have signed and ratified, acceded, approved, or succeeded to the Rotterdam Rules).

[120] *See* Bjorklund, *supra* note 28, at 373–74 (discussing the purpose of investment treaties).

[121] *See* Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOK. J. INT'L L. 899, 902 (2008) (discussing failed bills in the United States and Australia); Kinley & Tadaki, *supra* note 10, at 942 (discussing a failed bill introduced in the British parliament that "sought to impose social, environmental, and human rights obligations on corporations registered in the U.K. and their directors, with respect to their activities at home or overseas"); Peter Muchlinski, *The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World*, 18 IND. J. GLOBAL LEGAL STUD. 665, 687 (2011) (discussing the defeat in 2010 of proposed legislation in Canada that would have imposed certain requirements on mining, oil and gas companies operating in developing countries designed to prevent human rights abuses); Peter Muchlinski, *Corporate Social Responsibility*, *in* THE OXFORD

enactment 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.[122] To be sure, some countries already regulate overseas conduct to the extent necessary to address harms to which they assign a high priority, including anticompetitive behavior,[123] theft of trade secrets,[124] human trafficking,[125] sex tourism involving children,[126] and bribery of foreign officials.[127] It cannot be denied, however, that a more broad-based extraterritorial regulation of corporations' human rights compliance would impose a significant regulatory burden, at a time when governmental budgets are already strained.

Some also contend that legislation requiring corporations to comply with 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."[128] Such concerns have

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HANDBOOK OF INTERNATIONAL INVESTMENT LAW 637, 674 (Peter Muchlinski et al. eds., 2008) [hereinafter Muchlinski, *Corporate Social Responsibility*] ("[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." (footnote omitted)).

[122] *See, e.g.*, Abbott & Snidal, *supra* note 78, at 539 ("Transnational regulation strains the regulatory capacities of even developed country governments, given the difficulty of collecting information about firms' foreign operations.").

[123] Reinisch, *supra* note 82, at 56–57 (discussing extraterritorial antitrust legislation); Sornarajah, *supra* note 116, at 507–08 (same).

[124] Robert D. Williams, *(Spy) Game Change: Cyber Networks, Intelligence Collection, and Covert Action*, 79 GEO. WASH. L. REV. 1162, 1173 (2011) (discussing the U.S. Economic Espionage Act and noting that "[t]his legislation outlaws the possession, collection, duplication, transfer, or sale of trade secrets for purposes of using such secrets to benefit a foreign nation or any agent thereof" and "grants the Department of Justice authority to enforce the law extraterritorially").

[125] Craig Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms*, *in* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 45, 55 (Craig Scott ed., 2001).

[126] *Id.*

[127] Reinisch, *supra* note 82, at 60 (discussing extraterritorial anti-bribery legislation); Sornarajah, *supra* note 116, at 508 (same).

[128] *See* PARLIAMENTARY JOINT STATUTORY COMM. ON CORPS. & SEC., REPORT ON THE CORPORATE CODE OF CONDUCT BILL 2000, at 16 (2001) (Austl.), *available at* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=corporations_ctte/completed_inquiries/1999-02/corp_code/report/report.pdf (quoting assertion by member of Australian parliament that proposed legislation seeking to regulate corporate conduct abroad would imply "that local standards are either inferior, inadequate or somehow inappropriate," and could be regarded overseas as "arrogant, patronising, paternalistic and racist"); Abbott & Snidal, *supra* note 78, at 540–41 ("Whatever their own characteristics, individual states are not globally representative; given the sharp policy differences between North and South, developed countries' legitimacy for unilaterally making international policy choices is

not prevented capital-exporting states from imposing their own practices or standards in *other* contexts, as when they enact extraterritorial antitrust or trade secret legislation, when they insist that capital-importing states comply with an international minimum standard in their treatment of foreign investors,[129] or when they enact trade or investment sanctions designed to encourage the target states to respect human rights.[130] Nevertheless, it stands to reason 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 between the two countries. For that reason, having the home state impose and enforce the relevant human rights standards unilaterally is not optimal.

In addition, home state courts are not particularly well suited to hear claims against MNEs based on human rights violations in other countries. First, all or most of the witnesses and evidence in such cases is usually located 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.[131] Second, such 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

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questionable. Moreover, because developed country regulation would most often influence business activity in developing countries, it might impose inappropriate standards or cultural values." (footnote omitted)); Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145, 154–55 (1999) (asserting that "imposing the idiosyncrasies of U.S. law on cases involving international interests could cause resentment in other countries").

[129] Alireza Falsafi, *The International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard*, 30 SUFFOLK TRANSNAT'L L. REV. 317, 335 (2007) (discussing developed countries' historical and ongoing advocacy for the notion that host states are obliged to abide by an "international minimum standard" in their treatment of foreign investors, even if this requires them to deviate from national norms).

[130] *See* Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 31 (2001) (analyzing the United States' use of economic sanctions to promote foreign countries' compliance with human rights standards).

[131] 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 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.").

time—it can strain relations with the host state.[132] In fact, 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 suit.[133] Third, there may be a risk that home state courts will be biased in favor of the MNE, which may be a large employer in the area or otherwise enjoy goodwill with the adjudicator.[134] None of these factors is sufficiently serious to warrant a

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[132] *See* 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."); John B. Bellinger III, *The U.S. Can't Be the World's Court*, WALL ST. J., May 27, 2009, at A19 (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."); *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 impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs").

[133] *See* Bellinger, *supra* note 132, at A19 (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* Doe v. Exxon Mobil 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); Presbyterian Church of Sudan v. Talisman Energy, Inc., 01 Civ. 9882 (DLC), 2005 U.S. Dist. LEXIS 18399, at *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). 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, e.g.*, Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 170 (2004).

[134] 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, *The Jurisprudence and Politics of Forum-Selection Clauses*, 3

general policy on the part of home state courts against adjudicating claims by local stakeholders against MNEs. These factors do, however, underscore the potential problems associated with litigation of this nature, and the desirability of finding a suitable alternative.

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.[135] Similarly, corruption in developing countries is unlikely to disappear anytime soon, considering that it remains prevalent despite years of concerted international efforts to combat it.[136]

Even if a particular host state had 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. 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 necessarily raises very sensitive issues, potentially placing a serious stigma on the accused investor. 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, thereby creating tensions between the host state and its home country, or otherwise transforming the matter into an international dispute.

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 Ecua-

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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).

[135] *See* ADEFOLAKE O. ADEYEYE, CORPORATE SOCIAL RESPONSIBILITY OF MULTINATIONAL CORPORATIONS IN DEVELOPING COUNTRIES: PERSPECTIVES ON ANTI-CORRUPTION 19 (2012) ("[M]ost developing countries have some degree of international indebtedness, foreign exchange problems and balance of trade deficits, [and] they need foreign investments to survive."); John Alan Cohan, *Environmental Rights of Indigenous Peoples Under the Alien Tort Claims Act, the Public Trust Doctrine and Corporate Ethics, and Environmental Dispute Resolution*, 20 UCLA J. ENVTL. L. & POL'Y 133, 145 (2001/2002) ("The governments of [oil-bearing Latin American developing countries] are often desperate to gain foreign investment to pay down international debt, and they are easily tempted to compromise the long-term health and welfare of their populace with minimal environmental protection.").

