SPINNING STRAW INTO GOLD: INCORPORATING THE BUSINESS AND HUMAN RIGHTS AGENDA INTO INTERNATIONAL INVESTMENT AGREEMENTS

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ABSTRACT

The adoption of the U.N. Guiding Principles on Business and Human Rights represents a watershed moment in the business and human rights movement. Nevertheless, despite its achievements, the work to align business and human rights issues remains.

One approach to furthering the work in this area has been to focus on the establishment of a new international binding treaty on business and human rights issues. Treaty proponents view a binding treaty as a mechanism by which existing gaps in human rights protection can be closed. Yet critics are skeptical. They point to the lack of treaty support by states which are headquarters for multinational corporations, and worry about the diminishment of aspired treaty rights during the treaty negotiation process, as evidence of their concerns.

This article questions whether there is a need for a "new" international business and human rights treaty. Instead it argues that the linkage of business and human rights issues can be made by way of international investment agreements (IIAs). Given the bilateral or regional nature of IIAs, multilateral state support is lessened, facilitating adoption of new principles or rights. Moreover, IIAs offer a robust enforcement mechanism, through interna-

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tional arbitration, which can provide effective remedies. In addition, because multinational corporations are often reliant on IIAs to gain access to new markets, IIAs can be used as a tool to impose human rights obligations onto corporations from the outset before abuses occur. Most importantly, reconfiguring IIAs to adopt the BHR agenda ensures that norm development in business areas does not undermine human rights issues when these two areas intersect, and that corporate rights stand in parallel to corporate obligations.

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1. INTRODUCTION

For a number of years, members of a private security force belonging to Canadian corporation Barrick Gold have abused and assaulted individuals in the area around the Porgera mine, one of the world's top producing gold mines, situated in Papua New Guinea and owned by Barrick Gold.[1] After the abuses, the victims turned to Barrick Gold to seek redress, but were rebuffed when the company initially absolved itself of any responsibility. They were also not able to turn to Papua New Guinea law enforcement or the courts, who were too corrupt or unable to offer the victims a proper remedy.[2] As a result, the Porgera mine victims found themselves without a remedy.

The lack of remedy for the Porgera mine victims is not an isolated event. Instead, the incident is representative of a growing governance gap in the area of business and human rights. As globalization continues to expand corporate activities into the far reaches of the world, more and more multinational corporations are operating in states that—despite being responsible for protecting its peoples' human rights—cannot or choose not to protect its people. This failure to protect can leave human rights victims of corporate acts left without any forum for redress.

For several states, international organizations, NGOs, and concerned individuals, the solution to this problem can be found in the establishment of a binding international instrument on business and human rights.[3] This business and human rights (BHR) treaty,

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[1] *Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Porgera Gold Mine*, HUMAN RIGHTS WATCH at 5 (Feb. 1, 2011), https://www.hrw.org/report/2011/02/01/golds-costly-dividend/human-rights-impacts-papua-new-guineas-porgera-gold-mine [https://perma.cc/W5L5-5AJM].

[2] *Papua New Guinea: Country Summary*, HUMAN RIGHTS WATCH (Jan. 2015), https://www.hrw.org/world-report/2015/country-chapters/papua-new-guinea [https://perma.cc/83GB-UKNA].

[3] *See generally Letter to Special Representative John Ruggie: 151 Human Rights Organizations, Socially Responsible Investment Groups, and Concerned Individuals Share their Views*, HUMAN RIGHTS WATCH, Oct. 9, 2007, http://www.hrw.org/news/2007/10/09/letter-special-representative-john-ruggie [https://perma.cc/CBQ7-B6QX] (asking Professor Ruggie, the UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Businesses Enterprises, to "help to spread awareness of the compelling need for global standards on business and human rights to be outlined in a UN declaration or similar instrument adopted by member states."); *Advancing the Global Business and Human Rights Agenda: Sign-on Statement to the Human Rights Council from 55 Civil*

they argue, will close gaps in the international legal order that undermine human rights, and will increase clarity on applicable standards for corporations.[4]

Nevertheless, support for the proposed BHR treaty remains shaky. While there remains interest in further aligning business and human rights issues, many believe that a binding BHR treaty is not the best way forward.[5] For some, this is a result of the lack of

Society Organizations, HUMAN RIGHTS WATCH, May 13, 2011, http://www.hrw.org/news/2011/05/13/advancing-global-business-and-human-rights-agenda [https://perma.cc/UC65-UESL] (offering, in his [Professor Ruggie's] final report before the Council, "numerous suggestions to States and companies in the form of 'Guiding Principles for the Implementation of the UN "Protect, Respect, Remedy" Framework.'"); *Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises*, PEOPLE'S FORUM ON HUMAN RIGHTS AND BUSINESS (Nov. 2013), http://peoplesforum.escr-net.org/joint-statement-binding-international-instrument [https://perma.cc/DJ6B-VSSQ] (noting that a People's forum (located in Bangkok) called "upon the States to elaborate an international treaty" to, among other things, affirm "the applicability of human rights obligations to the operations of transnational corporations and other business enterprises"); Latin American and Caribbean Regional Forum on Business and Human Rights, *Declaration of Alternative Forum on Business and Human Rights in Colombia*, GLOBAL POLICY FORUM, Sep. 12, 2013, https://www.globalpolicy.org/global-taxes/52481-declaration-of-alternative-forum-on-business-and-human-rights-in-colombia.html [https://perma.cc/MV9P-EFQK]; *Global Movement for a Binding Treaty*, TREATY ALLIANCE (2015), http://www.treatymovement.com/ [https://perma.cc/YLT9-JU54] (calling "for an enhanced global regulatory framework for the accountability of TNCs-OBEs and improved access to justice by victims of corporate abuse.").

[4] *See* Human Rights Council, *Rep. of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect To Human Rights*, U.N.Doc. A/HRC/RES/26/9, at ¶4 (July 10, 2015) [hereinafter Working Group Report] (discussing the influence of "action[s] or omissions of TNCs and other business enterprises" on human rights violations); INTERNATIONAL COMMISSION OF JURISTS, NEEDS AND OPTIONS FOR A NEW INTERNATIONAL INSTRUMENT IN THE FIELD OF BUSINESS AND HUMAN RIGHTS, 15 (June 2014) [hereinafter INTERNATIONAL COMMISSION OF JURISTS] (determining that there is a lack of "accountability of companies" and "access to effective remedies for victims of abuse," which affects human rights); Jolyon Ford, *Business and Human Rights: Emerging Challenges to Consensus and Coherence*, CHATHAM HOUSE: THE ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, Feb. 2015, at 2-3 (illustrating the current developments within business and human rights discourse).

[5] For example, the U.S. boycotted deliberations on a binding treaty, the EU set parameters on its participation and then walked out on the second day, and Russia stated it did not support a binding treaty. *See generally* John G. Ruggie, *Get Real Or We'll Get Nothing: Reflections On The First Session Of The Intergovernmental Working Group On A Business And Human Rights Treaty*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, 2015, http://business-humanrights.org/en/get-real-or-well-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty [https://perma.cc/ECD8-RTYV]; Chip Pitts, *"Ready, Steady, Debate!": Treaty Talks Begin at UN*, BUSINESS AND

state support for the treaty,[6] while others focus on the diminishment of human rights obligations that would ensue from the large number of issues a binding treaty would need to contain in order to be meaningful.[7] There is also concern that drafting a BHR treaty is a retreat to past practices, which failed in seeking to link BHR issues previously.[8]

Against this background, this article questions the need for a "new" business and human rights treaty. Instead it argues that the legalization of business and human rights issues, that treaty proponents desire, should be made in international investment agreements (IIAs). As these agreements are bilateral or regional in nature, they supplant the need for multilateral support, that a new business and human rights treaty seems to lack. In addition, they offer a robust enforcement mechanism, which can provide effective remedies, and can also be used as a tool to impose human rights obligations onto MNCs from the outset before abuses occur. Most importantly, however, inserting business and human rights issues into IIAs ensures both that norm development in business areas does not undermine human rights issues when these two areas intersect, and that the corporate rights found in IIAs stand in parallel to corporate obligations.

The article makes this argument in four parts. In Part 2 it ex-

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HUMAN RIGHTS RESOURCE CENTRE, 2015, http://business-humanrights.org/en/ready-steady-debate-treaty-talks-begin-at-un [https://perma.cc/38FB-E5RW].

[6] Notable countries that have voted against a treaty are the U.S, the U.K., France, and Germany. *See* Ford, *supra* note 4, at 4 (reporting that a large number of countries were either against or abstaining to Resolution I on business and human rights); John G. Ruggie, *A UN Business and Human Rights Treaty?*, HARVARD KENNEDY SCHOOL, Jan. 28, 2014, at 3, https://www.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf [https://perma.cc/GDG7-NJLB] (reasoning that setting principles that reflect current law are easier for states to implement than principles that propose new rules).

[7] *See* Ford, *supra* note 4, at 3 (discussing a lack of interest from states to engage in "highly ambitious" negotiations); Chris Esdaile, *Does the World Need a Treaty on Business and Human Rights?*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, May 14, 2014, at 1, http://business-humanrights.org/sites/default/files/media/documents/chris_esdaile_ndu_talk_may2014_full_text.pdf [https://perma.cc/CD7V-R5DR] (stating that state support in the non-binding UN Guiding Principles does not mean that states would be as supportive to binding rules); Ruggie, *supra* note 6, at 3 (opining that one legal document would not suffice to capture all of the complex issues surrounding business and human rights).

[8] *Consensus on Business and Human Rights is Broken with the Adoption of the Ecuador Initiative*, INTERNATIONAL ORGANISATION OF EMPLOYERS, June 26, 2014, http://www.ioe-emp.org/index.php?id=1238 [https://perma.cc/HCH8-G5HZ] [hereinafter INTERNATIONAL ORGANISATION OF EMPLOYERS].

plores the importance of linking business and human rights issues, and describes previous attempts in the international arena to establish this linkage. In particular, it examines the importance of preventing international law from continuing to evolve in a fragmented approach, and why this approach is particularly harmful to the business and human rights movement.

Part 3 moves to explore the most recent attempts to link business and human rights issue through the proposed BHR treaty. It examines the advantages such a treaty could bestow, and evaluates these against the problems—both substantive and procedural—that such a treaty faces.

Part 4 turns to examine the IIA landscape as an alternative. It examines the main features of IIAs and discusses how the key components of the business and human rights agenda can be inserted into them. This Part also draws analogies from the experiences that international investment law has encountered with human rights issues to the broader BHR movement.