[136] *See* Norman D. Bishara, *Governance and Corruption Constraints in the Middle East: Overcoming the Business Ethics Glass Ceilings*, 48 AM. BUS. L.J. 227, 241, 283 (2011) (discussing the phenomenon of corruption in developing countries and efforts that have been taken to combat it, including the Foreign Corrupt Practices Act in the United States (adopted in 1977) and a multitude of anti-corruption international conventions, declarations, and codes of conduct).

dor.[137] The claimants in this case were inhabitants of the Ecuadorian Amazon who have allegedly experienced cancer and other serious illnesses as a result of pollution from oil operations carried out by the U.S. oil company Texaco.[138] After a lengthy proceeding, the Ecuadorian court issued an $18.2 billion judgment against Chevron, Texaco's successor-in-interest.[139] 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.[140]

Whatever the merits of the parties' respective allegations in that case, a good argument can be made that it would have been better for a dispute of this nature to be adjudicated at the outset in a neutral international forum—or at least that the plaintiffs should have had the option of pursuing their claims in such a forum—so as to avoid any potential semblance of bias or strains on the relations between the countries involved.

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

In light of the foregoing, domestic laws and institutions are probably insufficient on their own to address the power asymmetry between investors and local stakeholders. In particular, in cases involving an alleged violation by a foreign investor of the human rights of local stakeholders, it would arguably be better for the stakeholders to have access to an international forum. Because of its neutral nature, both parties would be more likely to secure a fair and unbiased adjudication of the claims. Furthermore, the risk of foreign relations tension would be reduced, because the home state would be less likely to view the proceedings as an unfair attack on one of its nationals, and the host state would have no reason to fault the home state, because the latter would not be allowing allegations to be aired in its courts that cast the host state in an unfavorable light.

If states were inclined to provide local stakeholders with access to an international forum for pursuing claims against foreign investors who violate their human rights, they would have various options. One would be to establish a new human rights court whose jurisdiction would have

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[137] For a discussion of the Lago Agrio litigation, see Jessica Lynd, *Seeking Justice for Victims of Oil Exploitation in Lago Agrio, Ecuador*, HUM. RTS. BRIEF, Spring 2011, at 44, *available at* http://digitalcommons.wcl.american.edu/hrbrief/vol18/iss3/9/.

[138] *See id.*

[139] Lise Johnson, *Case Note: How* Chevron v. Ecuador *is Pushing the Boundaries of Arbitral Authority*, INV. TREATY NEWS (Apr. 13, 2012), http://www.iisd.org/itn/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority/.

[140] *Id.*

broader geographic coverage, and would extend to private actors.[141] Yet achieving such a court would require the consensus and cooperation of a large number of countries, and is unlikely to be accomplished anytime soon.[142] In the meantime, a more readily achievable form of neutral international dispute resolution that should be considered is arbitration—the same method currently used to hear investor–state disputes under investment treaties.[143] Arbitration would be available to local stakeholders only if investors agreed to arbitrate with them,[144] but it might be possible to induce investors to do so by conditioning governmental benefits upon such agreement, in either the home state or the host state.[145] The Parts below demonstrate the viability and attractiveness of arbitration as a means of dispute resolution in this context.

1. International Arbitration Would Be a Viable Option for Handling Investor–Stakeholder Disputes

A major potential advantage of arbitration in this context is that investors and stakeholders would simply need to agree to refer disputes to arbitration under a particular set of arbitration rules;[146] there would be no need to create any new, permanent adjudicatory body.[147]

While it is common for national laws to preclude arbitrators from adjudicating certain categories of disputes, any such restrictions are gener-

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[141] *See supra* Part I.B.2.c.ii. (discussing the limitations of current human rights courts); *see also* Manfred Nowak, *The Need for a World Court of Human Rights*, 7 HUM. RTS. L. REV. 251 (2007) (advocating the creation of a "World Court of Human Rights" capable of hearing claims against MNEs).

[142] Nowak, *supra* note 141, at 255 (arguing that such a court is potentially feasible but acknowledging that it would require numerous states to negotiate a statute defining the court's structure and competence, and then to sign and ratify the same).

[143] Foster, *supra* note 10, at 676 (advocating the use of international arbitration to hear claims by indigenous peoples against MNEs operating on their lands, and explaining parallels to the dispute resolution mechanism of investment treaties); *see also* Guzman, *supra* note 134, at 1286 (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).

[144] *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 18 (2d ed. 2012) ("The parties' arbitration agreement gives the arbitrators the power to decide the dispute and defines the scope of that power.").

[145] Foster, *supra* note 10, at 676–77.

[146] *See* MOSES, *supra* note 144, at 18; Foster, *supra* note 10, at 678. ICSID arbitration is one form of arbitration often employed for investment treaty disputes that would *not* be available (because the administering body's jurisdiction is limited to disputes between investors and certain *states*). Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25(1), Mar. 18, 1965, 17 U.S.T. 1270, 1286, 575 U.N.T.S. 159 ("The jurisdiction of [ICSID] shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State . . . ."). Nevertheless, several other popular forms of arbitration could be used for disputes between investors and local stakeholders. Foster, *supra* note 10, at 678.

[147] *See* Foster, *supra* note 10, at 681.

ally narrow[148] and could be avoided by limiting the nature of the claims to be adjudicated.[149] The mere fact that disputes between investors and stakeholders could have public policy implications would not prevent them from being arbitrable.[150] Indeed, arbitrators in international cases routinely interpret and apply international law and sensitive matters of domestic law.[151]

Some have expressed discomfort with this aspect of investment treaty arbitration, arguing that it is inappropriate for private arbitrators to decide issues of significant importance to the public.[152] These concerns are understandable, and it probably would be optimal if disputes having public implications could always be heard by a reliable, accountable public institution. Yet this is not always possible as a practical matter. Part I.B.2, above, demonstrated that domestic courts are sometimes not suitable to hear disputes between foreign investors and local stakeholders, and no international court presently has jurisdiction over private actors. Under the circumstances, recourse to a private international dispute resolution forum may be the best available option. It must be kept in mind, moreover, that arbitral decisions regarding the rights and obligations of investors and stakeholders in individual cases would be binding only on the parties to the dispute, and would not establish binding precedent.[153]

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[148] MOSES, *supra* note 144, at 32–33 (acknowledging that many countries have restrictions on arbitrability, but concluding that "most disputes today are considered to be arbitrable, except for those that fall within clearly defined areas such as criminal law, family law, and patent law").

[149] Part II.B.2, *infra*, explains how any undertaking by investors to arbitrate with local stakeholders could be limited in this regard, namely to exclude any grant of authority to the tribunals to impose criminal liability.