Finally, in Part 5, the article moves to discuss whether IIAs are well suited to adopting the business and human rights agenda. In particular, it argues that refocusing IIAs on human rights issues may be able to progress the business and human rights agenda further than a treaty solely devoted to business and human rights.

2. LINKING BUSINESS AND HUMAN RIGHTS

Increasingly, the idea that business and human rights are two self-contained issues that operate in isolation from one another is becoming less accepted. In the wake of the Rana Plaza disaster,[9] human trafficking allegations in the shrimp industry,[10] or recent

[9] Julfikar Ali Manik & Jim Yardley, *Building Collapse in Bangladesh Leaves Scores Dead*, N.Y. TIMES, Apr. 24, 2013, http://www.nytimes.com/2013/04/25/world/asia/bangladesh-building-collapse.html?_r=0 [https://perma.cc/9PVB-T8QM] (discussing the Rana Plaza disaster where a "building housing several factories making clothing for European and American consumers collapsed into a deadly heap… only five months after a horrific fire at a similar facility prompted leading multinational brands to pledge to work to improve safety in the country's booming but poorly regulated garment industry.").

[10] Margie Mason et al., *Shrimp sold by global supermarkets is peeled by slave labourers in Thailand,* THE GUARDIAN, Dec. 14, 2015, http://www.theguardian.com/global-development/2015/dec/14/shrimp-sold-by-global-supermarkets-is-peeled-by-slave-labourers-in-thailand [https://perma.cc/DC26-XNXF] (discuss-

revelations that ExxonMobil executives were knowledgeable about human rights abuses in Indonesia,[11] it is becoming harder to resist the idea that business and human rights issues should operate concurrently.

Yet international efforts to link business and human rights issues have repeatedly encountered a difficult path. Despite the recognition of the importance of regulating the impacts of multinational corporations (MNCs) as early as in the period following the Second World War,[12] efforts to link business and human rights issues have been fraught with failure.

In part, efforts to coordinate business and human rights issues at the international level have been hampered by the development of business and human rights laws as self-contained or specialized regimes.[13] In many ways, the law governing international business issues and international human rights law have developed in relative isolation from each other. As a result, the specialized rules of each of these regimes may not only be non-cognizant of the objectives of the other regime, but they may operate in ways that actually undermine the other regime's objectives or other general principles of public international law.

The next section examines how the fragmented development of international law relating to business issues and to human rights issues may impact on the coherence of the law on business and human rights. It then moves to contrast the development of international investment law, which governs many aspects of business

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ing an investigation which "follow[ed] the trail of shrimp prepared by captive workers in squalid factories into the supply chain for food outlets in the US, Asia and Europe"); NY Times Editorial Board, *Slavery and the Shrimp on Your Plate: Thai Seafood Is Contaminated by Human Trafficking*, N.Y. TIMES, June 21, 2014, http://www.nytimes.com/2014/06/22/opinion/sunday/thai-seafood-is-contaminated-by-human-trafficking.html?_r=0 [https://perma.cc/HBN2-DSU7].

[11] Douglas Gillision, *Exxon Human Rights Case Survives – on Claim that Execs Knew All Along,* 100REPORTERS (July 16, 2015), https://100r.org/2015/07/exxon-human-rights-case-survives-claim-that-execs-knew-all-along/ [https://perma.cc/5GP9-Y47A] (reporting on allegations that Exxon executives "knowingly hired and supported local military forces who tortured, killed and sexually assaulted the [Aceh province] villagers" in order to protect high-volume operations on the local gas field).

[12] Helen Keller, *Codes of Conduct and their Implementation: The Question of Legitimacy* in RÜDIGER WOLFRUM & VOLKER RÖBEN, EDS., LEGITIMACY IN INTERNATIONAL LAW, 219, 223 (2008).

[13] *See generally* International Law Commission, *Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law*, U.N. Doc. A/CN.4/L.682 (April 13, 2006).

activities at the international level, with the development of international human rights law, in an effort to elucidate on the specific problems for business and human rights that these specialized regimes may pose.

2.1. The Fragmented Development of International Law

Given that the world, unlike states, lacks a legislative body, it is not surprising that international law has tended to develop in response to regional or functional needs.[14] As the Study Group of the International Law Commission (ILC) has recognized, globalization has led to "…increasing fragmentation – that is, to the emergence of specialized and relatively autonomous spheres of social action and structure… [which in turn] has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice."[15] The problem with such fragmentation, the ILC Study Group notes, is that these specialist areas develop their own principles and institutions without any recognition of either adjoining fields or the general principles and practices of international law. This can lead to conflicts between rules, contradictory institutional practices, and a lack of coherence in the law.[16]

For issues relating to business and human rights, the problems identified by the ILC Study Group relating to a fragmented development of international law are readily apparent. Indeed, these problems are pronounced as both areas constitute a specialized regime—a system of rules that is designed around a functional specialization and that is designed to supplant general principles with special rules and techniques of interpretation and administration.[17] International business law,[18] and human rights law are, in fact, the

[14] *Id*. at ¶5 (discussing that fragmentation stems in part from the separate systems of municipal law).

[15] *Id*. at ¶¶7-8 (describing what has been called "functional differentiation" as "the increasing specialization of parts of society and the related autonomization of those parts.").

[16] *Id*. at ¶8 (discussing the problem of having specialized law that is ignorant to "adjoining fields").

[17] *Id*. at ¶¶128-9 (describing the varying notions of a "self-contained regime" to demonstrate the difficulty of fusing two international fields).

[18] Although international business law comprises a number of different areas, the article focuses only on international investment and trade law.

quintessential definitions of a specialized regime.[19]

However, the ILC Study Group cautions that specialized regimes cannot operate in a legal vacuum or operate in "clinical isolation" from general principles of public international law.[20] Instead, rights and obligations arising from the specialized regime should be situated within the overall context of general international law, including relevant adjoining specialized regimes.[21]

The ILC Study Group's conclusions confirm that despite business and human rights issues evolving in separate regimes from one another, rules from one regime should be situated within the context of the other. Thus, international business law should accommodate human rights and vice-versa. Yet until recently, this accommodation has been modest at best.

2.2. The Evolution of Business and Human Rights Issues

International law governing business issues has evolved without much acknowledgement of human rights issues, while international human rights law has similarly evolved without recognition of the role of business in this area. While this might be seen as a natural development given the functional specialization of these two seemingly disparate areas, it is telling that as early as the post-World War II period, there had been at least some recognition of the need to regulate multinational corporations, including in relation to development goals.[22]

For the most part, business issues have evolved in their own regime; human rights in their own; and to a lesser extent, attempts have been made to develop principles and rules for business and human rights issues, as a bipartite issue. Yet legalization of BHR issues in its own specialized regime remains far less developed

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[19] The ILC Report even uses international trade law and human rights law as case studies for specialized regimes in its report.

[20] *Id*. at ¶¶163, 165 (illustrating that specialized regimes must be "interpreted as far as possible in harmony with other principles of international law").

[21] *Id*. at ¶¶170, 174 (discussing interpretation of the WTO with international human rights principles as an example).

[22] *See e.g.*, Keller, *supra* note 12, at 223 (noting that "[a]fter the initial, post-World War II period in which many developing countries welcomed foreign direct investment (FDI), attitudes changed in the later 1960s as developing countries became increasingly critical of TNCs for their failure to operate in harmony with local economic, social and political objectives.")

than equivalent laws in business or human rights areas.

2.2.1. The Development of Specialized Regimes for International Business and for International Human Rights Laws

The law governing international business activities is, to a large extent, contained in both international trade and international investment law. Both have origins that date back a number of years. International trade law originated in the Havana Charter of the International Trade Organization (ITO), the predecessor to the General Agreement on Tariffs and Trade (GATT). The ITO was created as a mechanism to prevent the economic causes of war,[23] but focused mainly on encouraging capital and trade flows and reducing tariffs.[24] Although it contained one reference to labor rights, the Havana Charter did not address human right issues.[25]

After the failure of the ITO, the GATT carried on the objectives of the Havana Charter and introduced limited and conditional exceptions to trade obligations,[26] including in relation to the protection of human health.[27] Nevertheless, neither the GATT nor any other WTO agreement made any specific reference to human rights.

Similarly, the predecessor to international investment agree-

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[23] Interim Commission for International Trade Organization, *United Nations Conference on Trade and Employment, Havana, Cuba, Final Act and Related Documents*, U.N. Doc. E/Conf.2/78, arts. 1, 8 (Apr. 1948) [hereinafter Havana Charter].

[24] *Id.* at art. 1 (regarding the purposes and objectives of the Act).

[25] *Id.* at art. 7 (regarding fair labor standards).

[26] United States-Section 337 of the Tariff Act of 1930, L/6439-36S/345, ¶ 5.9 (Nov. 7, 1989) (providing in Article XX(d) "for a limited and conditional exception from obligations under other provisions").

[27] *See* General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: … (b) necessary to protect human, animal or plant life or health.

While human rights is not specifically mentioned within the text of Article XX, other relevant exceptions to the GATT relating to human rights are the protection of public morals (Art. XX (a)) or relating to the conservation of exhaustible natural resources (Art. XX (d)).

ments, treaties of Friendship, Commerce and Navigation,[28] focused on trade and shipping facilitations as well as protection of foreign investments.[29] By the 1960s, the modern era of international investment agreements had emerged and their focus was mainly on the creation of favourable investment climates and the promotion of economic development.[30] However, neither the FCN treaties nor the post-FCN investment agreements referenced human rights.

International human rights law has also evolved without recognition of the role of business. The *Universal Declaration of Human Rights*,[31]the *International Covenant on Civil and Political Rights*,[32] and the *International Covenant on Economic, Social and Cultural Rights*[33] do not make any reference to the role of business in protecting or respecting human rights. Neither do any of the other core human rights treaties including the *International Convention on the Elimination of All Forms of Racial Discrimination* ,[34] or the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[35] among others, save for one solitary reference in the *Convention on the Elimination on all Forms of Discrimination against Women*.[36]

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[28] *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, 182 (3rd ed. 2010) (citing KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE (1992)).

[29] *See* Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24(3) INT'L LAW. 655, 656 (1990) (discussing the history of bilateral investment treaties).

[30] Bilateral investment treaties were initially formulated only between developed and developing states, but the North American Free Trade Agreement and the Energy Charter further developed the concept of investment treaties also between developed states. *See generally* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2nd ed. 2012).

[31] *See* Universal Declaration of Human Rights, GA Res. 271A (III) U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (ignoring the role of business in the protection and application of international human rights).

[32] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

[33] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976).

[34] International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/6014 (Dec. 21, 1965) (entered into force Jan. 4, 1969).

[35] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984) (entered into force June 26, 1987).