[150] Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 341, 346–48 (2007) (noting that at one time in the United States "[j]udicially created doctrines of non-arbitrability had prevented arbitration of statutory claims that are imbued with public policy, such as securities fraud, antitrust, and employment discrimination" but that now such claims—and many others raising public policy issues—are generally arbitrable in both domestic and international cases).

[151] *Id.* (listing a number of areas of U.S. law raising important public policy issues that are commonly subject to arbitration); Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 866–67 (2012) (asserting that arbitral tribunals empaneled under investment treaties and international commercial arbitration rules "provide many of the best examples of the successful application of international law over the past forty years").

[152] *See, e.g.*, Choudhury, *supra* note 13, at 984 ("Modeled after private arbitration, the opaque decision-making process [in investment arbitration] is propelled by unaccountable decision-makers whose decisions cannot be corrected by any meaningful checks or balances. . . . In effect, investment arbitration has become involved in the adjudication of society's core values without the input from the affected society.").

[153] Christopher R. Drahozal, *Business Courts and the Future of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 491, 500 (2009) ("Arbitration awards [in contractual arbitration] ordinarily are not published and do not have any binding precedential effect."); Sheffer, *supra* note 13, at 490 ("Regardless of which arbitral rules are used,

Another issue that must be considered when evaluating any form of dispute resolution as an option for handling investor–stakeholder disputes is the extent to which investors would enjoy an unfair advantage in the proceedings by virtue of their disproportionate financial resources. Investors, particularly large MNEs, could afford to hire top-quality lawyers and devote enormous sums of money to their defense, whereas local stakeholders may have little or no funds of their own. This dynamic could certainly put local stakeholders at a disadvantage in an arbitration, but it could do so just as much in *any* kind of adversarial proceeding, including lawsuits in national courts or proceedings before a human rights court. In addition, local stakeholders may be able to offset investors' resource advantage to some extent by relying on *pro bono* assistance from NGOs or law firms,[154] entering into contingency fee arrangements with law firms,[155] or accepting third-party funding (in exchange for an agreed share of any potential award).[156] For all these reasons, arbitration would not necessarily be an ideal means of resolving disputes between investors and local stakeholders, but it could be a viable—and even preferable—alternative to reliance on litigation in national courts.

2. Investment Treaties Could Be Drafted to Confirm Investors' Human Rights Obligations and Secure Their Consent to Arbitrate with Stakeholders

If governments were inclined to incentivize MNEs to arbitrate disputes with local stakeholders, one way of doing so that would be particularly logical and straightforward would be via investment treaties.

a. Employing Investment Treaties to Address Investor–Stakeholder Relations Would Require Only a Few Simple Drafting Innovations

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) at the same

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the decisions of the arbitrators are only binding on the parties to the arbitration and do not create binding precedent.").

[154] *See* ADEYEYE, *supra* note 135, at 25–29 (discussing several cases in which NGOs and law firms based in the United States assisted host state nationals in bringing lawsuits in the United States against multinational oil companies alleging violations of their human rights).

[155] For examples of such arrangements, see Patrick Radden Keefe, *Reversal of Fortune: A Crusading Lawyer Takes On Chevron*, NEW YORKER, Jan. 9, 2012, at 38, 40 (noting that the plaintiffs' lawyers in the Lago Agrio litigation in Ecuador worked largely on a contingency fee basis); Jennifer Langston, *Quest for American Justice on a South Pacific Island*, SEATTLE POST-INTELLIGENCER (July 18, 2004), http://www.seattlepi.com/default/article/Quest-for-American-justice-on-a-South-Pacific-1149662.php (noting that two lawyers agreed to represent a class of indigenous plaintiffs from Papua New Guinea and advance the funds for their U.S. lawsuit against multinational mining company Rio Tinto alleging human rights abuses).

[156] *See generally* Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT'L L. 159 (2011) (discussing the increasing prevalence of third-party litigation funding arrangements, including in cases against MNEs alleging human rights abuses).

time. The Norwegian government recognized this possibility in a Draft Model BIT released in 2007, which contained a provision that would have required the parties to any treaty based thereon 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."[157] Norway ultimately abandoned this draft and suspended its efforts to conclude new investment treaties, following criticisms by NGOs and other groups 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.[158] 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,[159] and even establish a dispute resolution mechanism pursuant to which victims of investor human rights violations could pursue redress directly against the corporate wrongdoer.[160]

None of these commentators has explained in any detail how investment treaties could be drafted to accomplish these ends, but it would not be difficult. 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. Toward the latter end, the parties could agree further that they would require any would-be investors seeking an investment authorization or to enter into an investment contract to make a unilateral commitment to arbitrate with local stakeholders in a neutral

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[157] Norwegian Model BIT art. 32 (2007), *available at* http://italaw.com/sites/default/files/archive/ita1031.pdf.

[158] Damon Vis-Dunbar, *Norway Shelves Its Draft Model Bilateral Investment Treaty*, INV. TREATY NEWS (June 8, 2009), http://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/.

[159] *See* Footer, *supra* note 32, at 61 ("[S]oft law approaches to ICSR [international corporate social responsibility] . . . could be made to bite if incorporated into bilateral treaty instruments."); 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, 437–38 (2004) (advocating the incorporation of investor human rights obligations into investment treaties and the establishment of an arbitration mechanism for enforcing the same); *cf.* 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).

[160] Weiler, *supra* note 159, at 438.

international forum regarding any alleged violations of the specified human rights, should the stakeholders elect to pursue a claim there.

The treaty could provide further that any investor protections set forth in the treaty (or at least any that go beyond customary international law) would be conditional upon the investor's agreement to arbitrate in this manner. 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's investor protections—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 specified stakeholders.[161]

Furthermore, the treaty could provide that any arbitral tribunal empaneled under an arbitration agreement in this regard would be authorized to decide whether the investor had respected the specified human rights and, if not, award compensation or injunctive relief. It may be prudent to specify that the tribunal would not be authorized to impose any purported criminal liability on the investor, so as to avoid running afoul of restrictions that exist in some countries regarding the arbitrability of criminal matters.[162] Hence even if a tribunal empaneled under this mechanism were to find that the respondent investor engaged in conduct that could be characterized as criminal under domestic or international law, the tribunal would not be authorized to impose criminal liability or sanctions on the investor. As a formal matter the tribunal would simply determine that the investor breached its agreement to respect the specified human rights, and assess the (monetary, injunctive or declaratory) relief due to the claimants as a result of that breach.[163]

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[161] The treaty should require investors to express their agreement in this regard in *writing*, in order to ensure compliance with writing requirements for arbitration agreements that exist under some laws and international agreements. *See, e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 2(1), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]; MOSES, *supra* note 144, at 19 ("[T]o establish that parties have actually consented, many national laws, as well as the New York Convention, require that an arbitration agreement be in writing.").

[162] MOSES, *supra* note 144, at 32–33 (discussing restrictions on the arbitrability of criminal matters).