[36] *See* Convention on the Elimination of All Forms of Discrimination Against

Yet while international investment, international trade, and international human rights developed into specialized regimes with their own set of rules and institutions, efforts were underway to develop a third specialized regime—business and human rights—although with considerably less success.

2.2.2. Efforts to Develop a Specialized Business and Human Rights Regime

Efforts to link business and human rights issues were initially driven by an attempt to control the power of multinational corporations over the sovereign power of states. In the late 1970s, developing countries proposed the creation of the United Nations Draft Code of Conduct for Transnational Corporations as a way to counter the economic influence of multinational corporations.[37] Among other provisions, the UN Draft Code contained a provision recommending multinational corporations to respect human rights.[38] The UN Draft Code was subject to years of negotiations and disagreements between developed and developing countries, and was eventually abandoned.[39]

In response to these efforts, OECD countries developed their own format for MNC regulation. The *OECD Declaration on International Investment and Multinational Enterprises*[40] was released in 1976

Women, G.A. Res. 34/180, Article 2, U.N. Doc. A/34/46 (Dec. 18, 1979) ("Parties … agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake…(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise").

[37] *See* Karl P. Sauvant, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations*, 16 J. OF WORLD INV. & TRADE 11, 12-13 (2015) (discussing the tools governing transnational corporations). *See also* Keller, *supra* note 12, at 223; JOHN M. KLINE, THE ROLE OF TRANSNATIONAL CORPORATIONS IN CHILE'S TRANSITION: BEYOND DEPENDENCY AND BARGAINING (1992).

[38] *See* Commission on Transnational Corporations, *Draft United Nations Code of Conduct on Transnational Corporations*, art. 13 (1983) (recommending that multinational corporations should respect international norms of human rights).

[39] Keller, *supra* note 12, at 223. *See* ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, 33 (2009) (discussing the OECD Convention on the Protection of Foreign Property).

[40] OECD, International Investment and Multinational Enterprises (1976) reprinted in ROGER BLANPAIN, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOUR RELATIONS 1976–1979: EXPERIENCE AND REVIEW, 35 (1979) (stating the terms of the Committee on International Investment and Multination-

and included guidelines for multinational enterprises, which urged them to make positive contributions to economic and social progress.[41] However, these voluntary guidelines did not make any reference to human rights.

In the ensuing years, multinational conduct relating to labor issues was clarified by the International Labour Organization with its *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*.[42] Yet, during the same time period, efforts to produce principles of conduct relating to technology transfer[43] and to illicit payments[44] both failed. Indeed, while negotiations on the U.N. Draft Code continued in parallel during this period—until their eventual abandonment in 1994—international efforts to link business and human rights issues remained mainly dormant.

However, in 1998, the U.N. Sub-Commission on the Promotion and Protection of Human Rights instituted a three-year working group to explore the activities of MNCs.[45] The working group decided to draft a code of conduct for MNCs that eventually became the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* ("U.N. Norms").[46] The U.N. Norms represented the first non-voluntary initiative to detail obligations on business and human rights. Nevertheless, due to opposition to the U.N. Norms, particularly by

al Enterprises).

[41] *See* OECD, Guidelines for Multinational Enterprises, 15 I.L.M. 969 ¶ 12 (1976) (stating that Multinational Enterprises should contribute towards the economic and social progress of the states).

[42] *See* ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 17 I.L.M. 422 (1978) (providing guidance to enterprises on social policy and inclusive, responsible and sustainable workplaces).

[43] *See* Sauvant, *supra* note 37, at fn. 21 (stating that between 1976 and 1985 negotiations at UNCTAD on the Draft International Code of Conduct on the Transfer of Technology were not completed).

[44] *See* U.N. Economic and Social Council, *Draft International Agreement on Illicit Payments*, (1991) (outlining a brief history and the text of the Draft International Agreement on Illicit Payments).

[45] *See* David Weissbrodt & Maria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard To Human Rights*, 97 AM. J. INT'L L. 901, 903-905 (2003) (providing an overview of the history of the development of the U.N. Norms).

[46] *See* U.N. Commission on Human 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. 26, 2003) (providing this code of conduct for MNCs).

business,[47] they were not adopted by the U.N.[48]

While the U.N. Commission of Human Rights was reluctant to adopt the draft U.N. Norms, it continued to confirm the importance of business and human rights issues.[49] Indeed, alongside the U.N. Norms drafting process, in a separate venue, the then U.N. Secretary-General Kofi Annan created the Global Compact, a U.N. sponsored policy initiative that advocated good corporate practices in several areas, including human rights.[50] The Global Compact was applauded by businesses, but derided by its critics for its non-binding nature and lack of any monitoring or enforcement mechanisms.[51] Given the problems with the U.N. Draft Norms and the shortcomings of the Global Compact, the U.N. continued to explore "what the international community expects of business when it comes to human rights."[52] Accordingly, it re-

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[47] *See* RADU MARES, *Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress* in THE U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION, 10 (2012) (commenting on feelings that business typically dislikes binding regulations until it sees their necessity or inevitability); Sean Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 Colum. J. Transnat'l L. 389, 408 (2005) ("[m]any criticisms have been leveled against such codes, suggesting that, over the long term, [such codes] may not survive in their present form").

[48] *See* Office of the High Commissioner for Human Rights, *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human rights*, U.N. Doc. E/CN.4/DEC/2004/116 (Apr. 20, 2004) (providing the final norms adopted by the U.N.).

[49] *See id*.

[50] *See* United Nations, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, Switzerland, U.N. Doc SG/SM/6881 (Feb. 1, 1999) (discussing the need engage business to further human rights goals). *See also* Andreas Rasche, "*A Necessary Supplement*"*: What the United Nations Global Compact Is and Is Not*, 48 BUS. & SOC'Y 511 (2009) (providing an overview of the Global Compact).

[51] *See*, *e.g.*, Surya Deva, *Global Compact: A Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship,* 34 Syracuse J. of INT'L. L & COM. 107 (2006) (arguing that the Global Compact principles are both general and vague, and there are risks of lack of commitment); Betty King, *The UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations*, 34 Cornell Int'l L. J. 481, 482 (2001) (noting that the U.N., while encouraging good practices, does not endorse companies that participate); Jean-Philippe Thérien & Vincent Pouliot, *The Global Compact: Shifting the Politics of International Development?*, 12 GLOBAL GOVERNANCE 55, 70 (2006) ("[A]lthough the Global Compact aims for openness and dialogue, the stakeholders inside and outside the Compact remain on very different wavelengths.").

[52] U.N. Commission on Human Rights, *Report Of The United Nations High Commissioner On Human Rights On The Responsibilities Of Transnational Corporations And Related Business Enterprises With Regard To Human Rights*, ¶ 17, U.N. Doc.

quested the U.N. Secretary General to appoint a Special Representative to, among other issues, clarify standards of MNC responsibility and accountability in relation to human rights.[53]

In a report entitled, The "Protect, Respect and Remedy" Framework,[54] the U.N. Special Representative John Ruggie advocated that responsibility for business and human rights issues rested on three different differentiated but complementary pillars. These included: the state duty to protect against human rights abuses by third parties, including business, through policies, regulations, and adjudication;[55] the corporate responsibility to respect human rights by way of a due diligence process that enables corporations to discern, prevent and address adverse human rights impacts;[56] and, finally, the need for more effective access by victims to remedies, both judicial and non-judicial in nature.[57]

After the Framework was welcomed by the Human Rights Council, Ruggie elaborated upon the Framework's three pillars in a second report. In "The Guiding Principles on Business and Human Rights," he provided detailed steps by which the Framework could be implemented.[58]

The Guiding Principles provided a unique approach to addressing the business and human rights problem. It advocated a "smart mix" of voluntary and mandatory initiatives,[59] which were

E/CN.4/2005/91 (Feb. 15, 2005).

53 *See* U.N. Commission on Human Rights, *Human rights and transnational corporations and other business enterprises*, Human Rights Council Res. 2005/69, ¶ 1, U.N. Doc. E/CN.4/RES/2005/69 (Apr. 20, 2005) (detailing this request).

54 U.N. Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights - Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (including the full text of the U.N. Special Representative report).

55 *See id*. at ¶ 43 ("The human rights treaty bodies can play an important role in making recommendations to States on implementing their obligations to protect rights vis-à-vis corporate activities.").

56 *See id*. at ¶¶ 51-81 (including a table outlining business impacts on human rights).

57 *See id*. at ¶ 91 ("States should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims.").

58 *See* U.N. Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, HR/PUB/11/04 (2011) (providing a guide to the Guiding Principles).

59 *See* JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS

designed to strengthen human rights in a pragmatic matter where change would be created "where it matters most—in the daily lives of people."[60]

For critics, however, the Guiding Principles were an insufficient response to the business and human rights problem. For some, the Guiding Principles were seen as having failed to propose enforceable accountability mechanisms, choosing to leave this with domestic governments instead.[61] For others, problems with the Guiding Principles lay in imposing only negative responsibilities on corporations for human rights.[62] Critics argued that the failure to impose positive human rights obligations on corporations reduced societal expectations of businesses.[63] Still others found fault with the lack of specificity of the human rights responsibilities of businesses in the Guiding Principles, and in their failure to demand that states reduce obstacles to access effective remedies.[64]

AND HUMAN RIGHTS, xxiii (2013) ("…to devise a smart mix of reinforcing policy measures that are capable over time of generating cumulative change and achieving large-scale success—including in the law").

[60] U.N. Commission on Human Rights, *Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, ¶81, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006).

[61] *See* Florian Wettstein, *Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment*, 14 J. HUM. RTS. 162, 166 (2015) (commenting that the Guiding Principles assert human rights for all companies irrespective of consent to be bound); Christopher Avery, *The Development of Arguments for the Accountability of Corporations for Human Rights Abuse* in CARRIE BOOTH WALLING & SUSAN WALTZ (EDS.), HUMAN RIGHTS: FROM PRACTICE TO POLICY : PROCEEDINGS OF A RESEARCH WORKSHOP - GERALD R. FORD SCHOOL OF PUBLIC POLICY UNIVERSITY OF MICHIGAN, 8 (2010)

Ruggie's framework proclaims that the state's duty is to protect, when neither the home nor host state has an incentive to protect it will be challenging to secure full respect for this duty. Not only do the home and host governments not have an interest in regulating, it is often the reverse–they have an interest in not regulating.

See generally Surya Deva & David Bilchitz, *The Human Rights Obligations Of Business: A Critical Framework For The Future* in, SURYA DEVA & DAVID BILCHITZ (EDS.) HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT?, 14 (2013).