[163] The mere fact that the arbitrators would take criminal laws into consideration when making their decision should not preclude the arbitrability of the dispute. *See* Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 239–42 (1987) (affirming the arbitrability of a civil claim under the federal Racketeering Influenced and Corrupt Organizations statute notwithstanding the fact that the statute contemplates criminal liability for the same conduct); Dragor Hiber & Vladimir Pavic, *Arbitration and Crime*, 25 J. INT'L ARB. 461, 469 (2008) (explaining that international arbitral tribunals may take criminal laws into account and issue civil law sanctions based on violations of criminal laws even though they are prohibited from imposing criminal penalties); Alexis Mourre, *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, 22 ARB. INT'L 95, 100 (2006) ("From the arbitrator's point of view, a criminal law rule is no more and no less than a mandatory rule. . . . The arbitrator has obviously no power to apply such rules in the same way as a

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,[164] and a determination by a domestic organ regarding the state's own international obligation is not binding on an international tribunal.[165] This would be a key 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.

b. Providing Local Stakeholders with Protections Under Investment Treaties Would Be a Natural Parallel to Those 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 host state's human rights obligations. As noted above in Part I.A.1, host states are obliged to ensure that third parties (including corporations) respect the human rights of their nationals. This requires not only that states pass laws obliging private actors to comply with human rights norms, but also that they provide victims of violations with *effective remedies*. 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 legal systems. Moreover, the home state's act of entering into a treaty that articulates human rights obligations on the part of corporations based therein would be ful-

criminal judge would, but he can take them into consideration provided they have a reasonable title to be applied to the dispute.").

[164] *See* Wawryk, *supra* note 159, at 56 (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").

[165] *See* William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 357, 367 (2000) ("[T]he customary international law rule of *res judicata* extends only to the effect of the decision of one *international* tribunal on a subsequent international tribunal. The decisions of domestic courts, by contrast, have not been given *res judicata* effect by international tribunals."); André Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 AM. J. INT'L L. 760, 773 (2007) ("[A] domestic court cannot make a determination that has any binding effect in the international legal order, because the court belongs to a different legal order.").

ly consistent with that state's undisputed authority under international law to regulate its companies' activities abroad.[166]

In fact, employing an investment treaty could be a relatively painless way for the parties to implement human rights obligations of foreign investors, because those investors would be receiving protections in the same instrument, which may act as a salve for the additional risk exposure to some extent.

Taking this step would also avoid the unseemliness of granting special protections to investors without imposing any corresponding obligations for the benefit of local stakeholders. Correcting this imbalance may help buttress the legitimacy of investment treaties, which is frequently impugned on this basis.[167]

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. The dispute resolution mechanism could be structured so that the same tribunal could hear any disputes that might arise between the investor and the host state relating to the treaty's investor protections, as well as any disputes between local stakeholders and the investor relating to the specified human rights. This would minimize the possibility of multiple separate proceedings at the domestic and international levels in connection with the same underlying set of facts, as has occurred in the Lago Agrio matter.

c. 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, in order to promote pre-

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[166] *See* Olivier de Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law* 7–9 (Ctr. Human Rights & Global Justice Working Paper No. 1, 2004), *available at* http://chrgj.org/publications/docs/wp/s04deschutter.pdf (discussing home states' right under international law to regulate the activity of their corporations abroad).

[167] *See, e.g.*, High Comm'r for Human Rights, *Human Rights, Trade and Investment: Rep. of the High Comm'r of Human Rights,* 4, U.N. Doc. E/CN.4/Sub.2/2003/9 (July 2, 2003) (asserting that states should consider amending investment treaties to "[p]romot[e] investors' obligations alongside investors' rights" because "[t]here is a need to balance the strengthening of investors' rights in investment liberalization agreements with the clarification and enforcement of investors' obligations towards individuals and communities" (emphasis omitted)); CERNIC, *supra* note 101, at 245 (noting that "[c]orporate investors enjoy a plethora of rights under international law on foreign investment, but are not formally required to comply with fundamental human rights," and arguing that an appropriate solution would be "amending foreign investment agreements already in place and introducing a new fundamental human rights provision into foreign investment agreements"); Pillay, *supra* note 76, at 508 (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").

dictability and minimize the burdens on investors, and thereby reduce the potential economic and political costs of this mechanism.

In particular, the 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.[168] The human rights that are generally regarded as "fundamental" can be divided into three categories: those relating to the safety of persons, to labor, and to non-discrimination.[169] 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.[170] The second includes freedom from forced labor and the worst forms of child labor, at a minimum,[171] although some contend that freedom of association and the right to bargain collectively are also fundamental rights.[172] 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.[173]

It would also be advisable for the treaty to recognize an obligation by covered investors to respect certain internationally-recognized rights of indigenous peoples. Indigenous peoples are the most vulnerable of all local stakeholders to adverse impacts of development projects, and in many cases have suffered acutely from corporate human rights abuses.[174]

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[168] *See* Muchlinski, *Corporate Social Responsibility*, *supra* note 121, 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."); *see also* CERNIC, *supra* note 101, at 67–71 (observing that many prominent corporations recognize their obligation to comply with fundamental human rights in their internal corporate codes of conduct).

[169] CERNIC, *supra* note 101, at 16–17.

[170] *Id.* at 61; *see also* Kinley & Tadaki, *supra* note 10, 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" (footnote omitted)).

[171] CERNIC, *supra* note 101, at 67.

[172] Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1, 13–14 (1999).

[173] *See* CERNIC, *supra* note 101, at 70; Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going 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."); 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.").

[174] *See* Foster, *supra* note 10, at 630 (listing harms suffered by indigenous peoples); *Performance Standard 7: Indigenous Peoples*, INT'L FIN. CORP., 1 (2012),

Indeed, the international community recently recognized the unique vulnerability of indigenous peoples and called for special precautions to be taken in connection with business activities carried out on their lands and territories, when the U.N. General Assembly overwhelmingly endorsed an instrument known as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[175]

UNDRIP articulated a number of rights of indigenous peoples, some of which can be violated by the private sector at least as readily as by the state.[176] 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.[177] Given the near-universal endorsement of UNDRIP by the international community, investors could not legitimately claim surprise or prejudice if an investment treaty conferring benefits on them also memorialized an obligation on their part to respect the indigenous rights enshrined in that instrument, or at least those applicable to the private sector.

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. It should be made clear in particular which groups would qualify as "indigenous" for purposes of the treaty, and the treaty should provide guidance regarding what is required in the way of protecting cultural sites, maintaining traditional means of subsistence, and conserving the environment. 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);[178] International Finance Cor-

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http://www1.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability+framework/2012+edition/performancestandard7 ("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.").

[175] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP]. For a summary of UNDRIP and details regarding its adoption, see *United Nations Adopts Declaration on Rights of Indigenous Peoples*, UN NEWS CENTRE (Sept. 13, 2007), http://www.un.org/apps/news/story.asp?NewsID=23794.

[176] Foster, *supra* note 10, at 673.

[177] *Id.* at 664–65.