[62] *See* Deva, *supra* note 61, at 15.

[63] *Id*.

[64] Amnesty International et al., *Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights*, Jan. 2011, at 1, https://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf [https://perma.cc/KXT4-8KRH] ("[T]he draft Guiding Principles provide little guidance as to what is or is not appropriate and, in so doing, fail to provide concrete recommendations for enhanced protection of human rights against abuse involving

Regardless of its shortcomings, today, the Guiding Principles delineate the principal obligations of business vis-à-vis human rights. Nevertheless, as non-binding obligations without any monitoring or enforcement mechanism, it is difficult to characterize the Guiding Principles as encompassing a specialized regime for business and human rights akin to the ones that exist for international trade, investment, and human rights.

2.2.3. Promoting Coherence or Specialization?

While most would accept that business and human rights issues require further legalization, whether that hardening of obligations for corporations should be confined within the BHR movement or in other related areas of international law, remains an open question. Of course, legalizing BHR issues within a specialized regime holds an intuitive appeal, in that it allows for a targeted development of the law that could focus on the unique problems BHR issues pose.

However, confining BHR legalization to a specialized area only risks problems of coherence. In particular, as specialized regimes for international business are endowed with such strong institutional frameworks, they have the ability to set international norms that can undermine international human rights norms whenever the two areas collide. Notably, international investment law has had a number of interactions with human rights issues, which have resulted in the human rights issue being viewed through an investment lens or negated entirely.[65] As a result, to further prevent international business norms from undermining human rights issues, further legalization of BHR issues should not be confined only to a specialized regime, but must be prevalent in other areas where BHR issues arise, most notably in the area of international investment law and in the context of international investment agreements.

business.").

[65] See the examples of these interactions in Part III.B., *infra*.

3. FURTHER LEGALIZING BUSINESS AND HUMAN RIGHTS ISSUES

Having determined the importance of legalizing BHR issues in not only a specialized regime but also in other areas where BHR issues arise frequently, this Part canvasses the options for further legalization. It begins with the proposed dedicated BHR treaty mentioned at the outset of this article before proceeding to discuss the advantages and disadvantages of concluding such a treaty.

3.1. Beginning the BHR Treaty Process

In 2013, Ecuador began canvassing the idea that the U.N. consider drafting a BHR treaty, which in many ways echoed the civil society critiques of the Guiding Principles.[66] This was followed up by a formal resolution, made to the Human Rights Council, in conjunction with Bolivia, Cuba, South Africa, and Venezuela, proposing that an open-ended intergovernmental working group be constituted to develop an international legally binding instrument for the regulation of MNCs and other business enterprises.[67] At approximately the same time, a second resolution—spearheaded by Norway—also called for the development of a BHR treaty, but unlike the Ecuadorian resolution, the Norwegian resolution did not focus only on the BHR treaty. Instead, it suggested that states continue to promote and build on the Guiding Principles while also launching an inclusive and consultative process to explore legal and practical measures to improve access to remedies for corporate-related abuse victims, including an exploration of the benefits and limitations of a legally binding instrument.[68]

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[66] Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council, *Transnational Corporations and Human Rights* (Sep. 2013), https://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf [https://perma.cc/UZ5L-R7QP] (including Ecuador's statement to the Human Rights Council).

[67] *See* Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014) [hereinafter Ecuador Resolution 26/9] (providing full text of the proposal to develop an international legally binding instrument for regulating MNCs).

[68] *See* Human Rights Council, *Human rights and transnational corporations and other business enterprises*, ¶8, U.N. Doc. A/HRC/26/L.1 (June 23, 2014) ("Requests the Working Group to launch an inclusive and transparent consultative process

From the outset, the Ecuadorian resolution reflected two problems in its suggested approach. First, the resolution made an active effort to move away from the Guiding Principles. While it did reference the Guiding Principles as background, it did not make any further reference to them thereafter.[69] Instead, its focus was only on the primary responsibility of states to protect and promote human rights, and consequently the need for a binding BHR treaty. However, by reiterating the role of the state and focusing only on a treaty—a governance method open only to states—the Ecuadorian resolution made clear that the three-pillared approach of the Guiding Principles fell short of their preferred mechanism of a reinvigorated state. This reassertion of the dominance of the state caused one commentator to argue that this approach may be akin to an attack on capitalist democracies and the former imperial powers, who through the domination of their MNCs, are viewed as "instruments of home state policies" and therefore under home state control.[70]

A second problem was that the Ecuadorian resolution addressed only the human rights adversities of transnational corporations, specifically excluding domestic businesses registered under national law.[71] However, businesses, whether domestic or transnational in nature, can cause human rights problems. As Ruggie illustrates, in the case of the Rana Plaza disaster, the Ecuadorian resolution would have covered the international businesses purchasing the garments from the factories, but not the local factories producing the garments.[72]

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with States in 2015, open to other relevant stakeholders, to explore and facilitate the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business-related abuses….").

[69] *Id*. at introduction ("Stressing that the obligation and primary responsibility to promote and protect human rights and fundamental freedoms lie with the State").

[70] Larry Catá Backer, *Moving Forward The U.N. Guiding Principles For Business And Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and The Treaty Law That Might Bind Them All*, 38 FORDHAM INT'L L. J. 457, 529-530 (2015).

[71] Ecuador Resolution 26/9, *supra* note 67, at n.1 ("Other business enterprises' denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.").

[72] John G. Ruggie, *The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty*, 1 (2014), https://www.hks.harvard.edu/mrcbg/CSRI/Treaty_Final.pdf [https://perma.cc/LQW6-LG4D] ("It then goes on to define 'other business enterprises' in a way that is intended to exclude national

The NGO EarthRights International was even more vocal in its identification with this aspect of the Ecuadorian resolution. As they noted: "How can we tell [victims of corporate human rights abuse] that the protections of international law don't apply to them simply because the corporation that's polluting their environment is a [domestic] company instead of [an international company]?"[73]

The problematic nature of the Ecuadorian resolution became apparent during its adoption at the Human Rights Council. It was adopted with 20 votes in favor, 14 against, and 13 abstentions.[74] Conversely, the Norwegian resolution, which emphasized a more general exploration of further avenues for legalization, was adopted by consensus.[75]

3.2. Arguments For and Against a Specialized BHR Treaty

Despite the Ecuadorian resolution for a BHR treaty having some shortcomings and polarizing the business and human rights debate, these downfalls do not necessarily suggest that a BHR Treaty is *per se* not needed. Indeed, while the Ecuadorian vision for a BHR Treaty may be flawed, there are some strong arguments supporting the elaboration of a BHR Treaty.

companies, so that the new legal framework would apply only to transnational corporations.").

[73] Jonathan Kaufman, *UN's Historic Business and Human Rights Treaty Resolution Falls Short in Providing Relief for Victims*, EARTHRIGHTS INTERNATIONAL, June 27, 2014, https://www.earthrights.org/media/uns-historic-business-and-human-rights-treaty-resolution-falls-short-providing-relief-victims [https://perma.cc/X2LK-QK5V].

[74] The Ecuadorian Resolution was adopted on June 26, 2014. *See* Human Rights Council, *Report of the Human Rights Council on its Twenty-Sixth Session*, ¶¶ 178-183, U.N. Doc. A/HRC/26/2 (Dec. 11, 2014) (including the voting record for the resolution).

[75] The Norwegian resolution was adopted without a vote on June 27, 2014. *See* Human Rights Council, *26/22 Human rights and transnational corporations and other business enterprises*, U.N. Doc. A/HRC/RES/26/22 (July 15, 2014) ("…recognizing that it may be further considered whether relevant legal frameworks would provide more effective avenues of remedy for affected individuals and communities").

3.2.1. The Need for a Specialized BHR Treaty

One of the primary arguments in favor of a BHR treaty is that an international mechanism can be used to cover the governance gaps that currently exist. Indeed, the failure of the Guiding Principles to cover the accountability of corporations that operate in states without adequate human rights regulation or remedies to address human rights abuses, or that are unwilling to enforce these regulations or provide access to remedies, has been one of the most important critiques of the Guiding Principles. Conversely, the existence of an internationally legally binding instrument could ensure that corporations that fail to follow national laws or operate in states without adequate laws or remedial mechanisms, can be more easily held accountable for human rights-related abuses.

A second argument for a BHR treaty would be to use it as a central source within which the responsibilities of corporations could be outlined. This could be used to clarify and help corporations and stakeholders understand the precise nature of the responsibilities imposed upon corporations. Alternatively, it could act as a template for states when they are enacting their own laws on corporate responsibility for human rights at the national level.[76] Similarly, a BHR treaty could be used to set international standards for corporate responsibilities for human rights.[77] In this way, the treaty could further norm development in this area, both at the international and at the national level.[78]

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[76] *See* SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS, 215-216 (2012) (arguing that once "corporate human rights responsibilities are agreed upon at [an] international level, they would have to be given a more precise meaning at [a] national level."); Chip Pitts, *The World Needs A Treaty On Business And Human Rights*, OPEN DEMOCRACY, May 26, 2014, https://www.opendemocracy.net/openglobalrights-blog/chip-pitts/world-needs-treaty-on-business-and-human-rights [https://perma.cc/J8ND-RLRJ] (stating that the treaties produce necessary international regulatory framework to ensure that the pursuit of commercial activity does not conflict with and enhances fundamental human dignity and development).

[77] *See* David Bilchitz, *The Necessity for a Business and Human Rights Treaty*, 11 (Nov. 30, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2562760 [https://perma.cc/NAX4-8XC8] ("One of the prime functions that a treaty could perform would be to provide such a mechanism for the development of international standards surrounding business and human rights.").

[78] *See* Bilchitz, *supra* note 77, at 12 (arguing that treaties and international human rights law could also help at a national level); Pitts, *supra* note 76 (stating that these treaties help create "new customary global law").

Third, proponents view a BHR treaty as serving as a mechanism for transforming the Guiding Principles, or principles derived from them—thought of as 'soft' law—into binding law.[79] By strengthening regulatory efforts in this area into 'hard' law, corporate accountability will be increased as corporations are thought more likely to comply with 'hard' rather than 'soft' human rights obligations.[80] Moreover, by codifying business and human rights obligations, the importance of business-related human rights obligations vis-à-vis other business norms are reinforced. This can be particularly cogent in areas where business and human rights issues clash—such as in international trade or investment law—and business norms are codified while human rights obligations remain 'soft' law.[81]

BHR treaty proponents further see the treaty as an opportunity to 'level the playing field' because it ensures that *all* corporations must adhere to the same set of human rights standards, and because it prevents states from adopting lower levels of human rights protection as a method of attracting investment.[82] It can also act as a tool to minimize risk and to enhance corporate reputation.[83] A

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[79] *See* Bilchitz, *supra* note 77, at 24 (noting that a soft instrument such as the Guiding Principles can indeed be a precursor to stronger, more binding international law in this field).

[80] *See, e.g.*, Pitts, *supra* note 76 ("…as a former Chief Legal Officer charged with ensuring corporate compliance with standards, I can assure you that executives are more inclined to comply with hard law (like a treaty).").

[81] *See* Barnali Choudhury et al., *A Call for a WTO Ministerial Decision on Trade and Human Rights* in THOMAS COTTIER & PANAGIOTIS DELIMATSIS (EDS), THE PROSPECTS OF INTERNATIONAL TRADE REGULATION: FROM FRAGMENTATION TO COHERENCE, 323, 330 (2011) (providing an overview of human rights clashes with WTO Law); Barnali Choudhury, *Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights*, 46 ALTA. L. REV. 983 (2009) (outlining human rights clashes with international investment law). *See also* Third World Network, *U.N. body to elaborate treaty on TNCs/human rights holds first session*, Global Policy Forum, July 8, 2015, https://www.globalpolicy.org/component/content/article/270-general/52786-un-body-to-elaborate-treaty-on-tncshuman-rights-holds-first-session.html [https://perma.cc/6SZX-DH3U] ("While TNCs are granted rights through hard law instruments, such as bilateral investment treaties and investment rules in free trade agreements, and have access to a system of investor-State dispute settlement, there are no hard law instruments that address the obligations of corporations to respect human rights.").

[82] *See* INTERNATIONAL COMMISSION OF JURISTS, *supra* note 4, at 34 (commenting on the unlevel playing field created by the differences between national jurisdictions); Pitts, *supra* note 76 ("Without a treaty, national courts make erroneous decisions on international law….").

[83] *See* Pitts, *supra* note 76 (arguing a treaty is in the interest of business to show compliance given that a few violators can create bad reputations every-

BHR treaty further enables small states to have a voice in the governance of corporations, a voice that some believe was marginalized in the scope of drafting the Guiding Principles.[84]

More importantly, however, a BHR treaty is thought to greatly increase access to effective remedies to human rights victims.[85] A treaty could facilitate international cooperation on remedies in numerous areas from investigations, to adjudication, to executions of judicial decisions.[86] It could also create supervisory or monitoring bodies to oversee states unwilling or unable to enforce human rights standards on corporations in their jurisdiction, thereby ensuring that regardless of location, victims would have access to a remedy.[87]

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where).

[84] *See* Bonita Meyersfeld, *To Bind or Not to Bind* (Apr. 2014), https://business-humanrights.org/sites/default/files/media/documents/a_new_treaty.pdf [https://perma.cc/F4KP-T6R3] (arguing, among other things, for a greater role for the Global South in the international treaty process); Larry Catá Backer, *Essay: Considering a Treaty on Corporations and Human Rights: Mostly Failures But With a Glimmer of Success*, Coalition for Peace & Ethics, Working Paper No. 6/1, Aug. 2015, 3-4, http://www.thecpe.org/wp-content/uploads/2013/05/Considering-a-Treaty-on-Corporations-and-Human-RightsV3.pdf [https://perma.cc/FMA5-VS6T] ("The treaty process is necessary as a crucial means by which small and developing states may have their voices heard, may preserve even a semblance of their sovereignty.").

[85] *See*, *e.g.*, Surya Deva, *Regulatory initiatives on business & human rights: Where are the victims*?, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, June, 2015, https://business-humanrights.org/en/regulatory-initiatives-on-business-human-rights-where-are-the-victims [https://perma.cc/UBC8-RU3G] ("We need a legally binding international instrument not for the sake of it, but to fill governance gaps left by the existing regulatory initiatives."); INTERNATIONAL COMMISSION OF JURISTS, *supra* note 4, at 15. *See also* Doug Cassel & Anita Ramasastry, *Anatomy of a business and human rights treaty?*, INSTITUTE FOR HUMAN RIGHTS AND BUSINESS at 2 (June 25, 2015) ("The lack of access to an effective remedy has led a global coalition of NGOs to advocate for a new, general treaty on business and human rights.").

[86] *See* INTERNATIONAL COMMISSION OF JURISTS, *supra* note 4, at 15 ("Availability and effectiveness of remedies to provide redress to those who suffer harm…."). *See also* Nicolás Carrillo Santarelli & Jernej Letnar Černič, *Summary of the Workshop on a Treaty on Business & Human Rights*, 9 (June 26, 2015), https://business-humanrights.org/sites/default/files/documents/Madridworkshop-summary.pdf [https://perma.cc/K7DR-6TND] (noting that greater cooperation is possible).

[87] Many proponents of the BHR treaty view monitoring or supervisory action as an important aspect of the treaty. *See, e.g.*, INTERNATIONAL COMMISSION OF JURISTS, *supra* note 4, at 15 (discussing the details of a redress system for victims of human rights violations); DEVA, *supra* note 76, at 219 (arguing that international instructions should be utilized to exert pressure on states to regulate the conduct of companies more vigorously).

3.2.2. Impediments to a Specialized BHR Treaty

Despite this array of strong arguments in favor of a BHR treaty, the debate over the treaty continues to gain strength and the arguments against a treaty continue to proliferate. One of the most vocal opponents to the elaboration of a legally binding instrument in this area is John Ruggie, the author of the Guiding Principles himself. Ruggie is not necessarily against the idea of a BHR treaty; he favors the idea of a legally binding instrument on business involvement in gross human rights abuses.[88] Yet he cautions against the elaboration of a BHR treaty, because of the desire of treaty proponents to create an "overarching international legal framework" for MNC conduct under international human rights law, and because of the vast spectrum of areas contained in the field of business and human rights, which are too broad and too complex to be detailed comprehensively in one document.[89]

Ruggie is not alone in his concern over the scope of a BHR treaty. As one commentator has questioned: just how much can one treaty address?[90] Businesses can affect a wide range of international human rights, including civil and political rights; economic, social, and cultural rights; labor rights; and environmental rights.[91] While the Ecuadorian resolution initially left the scope of covered human rights in the treaty unclear, more recently, the small num-

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[88] *See* John Ruggie, *Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors*, INSTITUTE FOR HUMAN RIGHTS AND BUSINESS (Sept. 9, 2014), http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html [https://perma.cc/TSH7-C7YP] (highlighting the difficulties of having successful negotiations to make a BHS treaty such as a weak political mandate, the proposed treaty's unworkable scope and scale, and the record of implementation of U.N. Guiding Principles on Business and Human Rights (UNGPs)).

[89] *See id.* at 7 (explaining that "neither the international political or legal order is capable of achieving that [overarching international legal framework] in practice").

[90] Shane Darcy, *'Key Issues In The Debate On A Binding Business And Human Rights Instrument*, BUSINESS AND HUMAN RIGHTS IN IRELAND (Apr. 13, 2015), *available at* https://businesshumanrightsireland.wordpress.com/2015/04/13/key-issues-in-the-debate-on-a-binding-business-and-human-rights-instrument/ [https://perma.cc/RZE7-5FJM].

[91] For a good overview of the range of human rights that businesses can impact, *see* Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, ¶ 2, A/HRC/8/5/Add.2 (May 23, 2008) (listing the civil, political, economic, and cultural rights and labor rights that are impacted by transnational corporations).

ber of states participating in the BHR treaty-drafting process declared that the full catalogue of human rights should be included within the treaty.[92] The problem with including such a large catalogue of human rights in the treaty is that there is a risk that the rights may have to be attenuated in order to gain state approval.[93] A treaty with the full spectrum of rights would also make the BHR treaty rather similar to the UN Norms, which contained references to over 50 different human rights, but was considered overly broad and was objected to by businesses.[94]

Another common complaint about the BHR treaty is that it appears to be moving away from the Guiding Principles, rather than building upon it.[95] Referring to the adoption of the Ecuador initiative as a "genuine setback" that broke the unanimous consensus on business and human rights, the International Organization of Employers stated that moving ahead with the BHR treaty is a retreat to past practices, which have failed in the past and which "are diametrically opposed to the goal of quickly advancing the implementation of these Guiding Principles."[96] Indeed, some have ex-

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[92] *UN Treaty on Business & Human Rights Negotiations Day 2: EU Disengagement & Lack of Consensus on Scope,* EUROPEAN COALITION FOR CORPORATE JUSTICE, at 4 (July 8, 2015), http://www.corporatejustice.org/UN-Treaty-on-Business-Human-Rights-negotiations-Day-2-EU-disengagement-Lack-of.html?lang=en [https://perma.cc/MWP4-YZYJ] ("While some voices were raised in the past year for limiting the binding instrument to gross violations, the room unanimously supported that the full catalogue of human rights—all of which subjectable to corporate violations—should be included.").

[93] *See* Chris Esdaile, *A step forward? A sceptical view on the need for a new business and human rights treaty*, OPEN DEMOCRACY (May 26, 2014), https://www.opendemocracy.net/openglobalrights-blog/chris-esdaile/step-forward-sceptical-view-on-need-for-new-business-and-human-r [https://perma.cc/AZ6G-EG5H] (arguing that accountability is needed, not a weak treaty).

[94] *See* Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309, 319 (2004) ("This instrument, however, does not seem to be as influential as any of its other counterparts; business organizations have objected to its somewhat unrealistically broad scope and binding references"); Esdaile, *supra* note 93, at 2 ("It seems highly unlikely that companies will willingly accept binding obligations in the area of economic, social, and cultural rights (despite them being included in the GPs)….").

[95] *See, e.g.*, Backer, *supra* note 70, at 527-28 (arguing that the core of the Ecuador initiative "strategy was a reconceptualization of the GPs, rejecting the GP project as an objective, asserting that they were merely a gateway to a more permanent and quite distinct objective").