[178] SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, AKWÉ: KON GUIDELINES (2004), *available at* http://www.cbd.int/doc/publications/akwe-brochure-en.pdf.

poration Performance Standard 7 on Indigenous Peoples;[179] SA 8000 (a set of standards dealing predominantly with labor issues developed by the NGO Social Accountability International);[180] and ISO 14000 and 26000 (standards promulgated by the International Organization for Standardization concerning environmental management systems and social responsibility, respectively).[181]

Whatever human rights an investment treaty might reference, it should not purport to provide an exhaustive list of the investor's human rights obligations, but merely a subset enjoying special protection under the treaty. In addition, the treaty should make clear that investors are obliged 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 abuses by the host state, as where the violations are designed to suppress resistance by local stakeholders to the MNE's operations.[182]

Were a treaty to be drafted in the manner proposed, it would not cover *all* potential human rights violations, but would cover the most egregious violations 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 above in the Introduction and in Part I.B.1. Had the investors' home states concluded investment treaties of the nature proposed with the host state, impacted local stakeholders likely could have brought arbitration claims against the investors for at least the most serious alleged human rights violations, and might have obtained monetary awards and injunctive relief. Indeed, the existence of such a remedy may have deterred any such human rights abuses in the first place.

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[179] *Performance Standard 7: Indigenous Peoples*, *supra* note 174.

[180] SOC. ACCOUNTABILITY INT'L, SOCIAL ACCOUNTABILITY 8000 (2008), *available at* http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf.

[181] INT'L ORG. STANDARDIZATION, ISO 26000: GUIDANCE ON SOCIAL RESPONSIBILITY (2010); INT'L ORG. STANDARDIZATION, ISO 14000: ENVIRONMENTAL MANAGEMENT SYSTEMS (2004). For a detailed discussion of these ISO standards, see Janelle M. Diller, *Private Standardization in Public International Lawmaking*, 33 MICH. J. INT'L L. 481 (2012).

[182] *See* Kinley & Tadaki, *supra* note 10, 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.").

III. Theoretical Perspectives on the Viability of the Proposed Reforms

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.[183] 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.[184] The Parts 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 they are nevertheless potentially viable over the long term.

A. *Realism*

Realism maintains that states act solely according to their own perceived interests, particularly those of a security or economic nature.[185] This theory predicts further that a state will rarely take action in relation to human rights abuses in other countries, because of the risk that this could create foreign relations tension with the other state.[186]

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[183] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. Chi. L. Rev. 469, 476–77 (2005).

[184] *See id.* at 476–83.

[185] *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." (footnote omitted)); Richard E. Rupp, *Cooperation, International Organizations, and Multilateral Interventions in the Post-Cold War Era: Lessons Learned from the Gulf War, The Balkans, Somalia, and Cambodia*, 3 UCLA J. Int'l L. & Foreign Aff. 183, 221 (1998) (noting that under a realist framework, "[t]he self-interests of individual states remain the key guidepost to a particular government's foreign policy").

[186] Forsythe, *supra* note 6, 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

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 either state 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.[187] 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.[188]

In addition, states arguably have a security interest in promoting MNE compliance with key human rights. In several cases development projects carried out by foreign investors over the opposition of local stakeholders have triggered or fueled civil wars,[189] and civil wars can spill across borders and undermine regional stability.[190]

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it could undermine U.S. security interests to give significant attention to Soviet domestic affairs).

[187] *See* Foster, *supra* note 10, at 685 (explaining why implementation of the rights enshrined in UNDRIP would not significantly undermine investment flows).

[188] FORSYTHE, *supra* note 6, at 157 (asserting that "[g]overnments are often reluctant to undertake economic sanctions against another state—whether for human rights or other reasons—as they may hurt themselves," but that they "do sometimes suspend full trade, and also development aid or other types of foreign assistance").

[189] *See, e.g.*, Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007), *rev'd in part on other grounds on reh'g en banc*, 671 F.3d 736 (9th Cir. 2011). In this opinion—issued by a U.S. court in a case brought by Papua New Guinea (PNG) nationals against the MNE oil company Rio Tinto—the Court explained as follows how Rio Tinto's mining operations on the island of Bougainville contributed to a civil war:

> [W]aste products from the mine polluted Bougainville's waterways and atmosphere and undermined the physical and mental health of the island's residents. In addition, the islanders who worked for Rio Tinto, all of whom were black, were paid lower wages than the white workers recruited off island and lived in 'slave-like' conditions.
>
> In November 1988, Bougainvilleans engaged in acts of sabotage that forced the mine to close. Rio Tinto sought the assistance of the PNG government to quell the uprising and reopen the mine. The PNG army mounted an attack on February 14, 1990, killing many civilians. In response, Bougainvilleans called for secession from PNG, and 10 years of civil war ensued.
>
> During the 10-year struggle, PNG allegedly committed atrocious human rights abuses and war crimes at the behest of Rio Tinto, including a blockade, aerial bombardment of civilian targets, burning of villages, rape and pillage.

Id. at 1198; *see also* Dufresne, *supra* note 72, at 335–45 (discussing conflicts in Nigeria, Sudan, Angola and elsewhere, and explaining that in each case host state violence against local populations aimed at repressing resistance to MNE oil extraction operations escalated into civil war, or the host state used the revenues from such operations to fund military campaigns against opposition groups).

[190] *See generally* JASON K. STEARNS, DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA (2011) (explaining that a

That there exists a linkage between human rights and security is not a novel notion; it was, in fact, part of the original inspiration for the modern human rights movement.[191] 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."[192] In other words, the drafters of the U.N. Charter recognized that respect for human rights was necessary to promote international stability, peace, and friendly relations.

Of course, the mere fact that human rights abuses can present 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 reforms proposed herein would be designed to address, in terms of the threats they pose to foreign relations.

First, these abuses would be committed directly or indirectly *by a foreign actor*. When a bad act is committed by such an actor—even a private one—the ill will that the act generates locally may be directed not only against the actor, 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 violent attacks on Danish and U.S. embassies that have occurred in the Middle East following the publication of works that were critical of the Prophet Muhammad by private citizens of those countries.[193] This risk can be so significant, in-

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civil war between Hutus and Tutsis in Rwanda led to a Hutu exodus into the Democratic Republic of Congo (DRC); that Hutu groups then launched attacks from the DRC into Rwanda; that this prompted a Rwandan invasion of the DRC; and that this, in turn, led to a regional war involving numerous countries); *see also* Jennifer L. De Maio, *Is War Contagious? The Transnationalization of Conflict in Darfur*, 11 AFR. STUD. Q. 25, 25 (2010) ("[The civil war in Sudan has] escalated to include neighboring countries. Indeed, a system of wars has emerged around Sudan. The violence is the result of distinct domestic politics and involves different actors and issues that have become entangled and have spilled across the geographical and political borders that divided them. The genocide in Darfur is frequently cited as the cause of tensions in neighboring Chad and the Central African Republic (CAR)."); Ken Menkhaus, *The Crisis in Somalia: Tragedy in Five Acts*, 106 AFR. AFF. 357, 357–58 (2007) (asserting that instability and civil war within Somalia prompted Ethiopian military intervention, and that Somali groups thereafter staged terrorist attacks in Ethiopia in retaliation).

[191] *See, e.g.*, ARTHUR N. HOLCOMBE, HUMAN RIGHTS IN THE MODERN WORLD 1 (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).

[192] U.N. Charter art. 55; *see also* HOLCOMBE, *supra* note 191, at 1–2 (asserting that concerns about the security implications of human rights abuses prompted the adoption of Article 55).

[193] *See* John R. Maney, Jr., *Burning*, CRIM. L. BRIEF, Fall 2011, at 48, 51 (noting that in 2005 a Danish newspaper published editorial cartoons that portrayed the Prophet Muhammad in an unfavorable light, which led to violent protests throughout the Middle East and "caused Danish embassies in Syria, Lebanon, and

deed, 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. For example, this risk was a key motivation for Congress's 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.[194] In particular, Congress feared that such conduct would reflect poorly on the United States and adversely affect the country's position internationally.[195] 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 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.[196]

Second, the human rights abuses targeted by the reforms proposed herein pose heightened risks because of their *severity*, in that they involve violations of human rights that are fundamental or directed at uniquely vulnerable peoples. It stands to reason that the more serious the violations, the more likely they would damage the reputation of the home state, trigger a civil war in the host state, or invite intervention by third countries.

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 *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.

Iran to be set on fire and European buildings stormed"); Adelina Campos, *Al-Qaeda Declare War over Film*, SUNDAY MIRROR (London), Oct. 14, 2012, at 29 ("The leader of al-Qaeda has urged Muslims to wage holy war against the United States and Israel over a film that insulted Islam's Prophet Mohammed. . . . The amateur film *Innocence of Muslims* was made by an Egyptian-born American citizen."); Ahmed al Haj, *Worker for U.S. Mission in Yemen Fatally Shot*, WASH. POST, Oct. 12, 2012, at A12 ("Protestors also stormed several U.S. embassies in Arab nations—including the one in [Yemen]—in outrage over the film, which denigrates the prophet Muhammad.").

[194] Foreign Corrupt Practices Act of 1977, §§ 103–04, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78dd-1 to 78dd-2 (2006)).

[195] *See* Clayco Petrol. Corp. v. Occidental Petrol. Corp., 712 F.2d 404, 408 (9th Cir. 1983) ("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. The FCPA thus represents a legislative judgment that our foreign relations will be bettered by a strict anti-bribery statute." (footnote and citation omitted)).

[196] *See* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 185–87 (2d Cir. 2009) (explaining that a U.S. corporation's commission of a serious human rights abuse like nonconsensual medical experimentation in a foreign country can damage the reputation of the United States and undermine international peace and stability).

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 involve 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[197]—a perception that seemingly does not exist with sufficient clarity at present.

B. Liberal Institutionalism

Another interest-based theory, known as liberal institutionalism, holds that states act based not on their own interests *per se*, but on the interests of domestic constituencies that wield sufficient political clout within their political systems.[198] 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.[199]

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.[200] 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 in those countries, at least in the short term.

After all, one can hardly expect MNEs to promote binding measures aimed at regulating their own conduct. To the contrary, MNEs have lob-

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[197] *See* 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)).

[198] *See* Hathaway, *supra* note 183 at 483–84.

[199] Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1954 (2002); Samuel P. Baumgartner, *Does Access to Justice Improve Countries' Compliance with Human Rights Norms?—An Empirical Study*, 44 CORNELL INT'L L.J. 441, 450 (2011).

[200] *See, e.g.*, HUMAN RIGHTS WATCH, "YOU'LL BE FIRED IF YOU REFUSE": LABOR ABUSES IN ZAMBIA'S CHINESE STATE-OWNED COPPER MINES 1 (2011), *available at* http://www.hrw.org/sites/default/files/reports/zambia1111ForWebUpload.pdf (listing sources purporting to identify a pattern of egregious labor abuses and other human rights violations by Chinese state-owned companies in Africa, and asserting that companies controlled by the Chinese government have engaged in numerous such violations in connection with copper mining in Zambia specifically).

bied effectively *against* previous attempts to adopt such measures.[201] Once again, however, it must be kept in mind that the proposed reforms are 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 lobby openly against their adoption, or at least more so than it was for them to lobby against previous initiatives.[202]

Moreover, MNEs are not the only domestic constituency in capital-exporting states whose interests must be considered. Many organizations and individuals in capital-exporting countries are increasingly calling on corporations to behave in responsible ways, including environmental or social advocates, investment firms practicing "socially responsible investment" (SRI), and consumers.[203] Furthermore, social activists and NGOs

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[201] *See* Jena Martin Amerson, *What's in a Name? Transnational Corporations as Bystanders Under International Law*, 85 ST. JOHN'S L. REV. 1, 9 n.35 (2011) (explaining that the Draft Norms were intended to "articulate a system of accountability and enforcement mechanisms for TNCs regarding abuses of human rights" but that "TNCs from across the world balked at their implementation" and, "[a]s a result of intense lobbying by TNCs, most states took a very muted approach to the resolution of these Norms, and they never became effective"); Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, 22 (1995) (asserting that MNEs have a "deep-seated resistance to regulation" at the international level and have displayed "stern resistance even to certain 'soft law' measures such as the draft U.N. Code of Conduct for Transnational Corporations," a proposed set of standards governing MNE conduct); Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 IND. J. GLOBAL LEG. STUD. 617, 618 (2011) (observing that there has been "a plethora of political initiatives aimed at regulating TNCs through binding legal norms," but that "the strong resistance of TNCs against national and supranational regulations as well as difficulties achieving effective regulation via protracted international agreements led to the failure of many of these initiatives").

[202] Foster, *supra* note 10, at 682 ("The TNC Code and the [Draft] Norms would have applied to *all* MNEs and would have imposed restrictions in such diverse areas as human rights, corruption, relations between MNEs and host states, consumer protection, workers' rights, and protection of the environment.").

[203] *See* Halpern, *supra* note 11, at 135 ("Currently, the most acute pressure felt by TNCs to modify their behavior results from concerted NGO and consumer action campaign activity."); Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 663 (2007) ("This demand for corporate social responsibility ('CSR') is growing and is coming from a number of sources, including corporate critics, social investors, activists, and consumers who increasingly claim that CSR affects their purchasing decisions." (footnote omitted)); Rachel Kyte, *Balancing Rights with Responsibilities: Looking for the Global Drivers of Materiality in Corporate Social Responsibility & the Voluntary Initiatives That Develop and Support Them*, 23 AM. U. INT'L L. REV. 559, 567 (2008) (asserting that the SRI community has $3.2 billion in assets in the United States alone, that "now SRI is making inroads into the mainstream," and that "[m]any leading sell-side analysts are beginning to publish sector reports looking at sustainability performance"); *see also* Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1435 (2008) (defining SRI as "bringing both financial and ethical considerations to bear on investment decisions" and noting that it "works principally through screening out

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[204] to modern conventions against torture and the use of landmines.[205]

Yet even if the proponents of CSR do not presently wield sufficient political influence to counter MNE resistance to reforms such as those proposed herein, 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, thereby opening the door to successful campaigning by religious and social groups dedicated to its abolition.[206] 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 with reduced environmental and

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certain companies engaged in specified industries—so-called 'sin stocks,' such as tobacco, alcohol, and gambling—or that are deemed to have bad records in specified issue areas, such as labor relations and the environment").