[96] See INTERNATIONAL ORGANISATION OF EMPLOYERS, supra note 8 (explaining how the vote at the UN Human Rights Council on the Ecuador Initiative represents a setback to the efforts of improving the human rights situation in business).

pressed concern that progressing with a treaty may distract from full implementation of the Guiding Principles, which remain in their infancy and have not been able to be fully realized by many states.[97]

A third concern about the BHR treaty is the apparent preference for the treaty as a form. The deep interest in a treaty appears, in part, because it is seen as being able to close the governance gaps that the Guiding Principles did not address. Nevertheless, simply concluding a treaty does not necessarily mean that states will comply with it. In fact, several studies have found that the ratification of a human rights treaty may not have any impact, or only a marginal impact on a state's respect for human rights.[98] Conversely, a voluntary measure, such as the Guiding Principles, can influence respect for human rights, even without being in the form of a treaty.[99] A preference for a treaty over other initiatives can al-

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[97] *See* International Justice Resource Centre, *In Controversial Landmark Resolution, Human Rights Council Takes First Step Toward Treaty On Transnational Corporations' Human Rights Obligations* (July 15, 2014), http://www.ijrcenter.org/2014/07/15/in-controversial-landmark-resolution-human-rights-council-takes-first-step-toward-treaty-on-transnational-corporations-human-rights-obligations/ [https://perma.cc/9ZBH-38W4] (establishing that the call for the elaboration of a BHS treaty distracts from full implementation of the Guiding Principles); Michael Kourabas, *Is a Binding Treaty the Way Forward for Business and Human Rights?*, TRIPLE PUNDIT at 2 (July 14, 2015), http://www.triplepundit.com/2015/07/binding-treaty-way-forward-business-human-rights/ [https://perma.cc/2FJD-26ZC] (noting that some feel that a treaty would "undermine the young UNGPs").

[98] *See* the studies cited in Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925, 950-51 (2005) (providing evidence that where there is an absence of civil society or democracy, "human rights treaty ratification often makes no difference and can even make things worse"). *See also* Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588 (2007) (explaining how the effectiveness of human right treaties depends on domestic legal enforcement).

[99] The Guiding Principles have influenced several international and national bodies including the Global Compact, the OECD's Guidelines for Multinational Enterprises, the OECD's Common Approaches for Export Credit Agencies, the ISO 26000 standard on social performance, the IFC's Sustainability Principles and Performance Standards in addition to EU and national law and policy. *See* SHIFT, *UN Guiding Principles on Business and Human Rights* (2015), http://www.shiftproject.org/page/un-guiding-principles-business-and-human-rights [https://perma.cc/T34N-C5JM] (explaining that the Guiding Principles "are the authoritative global standard on business and human rights, unanimously endorsed by the UN Human Rights Council in 2011"); Karin Buhmann, *Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions*, DIGITAL COMMONS (2014), http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1051&context=olsrps [https://perma.cc/226M-V7Q3] (showing how "the Guiding Princi-

so be seen as a preference for state regulation—and an effort to elevate states as the supreme form of governance—over other forms of regulation, including self-governance, as offered in the Guiding Principles, which encourages corporations to take ownership of their actions.[100]

Finally, critics argue that a BHR treaty would be of limited value because states that are home to some of the world's largest MNCs are not supportive of the treaty. This critique stems from the number and identity of states that opposed Ecuador's resolution at the time of its adoption by the Human Rights Council. States opposing Ecuador's resolution included, among others, the U.S., the U.K., France, Italy, and Japan.[101] Coincidentally, of the 10 largest transnational companies in the world, two are headquartered in the U.S., two in France, three in the U.K., one in Japan, and one in Italy.[102] Conversely, support for the resolution stemmed mainly from states that are recipients of MNC activity.[103]

While there is some support for the expressive function of law,[104] a BHR treaty that would not be ratified by states that are

ples have already had significant influence on several other public and private business governance instruments, including the Global Compact, OECD's Guidelines for Multinational Enterprises, ISO 26000 as well as EU and national law and policy").

100 *See* Backer, *supra* note 70, at 532 (arguing that the ideological foundations of the treaty movement are meant "to manage, if not eliminate the private sector, or at least to subordinate it to the command of the state").

101 The full list of states that opposed the resolution were: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, UK, and the US. *See UN Human Rights Council Sessions,* BUS. & HUM. RTS. RES. CTR. at 2 (Jun. 2014), http://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions [https://perma.cc/4PRP-G3C5] (observing that on June 26th, 2014, the UN Human Rights Council adopted Ecuador and South Africa's resolution with 20 votes in favor, 14 votes against, and 13 abstentions).

102 *See* The Economist Online, *Biggest Transnational Companies,* THE ECONOMIST, July 10, 2012, http://www.economist.com/blogs/graphicdetail/2012/07/focus-1 [https://perma.cc/5WNJ-CMAD] (showing that the TNCs include General Electric (US), Royal Dutch Shell (Netherlands/UK), BP (UK), Exxon Mobil (US), Toyota (Japan), Total (France), GDF Suez (France), Vodafone (UK), Enel (Italy)).

103 The resolution was supported by Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, and Vietnam. *See supra* note 101 (listing the votes in favor of the resolution).

104 *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2051 (1996) ("There can be no doubt that law, like action in general, has an expressive function. Some people do what they do mostly because of the state-

home to the world's largest MNCs could be of limited value. There is a risk that MNCs headquartered in the non-ratifying states would cease operations in states that did ratify the BHR treaty, that remedies garnered by human rights victims would not be recognized in non-party states, or that the actions of the world's most powerful MNCs would not be covered under the BHR treaty. Failing to garner global support for the BHR treaty could not only perpetuate the existing governance gaps, but it could resign the BHR treaty to the same fate as the *International Convention on the Protection of the Rights of All Migrant workers and Their Families*,[105] which after 25 years has only been ratified by 48 states, most of which are migrant-sending States.[106]

The difficulties with concluding a global treaty on business and human rights are not a sufficient reason not to pursue a treaty route in this field. Addressing the existing governance gaps; elaborating business responsibilities—particularly as a counterbalance to business rights which seem to be well delineated in treaties; providing victims with easier access to remedies and leveling the playing field, are cogent reasons that support the argument for a BHR treaty. At the same time, the complexity of cataloguing the full range of human rights as well as the unfavorable political climate in which the treaty is clearly mired, suggests that a BHR treaty still faces a long road ahead. Moreover, given the presence of Guiding Principles and their apparent positive influences in several areas, the answer to whether a BHR treaty is needed is, likely, "not now."

4. LOOKING BEYOND A BUSINESS AND HUMAN RIGHTS TREATY

Despite the climate not being favorable to moving forward with a BHR treaty, further legalization is necessary to continue to evolve the business and human rights agenda.[107] One approach to

ment the act makes; the same is true for those who seek changes in law.").

105 *United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, G.A. Res. 45/158 (Dec. 18, 1990), (entered into force July 1, 2003).

106 *See* UN Treaty Collection, *International Convention on the Protection of the Rights of All Migrant workers and their Families* (providing the full list of countries that have ratified the treaty).

107 *See* John G. Ruggie, Remarks Made At The Annual Harry LeRoy Jones

doing so is to turn to international investment agreements (IIAs). Since these agreements already provide a defined role for corporations and have previously implicated BHR issues, including the BHR agenda, within their ambit seems like a natural fit. More importantly, IIAs have the potential to meet several of the proposed BHR treaty's goals while assuaging some of the concerns of the treaty opponents.

4.1. The Background to International Investment Agreements

International investment agreements are bilateral, preferential or regional treaties—including free trade agreements (FTAs)—concluded by two or more states, to govern foreign investment in the contracting states.[108] There are now well over 3,200 of these agreements in the world, covering global foreign direct investment inflows of well over $1.45 trillion.[109]

States that are parties to IIAs are required to protect and promote foreign investment.[110] IIAs are therefore designed to shield foreign investors and their investments from state interference.[111]

Award of the Washington Foreign Law Society: International Legalization in Business and Human Rights, (June 11, 2014), (transcript available at http://www.hks.harvard.edu/m-rcbg/CSRI/research/WFLS.pdf) [https://perma.cc/U6XB-PFQC]) (arguing that "further legalization is an inevitable and necessary component of future developments.").

[108] For an overview of international investment agreements, see DOLZER & SCHREUER, *supra* note 30; *see also* SORNARAJAH, *supra* note 28 (providing an overview of the principles that shape international law of foreign investments as defined by investment treaties and the decisions of international courts).

[109] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, World Investment Report 2014: Investing in the SDGs: an Action Plan (2014).

[110] *See* SORNARAJAH, *supra* note 28, at 188 ("Every bilateral investment treaty begins with a declaration as to the purpose of the treaty. This is usually stated to be the reciprocal encouragement and protection of investments."). In fact, many treaties are entitled Treaty "Concerning the Reciprocal Encouragement and Protection of Investment." *E.g.*, Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, 31 I.L.M. 124 [hereinafter U.S.-Arg. Investment Treaty]; Agreement Concerning the Encouragement and Reciprocal Protection of Investments, Burundi-Ger., Sept. 10, 1984, 1517 U.N.T.S. 288, 293 (1988) (providing examples of the many treaties that use that phrase in their titles).

[111] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 80 – 81 (2007) (arguing that an investment treaty would do very little if it did not curb state conduct).

Indeed, because prior to the creation of IIAs, foreign investors were often pitted against more powerful states when trying to assert their property rights,[112] IIAs also work to establish standards of protection that states must respect as well as provide a neutral system of dispute resolution to resolve investment disputes.[113]

The idea behind IIAs is that they are premised on a "grand bargain:" States promise to protect investment and, in return, they expect this promise to increase the amount of foreign investment they will receive into the state.[114] As a result, the treaties have dual purposes—to protect foreign investment and, by protecting these investments, to attract foreign investment.[115]

Unfortunately, the idea of the "grand bargain" premise has been somewhat undercut by the numerous studies that question whether the conclusion of IIAs increases the amount of foreign investment[116] and by the increasing number of states that act as both

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[112] For an overview of the historical origins of international investment law, see KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 17 – 122 (2013) (discussing the international legal developments in investment law beginning over the course of the 17th to mid-20th centuries); *see also* SORNARAJAH, *supra* note 28, at 19 – 44 (outlining the history of foreign investment law in the colonial and the post-colonial period); *see also* NEWCOMBE & PARADELL, *supra* note 39, at 1 – 57 (explaining how the origins of international investment law show a continuous pattern of restraint and resistance through law).

[113] *See* NEWCOMBE & PARADELL, *supra* note 39, at 65 – 74 (outlining the scope and structure of IIAs); *see also* SORNARAJAH, *supra* note 28, at 201 – 205, 276 – 305 (explaining the use of contract-based arbitration in the settlement of investment disputes).

[114] *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation Of Bilateral Investment Treaties And Their Grand Bargain,* 46 HARV. INT'L. L. J. 67, 77 (2005) (stating that a BIT between a developed and a developing country is founded on a grand bargain: a *promise* of protection of capital in return for the *prospect* of more capital in the future).

[115] U.N. CONFERENCE ON TRADE AND DEVELOPMENT, The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries (2009) (reviewing a number of econometric studies that explore the impact of IIAs on investment inflows). For this reason, creating "favourable conditions for investment" is typically the first listed object or purpose of IIAs. *See e.g.*, Agreement for the Promotion and Protection of Investments, U.K.-India, Mar. 14, 1994, 34 I.L.M. 935 ("Desiring to create conditions favorable for fostering greater investment by investors…"); *see also* Agreement Between the Government of the People's Republic of China and the Belgian-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments, China- Belg./Lux., June 4, 1984, UNCTAD, http://investmentpolicyhub.unctad.org/Download/TreatyFile/340 ("Desiring to develop economic cooperation…").

[116] *E.g.*, Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 434 –

capital importers *and* exporters.[117] Modern IIAs therefore reflect state interest in concluding these treaties to both grant protection to their investors when acting abroad, as well as attract foreign investment into their territory in order to foster their country's economic development.[118]

Despite the 'spaghetti bowl'[119] phenomenon of IIAs, with treaties often bearing inconsistent or overlapping provisions, IIAs tend to bear a number of similar features. Most treaties begin with a preamble that references the contexts within which the treaty is being concluded. Preambular language generally includes references to desiring the promotion of "greater economic cooperation" between the contracting states,[120] creating "favorable conditions" for investment,[121] and recognizing that a favorable treatment of investment will stimulate economic development or the prosperity of

39 (2011) (explaining how BITs at best "spur investment only irregularly, inconsistently, and with generally unassuming impact"); *see also* Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only A Bit…And They Could Bite* (World Bank, Policy Research, Working Paper No. WPS 3121, 2003) ("Analyzing twenty years of bilateral FDI flows from the OECD to developing countries finds little evidence that BITs have stimulated additional investment."). There are, however, conflicting views on the ability of IIAs to attract foreign investment. For a thorough compilation on both points of view, see KARL P. SAUVANT & LISA E. SACHS, THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (2009).

117 *See generally* U.N. Conf. on Trade & Dev., *South-South Investment Agreements Proliferating, IIA Monitor No. 1*, UNCTAD (2005) [hereinafter UNCTAD South-South Investment Agreements].

118 *See, e.g.*, OECD, FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: MAXIMISING BENEFITS, MINIMISING COSTS 3 (2002) (noting "Foreign direct investment is … a major catalyst to development"); *see also* UNCTAD South-South Investment Agreements, *supra* note 117, at 1 (noting that South-South investment agreements represent one aspect of cooperation within the developing world aimed at achieving development goals).

119 Jose E. Alvarez, *The Once and Future Foreign Investment Regime* in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 607, 635 (Mahnoush H. Arsanjani et al. eds., 2010).

120 U.S.-Arg. Investment Treaty, *supra* note 110, at pmbl.; Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Can.-China, Sept. 9, 2012, Glob. Affairs Dep't. of Can.

121 Agreement Between The Government Of The United Kingdom Of Great Britain And Northern Ireland And The Government Of The Republic Of Mozambique For The Promotion And Protection Of Investments, Mozam.-U.K., Mar. 18, 2004, UNCTAD; Bilateral Investment Treaty between The Government of the People's Republic of China and the Government of the Republic of Benin, Benin-China, Feb. 18, 2004, UNCTAD.

the parties.[122] It may also contain references to the importance of strengthening economic relations, or even bonds of friendship between the states,[123] and may confirm the importance of economic or sustainable development.[124] After the preamble, some treaties outline the objectives of the treaty.[125] Thus, some treaties specify the treaty's objective as being the promotion of an "attractive investment climate"[126] whereas others reference objectives such as dismantling trade barriers, promoting competition in markets, and protecting intellectual property rights.[127]

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[122] *See, e.g.*, Agreement between the Swiss Confederation and the Republic of Trinidad and Tobago on the Promotion and Reciprocal Protection of Investments, Switz.-Trin. & Tobago, Oct. 26, 2010, Caribbean Elections ("Desiring to intensify economic cooperation to the mutual benefit of both States"); *see also* Treaty Between the United States of America and The Czech And Slovak Federal Republic Concerning The Reciprocal Encouragement And Protection Of Investment, Czech-U.S., Oct. 22, 1991, U.S. Dep't. of State ("Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party . . . "); *see also* Agreement Between The Government Of The Republic Of Mauritius And The Government Of The Arab Republic Of Egypt On The Reciprocal Promotion And Protection of Investments, Egypt-Mauritius, Aug. 28, 2014, UNCTAD ("Desiring to intensify economic cooperation to the mutual benefit of both Contracting Parties").

[123] *See, e.g.*, Free Trade Agreement Between The Swiss Confederation and The People's Republic Of China, China-Switz., July 6, 2013, Swiss Fed. Institute of Intellectual Prop. ("Committed to strengthening the bonds of friendship and collaboration between the Parties by establishing and deepening close and lasting relations.").

[124] *See, e.g.*, Free Trade Agreement between the European Union and its Member States and the Republic of Korea, E.U.-S. Kor., Sept. 16, 2010, Official Journal of the Eur. Union ("[T]o contribute, by removing barriers to trade and by developing an environment conducive to increased investment flows, to the harmonious development and expansion of world trade") [hereinafter EU-Korea FTA]; *see also* Agreement Establishing The Free Trade Area between the Caribbean Community And The Dominican Republic, CARICOM-Dom. Rep., Aug. 22, 1998, Org. of the Americas ("Considering the urgent need to broaden the markets of the Parties in order to achieve the economies of scale that will support better levels of efficiency, productivity and competitiveness").

[125] This is more common in free trade agreements and trade and investment framework agreements. Bilateral investment treaties tend not to explicitly define objectives.

[126] *E.g.*, Trade and Investment Framework Agreement between the United States of America and Myanmar, Myan.-U.S., May 21, 2013, UNCTAD; Investment Agreement for the COMESA Common Investment Area, May 23, 2007, TRALAC; Trade and Investment Framework Agreement between the United States of America and the Oriental Republic of Uruguay, Uru.-U.S., Jan. 25, 2007, Official J. of the E.U.

[127] *E.g.*, Free Trade Agreement between People's Republic of China and the Government of the Republic of Costa Rica, China-Costa Rica, Apr. 8, 2011,

IIAs then move to define the concept of investment–which is generally done widely by specifying that investments include "every kind of asset owned or controlled, directly or indirectly, by an investor"[128]–and investors, among other key terms. The agreements further oblige states to promote or encourage the creation of favorable conditions for investments in their territory.[129] Some agreements also couple promotion or encouragement obligations with admission obligations that require states to admit the investors and investments that they have encouraged, to invest in accordance with the standards in the agreement.[130] These types of provisions require states to accord national treatment, or most-favored nation treatment, in relation to the admission or establishment of investments.[131]

Because investor protection is such a large component of IIAs, a significant portion of the treaties are devoted to outlining the substantive protections accorded to investors and investments. Generally, the four most consistently found standards of protection in these treaties are national treatment, most-favored nation treat-

UNCTAD (stating objectives such as facilitating trade in goods and services, ensuring the effective protection of intellectual property rights amongst others); *see also* EU-Korea FTA, *supra* note 124, at art. 1.1(2) (establishing objectives such as to liberalize and facilitate trade in goods and services, to promote competition, to remove barriers, amongst others).

128 *E.g.*, Agreement between Japan and Ukraine for the Promotion and Protection of Investment, Japan-Ukr., Feb. 5, 2015, Ministry of Foreign Affairs of Japan; Agreement Between The Government Of The Republic Of Croatia And The Government Of Canada For The Promotion And Protection Of Investments, Can.-Croat., Feb. 3, 1997, UNCTAD.

129 *E.g.*, Agreement between the Government of Canada and the Government of the Republic of Côte d`Ivoire for the Promotion and Protection of Investments, Can.-Côte d'Ivoire, Nov. 30, 2014, Global Affairs Can. [hereinafter Can.-Côte d'Ivoire Bilateral Investment Treaty]; Agreement between the Government of the State of Israel and the Government of the Republic of the Union of Myanmar for the Reciprocal Promotion and Protection of Investments, Isr.-Myan., Oct. 5, 2014, Dir. of Inv. and Co. Admin.

130 *See, e.g.*, Can.-Côte d'Ivoire Bilateral Investment Treaty, *supra* note 129, at art. 3 ("Each Party shall encourage the creation of favourable conditions for investment in its territory by investors of the other Party and shall admit those investments in accordance with the provisions of this Agreement"). *See also* North American Free Trade Agreement, art. 1102, Dec. 17, 1992, 32 I.L.M. 289 (1993), Can. T.S. 1994 No. 2 [hereinafter NAFTA] ("Each Party shall accord to investors of another Party treatment no less favorable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.").

131 NEWCOMBE & PARADELL, *supra* note 39, at 134.

ment, fair and equitable treatment, and prohibitions on expropriation.[132] National treatment prohibits states from discriminating against foreign investors by obliging them to treat foreign investors and investments no less favorably than domestic investors or investments.[133] Most–favored nation treatment also prohibits discriminatory treatment, but it measures the standard of treatment against investors from third party or non-party states.[134] Thus, states must accord any advantages they accord to investors from third party or non–party states to foreign investors from the contracting state.

Another common standard of treatment found in IIAs is the requirement to accord "fair and equitable treatment."[135] Pursuant to this requirement, states must accord investors a minimum standard of treatment, generally the standard required by international law, regardless of the standard of treatment it accords to its domestic investors.[136] In many treaties, the requirement is undefined allowing this standard of treatment to receive varying interpretations.[137] Fair and equitable treatment requirements are also often coupled with the requirement to accord investors and investments "full protection and security."[138]

Finally, IIAs prohibit states from expropriating investments

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[132] *E.g.*, 2012 U.S. Model Bilateral Investment Treaty, art. 3–6, 2012, U.S. Dep't of State [hereinafter 2012 U.S. Model BIT].

[133] *E.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Hond.-U.S., July 1, 1995, S. Treaty Doc. No. 106-27; NAFTA, *supra* note 130, at art. 1102.

[134] *E.g.*, Agreement between the Swedish Government and the Macedonian Government on the Promotion and Reciprocal Protection of Investments, Maced.-Swed., May 7, 1998, UNCTAD; NAFTA, *supra* note 130, at art. 1103.

[135] *E.g.*, NAFTA, *supra* note 130, at art. 1105; Treaty between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments, Turk.-U.S., Dec. 3, 1985, S. Treaty Doc. 99-19.

[136] *See, e.g.*, SORNARAJAH, *supra* note 28, at 204 (discussing the evolution of the fair and equitable treatment standard in international law). There is a debate as to whether the minimum standard or an autonomous standard is the standard under international law. *See Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD, at 21 (2012) [hereinafter *UNCTAD Fair and Equitable Treatment*].

[137] SORNARAJAH, *supra* note 28, at 345-46; *UNCTAD Fair and Equitable Treatment*, *supra* note 136, at xiii, 1.