[204] UDHR, *supra* note 91, art. 7; *see* MICHELINE R. ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 214–15 (2004) (asserting that NGOs such as the American Jewish Committee, the World Trade Union Congress, and the Council of Christians had sufficient lobbying strength to prompt "the major powers to amend the [draft UN] charter and its preamble, and to make human rights a central part of UN activities"); WIKTOR OSIATYNSKI, HUMAN RIGHTS AND THEIR LIMITS 17–18 (2009) (asserting that an assortment of NGOs was instrumental in inducing the major powers to adopt human rights language in the U.N. Charter in 1945, as well as in securing adoption of the UDHR in 1948).

[205] Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT'L 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).

[206] *See* JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW 13 (2012) ("Changes in the world economy in the nineteenth century certainly created the conditions that made the abolition of slavery more feasible."); Henkin, *supra* note 95, at 211 (discussing the abolition of slavery in Europe, the United States and Latin America and asserting that it was facilitated by "increasing industrialization which did not depend on slaves"); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2611–12 (1997) (book review) (discussing the effectiveness of campaigning by anti-slavery activists and organizations during the 19th century); Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG. 479, 495 (1990) (discussing the impact of the Anti-Slavery Society in the international movement to abolish slavery).

social impacts, and as those practices gain broader acceptance within the business community.[207]

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 considerably from country to country. It is important to note, however, that even if a particular country has little internal political pressure to adopt measures promoting MNE compliance with human rights standards, it might be induced to do so pursuant to an investment treaty, if the capital-exporting state with which it would be contracting insisted on the inclusion of language aimed at regulating covered investors. After all, the capital-importing state would not *itself* be subject to claims under the proposed language, and it may be reluctant to pass up the economic benefits that such a treaty is intended to generate.[208] It bears noting that the benefits of these treaties may include not only those associated with foreign investment, but also trade preferences, if—as is sometimes the case—the treaty addresses both trade and investment.[209] Indeed, it is not only the capital-importing state that could benefit from increased bilateral trade and investment, but also important domestic constituencies within its territory, and the latter may exert pressure on it to sign the treaty in order to secure those benefits[210]—notwithstanding any restrictions that the treaty may place on foreign investors.

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[207] Kerr, *supra* note 203, at 641–42, 644.

[208] *See* Mohamed R. Hassanien, *Greening the Middle East: The Regulatory Model of Environmental Protection in the United States–Oman Free Trade Agreement, A Legal Analysis of Chapter 17*, 23 GEO. INT'L ENVTL. L. REV. 465, 498 (2011) (observing that the United States has induced some developing countries to sign bilateral trade and investment agreements that impose certain environmental standards on them, which they sign "in hopes of getting trade benefits and market access"); C. O'Neal Taylor, *Regionalism: The Second-Best Option?*, 28 ST. LOUIS U. PUB. L. REV. 155, 172–74 (2008) (asserting that numerous developing countries have agreed in recent years to conclude bilateral trade and investment agreements with the United States because these agreements "constitute a necessary attempt to build on and increase traditional trade and investment flows" and emphasizing that the United States is "the world's largest market" as well as a major potential source of foreign direct investment).

[209] Taylor, *supra* note 208, at 160–61, 171–74 (noting that free trade agreements often address both trade and investment, and describing benefits that can be derived therefrom by developing countries who sign them).

[210] Warren H. Maruyama, *Preferential Trade Arrangements and the Erosion of the WTO's MFN Principle*, 46 STAN. J INT'L L. 177, 189 (2010) ("The underlying commercial aim of almost every FTA is to lock in preferential access to the market of a key trading partner and secure a margin of preference that gives domestic exporters a commercial advantage. Whatever reasons governments may have for FTAs, such commercial considerations are the main attraction for manufacturing, services, and agricultural exporters, who play a key role in building political support for trade agreements in democratic political systems."); C. O'Neal Taylor, *Of Free Trade Agreements and Models*, 19 IND. INT'L & COMP. L. REV. 569, 601 (2009) (asserting that one reason developed countries agree to FTAs is that they have influential domestic interest groups that stand to benefit from them, namely exporters).

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 longtime law professor and former Legal Adviser of the U.S. Department of State.[211] Koh argues that norms can be developed and internalized by states over time through a complicated process involving three separate phases.[212] 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.[213] Second, this interaction prompts the other actor to interpret or enunciate the norm.[214] Third, the new interpretation is internalized by that actor.[215] As will be seen, there is strong evidence that this process is underway with regard to MNE human rights norms, even if consensus is still lacking regarding the precise extent of MNE 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 a new interpretation of norms. He refers to these actors as "transnational norm entrepreneurs."[216] These can include not only states but also intergovernmental organizations, NGOs, business entities, and individual activists.[217] 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.

It was noted previously, in Part III.B, above, that social and environmental advocates and SRI firms have increasingly been monitoring corporate behavior and placing pressure on corporations to behave in responsible ways. In addition, numerous scholars have written books and articles in recent years arguing that corporations owe human rights obli-

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[211] *See* Andrew Strauss, *Cutting the Gordian Knot: How and Why the United Nations Should Vest the International Court of Justice with Referral Jurisdiction*, 44 CORNELL INT'L L.J. 603, 642 (2011) (describing Koh as "one of the most influential transnational legal process theorists").

[212] Koh, *supra* note 206, at 2603, 2646 (describing the three-part process of interaction, interpretation, and internalization).

[213] *Id.* at 2646.

[214] *Id.*

[215] *Id.*

[216] Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 646–47 (1998).

[217] Koh, *supra* note 206, at 2624.

gations to one extent or another and advocating particular avenues for holding them accountable for violations.[218]

Meanwhile, parallel developments are occurring at the intergovernmental level. One example is the U.N. Secretary General's appointment of Professor Ruggie as his Special Representative for Business and Human Rights;[219] the drafting of Ruggie's report in a process that involved extensive consultation with and input from MNEs, states, and human rights advocates;[220] and the eventual endorsement of Ruggie's findings and recommendations by the U.N. Human Rights Council.[221] Similarly, other U.N. bodies drafted and adopted UNDRIP (in a process that likewise involved extensive consultation with states, business entities, and indigenous peoples) and have been involved in monitoring its implementation.[222] 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.[223]

By taking these steps, the above actors are provoking interactions with MNEs and states, as well as amongst themselves, and 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.[224] It is clear that norm internalization regarding corporate human rights obligations is still incomplete, but the

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[218] Examples are too numerous to list, but for a handful of representative sources, see generally CERNIC, *supra* note 101; Foster, *supra* note 10; Kinley & Tadaki, *supra* note 10; Nowak, *supra* note 141; Paust, *supra* note 102; Wawryk, *supra* note 159; Weiler, *supra* note 159.

[219] *See* U.N. Press Release, *supra* note 106 (discussing Ruggie's appointment and noting that it "was requested by the United Nations Commission for Human Rights in its resolution 2005/69").

[220] *See* John R. Crook, *United States Endorses Ruggie Principles on Responsibility of Businesses and Transnational Corporations to Respect Human Rights*, 105 AM. J. INT'L L. 792, 792 (2011) (observing that the principles articulated in his final report "result from Professor Ruggie's extensive efforts and consultations with a range of interested parties, including governments, business interests, and the human rights community, aimed at developing a broadly acceptable package").

[221] *See* Knox, *supra* note 106 (discussing the Human Rights Council's endorsement of Ruggie's final report); Anna Triponel, *Business & Human Rights Law: Diverging Trends in the United States and France*, 23 AM. U. INT'L L. REV. 855, 857, 882, 898 (2008) (noting that the Human Rights Council replaced the Human Rights Commission in 2006, and that Ruggie reported to the former).

[222] *See generally* Erica-Irene Daes, *The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal*, *in* REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 11, 39 (Stephen Allen & Alexandra Xanthaki eds., 2011) (describing the drafting and consultation process and efforts to monitor UNDRIP's implementation).

[223] Foster, *supra* note 10, at 673–74.

[224] Koh, *supra* note 216, at 641–44.

more norm entrepreneurs promote enhanced expectations for corporate human rights compliance, the more these norms should gain legitimacy, and the more likely it is 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 compliance and accountability. These include:

- improved modes of communication and more frequent media exposure of the plight of indigenous and other local stakeholders impacted by development projects,[225] which tend to make constituencies in home and host states alike more cognizant of the need to regulate corporate behavior effectively;[226]
- increasing sophistication of NGOs, indigenous peoples, and other non-state actors interested in corporate human rights accountability,[227] which tend to make them more effective at devis-

[225] *See* Cathryn Meurn, *The Role of Information Communications Technologies in Violence Prevention*, *in* COMMUNICATIONS AND TECHNOLOGY FOR VIOLENCE PREVENTION: WORKSHOP SUMMARY 44, 47 (2012), *available at* http://www.nap.edu/catalog.php?record_id=13352 (noting that "[t]echnologies provide not only increased communication but also increased accountability and transparency," and citing examples of NGO use of video technology to document and expose human rights abuses); Stuart Kirsch, *Indigenous Movements and the Risks of Counterglobalization: Tracking the Campaign Against Papua New Guinea's Ok Tedi Mine*, 34 AM. ETHNOLOGIST 303, 304 (2007) ("Whereas operating in remote locations once afforded corporations freedom from scrutiny, activists harnessing new communications technologies ranging from the Internet and cell phones to satellite imaging are now able to track and monitor corporate activity in approximately real time wherever it occurs."); Sarah Sewell, *The Internet and Human Rights* 2 (Harvard Kennedy Sch. Carr Ctr. for Human Rights Policy Working Paper T-00-01A 2006), *available at* http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/HRand%20Internet.pdf ("Human rights activists were among the first to make use of the Internet to coordinate actions, make contacts and communicate privately; to post and obtain information; to expose and publicize human rights violations; and to solicit action to address specific issues.").

[226] *See* Kirsch, *supra* note 225, at 310–15 (observing that a campaign to expose the environmental destruction caused by a mine operated by an Australian-based MNE in Papua New Guinea influenced public opinion in Australia and placed pressure on the company to offer compensation to impacted indigenous communities); Mark Baller & Leor Joseph Pantilat, *Defenders of Appalachia: The Campaign to Eliminate Mountaintop Removal Coal Mining and the Role of Public Justice*, 37 ENVTL. L. 629, 662 (2007) (noting that when members of the American public see photos of mountain-top mines featuring "images of blasted mountains, buried streams, and decimated forests," some experience "disbelief that such an environmental calamity could be occurring in the United States and are immediately convinced that something must be done").

[227] *See* Jacqueline Peel, *Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court*

ing new interpretations of the relevant norms and promoting the same; and

- increasing solidarity and cooperation among local stakeholders across national borders, which will likely enhance their lobbying power and the effectiveness of their advocacy efforts.[228]

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

IV. 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: investors, states, and stakeholders. Investment treaties already do so to a considerable extent with regard to investor–state relations, and could likewise address the power asymmetry that often exists between investors and stakeholders, if only the political will existed to employ them toward that end. In fact, investment treaties have many features that make them better suited to address this power

of Justice and World Trade Organization, 12 Colo. J. Int'l Envtl. L. & Pol'y 47, 72 (2001) ("NGOs are increasingly sophisticated international actors with access to a wide range of resources and expertise. NGOs may possess better information than governments on environmental issues." (footnote omitted)); Cynthia A. Williams, *Civil Society Initiatives and "Soft Law" in the Oil and Gas Industry*, 36 N.Y.U. J. Int'l L. & Pol. 457, 466–67 (2004) (referring to "the increasing sophistication of civil society organizations, usually referred to as NGOs, such as environmental organizations, human rights organizations, and organizations . . . that directly address corporate social responsibility," and asserting that they "have also become extremely well versed at harnessing the power of publicity to focus public and media attention"); Amalia Córdova & Gabriela Zamorano, *Mapping Mexican Media: Indigenous and Community Video and Radio*, Native Networks (2004), http://www.nativenetworks.si.edu/eng/rose/mexico.htm (noting that indigenous groups in Mexico are increasingly becoming proficient in modern forms of communication, and that video productions they have created "have played crucial roles in community efforts to assert land rights, expose human rights violations, or defend women's rights").

[228] *See* David P. Ball, *U.S. and Canada-Wide Protests Target Pacific Trails' Proposed Fracking Pipeline*, Indian Country Today (Nov. 27, 2012), http://indiancountrytodaymedianetwork.com/article/us-and-canada-wide-protests-target-pacific-trails-proposed-fracking-pipeline-145895 (discussing protests by British Columbian First Nations against a proposed natural gas pipeline, and noting that other indigenous groups and activists have organized "solidarity demonstrations" in other parts of Canada, as well as in the United States and Trinidad and Tobago); Rick Kearns, *International Solidarity Protests Against Peruvian Forest Laws*, Indian Country Today (June 10, 2009), http://indiancountrytodaymedianetwork.com/article/international-solidarity-protests-against-peruvian-forest-laws-33745 (discussing demonstrations and public statements by indigenous groups in several countries in North and South America in support of Peruvian indigenous groups who were resisting expansion of oil and mining development by foreign companies).

asymmetry than alternative solutions involving domestic laws and institutions.

Accordingly, those seeking to reform international investment law to better protect and promote human rights should not focus exclusively on treaty amendments designed to limit investor rights or expand host state regulatory authority. They should also consider adjustments that would empower local stakeholders to protect their *own* fundamental human rights, without the need to rely on their governments to do so on their behalf.