[138] *See* NEWCOMBE & PARADELL, *supra* note 39, at 233–34, 306–309 (explaining the common IIA practice regarding protection and security obligations).

without compensation.[139] This prevents states from engaging in both physical takings or depriving foreign investors from being able to use or control their property.[140]

Besides the standards of treatment, IIAs generally include a dispute resolution mechanism, known as investment arbitration, which is designed to resolve investment-related disputes.[141] Investment arbitration permits foreign investors to initiate claims against the host state for breaches of the treaty clauses and have these disputes resolved by international arbitrators.[142] If the state is shown to have breached one or more of the treaty provisions, the state is obliged to compensate the investor for any losses incurred.[143]

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[139] *E.g.*, Agreement between the Government of The Republic of Guatemala And The Government Of The Russian Federation On Promotion And Reciprocal Protection Of Investments, Guat.-Russ., Nov. 27, 2013, UNCTAD; Agreement Between The Republic Of Serbia And The Kingdom Of Morocco On The Reciprocal Promotion And Protection Of Investments, Morocco-Serb., June 6, 2013, UNCTAD.

[140] *See, e.g.*, UNCTAD, EXPROPRIATION: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II (2012) [hereinafter *UNCTAD Expropriation*] (examining indirect takings and other core concepts of expropriation); *see also Indirect Expropriation" and the "Right To Regulate" in International Investment Law* 2–4, OECD, (Working Papers on Int'l Inv., No. 2004/4, 2004) (describing growing concerns with indirect expropriation).

[141] *E.g.*, Agreement between Japan and Ukraine for the Promotion and Protection of Investment, Japan-Ukr., Feb. 5, 2015, UNCTAD; EU-Korea FTA, *supra* note 124, at art. 14.4 - 14.7; Treaty Between The Government Of The United States Of America And The Government Of The Republic Of Rwanda Concerning The Encouragement And Reciprocal Protection Of Investment, Rwanda-U.S., Feb. 19, 2008, U.S. Dep't. of State.

[142] *See* NEWCOMBE & PARADELL, *supra* note 39, at 70 (explaining how most IIAs provide investors the remedy of arbitration when disputes arise from treaty breaches); *see also* SORNARAJAH, *supra* note 28, at 276–305 ("An arbitration clause is included in the contract so as to allow the choice of a neutral forum for the settlement of disputes which arise from the agreement."). *See generally* CAMPBELL MCLACHLAN et al., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2008) (tracing the history and functioning of investment arbitration).

[143] *See generally* BORZU SABAHI, COMPENSATION AND RESTITUTION IN INVESTOR–STATE ARBITRATION: PRINCIPLES AND PRACTICE 91–102 (2011) (detailing how the remedy of compensation works in investment arbitration).

4.2. Parallels between Business and Human Rights and Investment and Human Rights Issues

One of the reasons international investment law is ripe for accommodating BHR issues is because, in many ways, the BHR agenda parallels many of the issues that have plagued IIAs. In a number of instances, investment arbitrations have highlighted ways in which human rights issues can become enmeshed with business issues. Investment disputes have demonstrated that business operations can implicate human rights such as the right to water,[144] the right to health,[145] equality rights,[146] and indigenous rights.[147] Indeed, these intersections have been so instrumental at times that it has increasingly been accepted that human rights issues should be addressed both within the substance of IIAs as well as in the investment arbitration process itself.[148]

One very recent illustration of the reflection of the BHR agenda in international investment law was the dispute between Philip

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144 *E.g.*, SAUR Int'l S.A. v. Arg., ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liab. (June 6, 2012), Award (May 22, 2014); EDF Int'l S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award (June 11, 2012); Biwater Gauff (Tanzania) Ltd v. United Republic of Tanz., ICSID Case No. ARB/05/22, Award (July 24, 2008); Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006); Compañía de Aguas del Aconquija S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award (Nov. 10, 2000).

145 *E.g.*, Técnicas Medioambientales Tecmed, S.A. v. United Mex. States, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003); Methanex Corp. v. United States, UNCITRAL, NAFTA Investor-State Arbitration, Final Award (Aug. 3, 2005).

146 *E.g.*, Foresti v. Republic of S. Afr., ICSID Case No. ARB/(AF)/07/1, Award (Aug. 4, 2010).

147 Glamis Gold, Ltd. v. United States, UNCITRAL, NAFTA Ch. 11 Arb. Trib., Award (June 8, 2009); Border Timbers Limited v. Republic of Zim., ICSID Case No. ARB/10/25 (Dec. 20, 2010); Bernhard von Pezold v. Republic of Zim. ICSID Case No. ARB/10/15 (July 8, 2010).

148 *E.g.*, HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre-Marie Dupuy et al. eds., 2009) (providing a systematic analysis of the interaction between international investment law, investment arbitration, and human rights,); *see also* Eric De Brabandere, *Human Rights Considerations in International Investment Arbitration*, *in* THE INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS: LEGAL AND PRACTICAL IMPLICATIONS 183, 215 (Malgosia Fitzmaurice & Panos Merkouris eds., 2012) (explaining that it is the host state who is obligated to ensure respect for human rights in its territory, and that respecting investment agreements can lead to violations of human rights obligations, specially in the areas of the rights to water and health).

Morris and Uruguay.[149] In 2010, tobacco company Philip Morris instigated an investment arbitration against the Government of Uruguay, arguing that its anti-smoking regulations violate Uruguay's investment treaty obligations. In particular, Philip Morris argued that Uruguay's regulations requiring that tobacco packaging contain large health warnings of the risks of smoking and graphic pictures depicting the negative health effects associated with smoking destroy the goodwill associated with the company's trademarks. It further contended that requirements to sell only a single line of tobacco products decrease sales. Philip Morris sought to have Uruguay's anti-smoking regulations suspended as well as damages in the amount of US$25M, although the tribunal eventually rejected the company's claims.[150]

Until recently, Philip Morris had been pursuing a similar investment arbitration against Australia in which it challenged Australia's public health laws relating to anti-smoking.[151] However, in December 2015 the dispute was dismissed on jurisdictional grounds.[152]

The Philip Morris investment arbitrations against Uruguay and Australia have re-emphasized the impact that international investment law can have on public health issues. From an international investment law perspective, the concern has focused on a state's regulatory abilities to promote public health objectives in light of its investment treaty obligations. For that reason, the new *Trans-Pacific Partnership* specifically allows states to deny investors

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149 Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7 (Mar. 25, 2010).

150 Bob Violino, *An Uruguayan Lawsuit With International Implications For Philip Morris*, FORBES (Sep. 22, 2014) http://www.forbes.com/sites/greatspeculations/2014/09/22/an-uruguayan-lawsuit-with-international-implications-for-philip-morris/ [https://perma.cc/2VDR-7F3U]; Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award (Jul. 8, 2016).

151 Philip Morris Asia Ltd. v. The Commonwealth of Austl., UNCITRAL, PCA Case No. 2012–12 (2011). There are 3 documents from 2011, the Notice of Claim, Notice of Arbitration and Australia's response. We need to know which one it is to provide the exact date and include what the document is about as per Rule 21.6.

152 The award dismissing the case is confidential, but Philip Morris released a press release confirming the dismissal. Press Release, *Philip Morris Asia Ltd. Comments on Tribunal's Decision to Decline Jurisdiction in Arbitration Against Commonwealth of Australia Over Plain Packaging*, PHILIP MORRIS INT'L. (Dec. 17, 2015), http://investors.pmi.com/phoenix.zhtml?c=146476&p=irol-newsArticle&ID=2123843# [https://perma.cc/VLP5-FJG7].

the use of investment arbitration for tobacco control measures in order to ensure full regulatory control in this area.[153]

Yet, the Philip Morris investment arbitrations also highlight many of the complexities prevalent in the BHR community. Not only do the arbitrations represent clear clashes between corporate and human rights objectives, but they emphasize the lack of a strong governance framework that delineates the obligations of corporate responsibility vis-à-vis human rights. Particularly in the case of the Uruguay, they also highlight the power differentials that may exist between multinational corporations and states, which make it difficult for the latter to protect human rights. More importantly, both arbitrations demonstrate that investment treaty obligations may be used by corporations as a tool by which to strengthen their power—against even strong states like Australia—to weaken state ability to protect human rights.

4.3. Reconfiguring IIAs to Incorporate BHR Issues

Given the growing recognition of the importance of human rights issues in international investment and trade law, this recognition should be used as a base upon which the scope of business' human rights obligations can be built upon and broadened. Not only are there numerous avenues to insert human rights considerations into IIAs, but a reconfigured IIA can also meet many of the BHR treaty proponents' goals.

4.3.1. Using IIAs to meet BHR treaty goals

A reconfigured IIA has the potential to meet many of the BHR treaty proponents' goals. For one, a reconfigured IIA can help address some of the governance gaps that BHR treaty proponents argue have been left as a result of the Guiding Principles. While states may be unwilling to enact or enforce corresponding domestic legislation that implements the Guiding Principles, if they become party to an IIA that contains human rights obligations, they will be automatically beholden to these obligations in the context

[153] Trans-Pacific Partnership, art. 29.5, Nov. 5, 2015, Office of the U.S. Trade Representative.

of foreign investment.[154] Moreover, to the extent that less powerful states are the ones reluctant to implement the Guiding Principles, using IIAs to impose human rights obligations on these states may be fruitful since there has been a marked interest by the more 'powerful' states in increasing human rights considerations in IIAs and they may dominate the IIA negotiation process, particularly with 'weaker' states.[155]

Second, reconfiguring IIAs would meet BHR treaty proponents' aims for transforming human rights obligations of business into binding, or 'hard,' law. As commentators have noted, IIAs and investment arbitrations are one of the most prominent sources of enforceable hard law for businesses.[156] Consequently, inserting human rights obligations of business into these treaties 'hardens' the obligations as well and reinforces their importance alongside state obligations to investors.

Finally, BHR treaty proponents have cited the need for access to effective remedies for human rights victims as a reason to enact a BHR treaty. IIAs offer one of the most robust vehicles from which an effective remedy can be sought–investment arbitration. Unlike many other areas of international law, investment arbitration provides an easily accessible avenue through which IIA obligations can be enforced and which provides monetary compensation for failure to abide by those obligations.[157] While at present, investment arbitration mainly acts as a vehicle by which corporations and other investors can seek remedies, a reconfigured IIA could provide access to remedies for more than just investors.

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[154] This is because the human rights obligations will be part of the treaty obligations to which they must adhere.

[155] *See, e.g.*, 2012 U.S. Model BIT, *supra* note 132; Canada's 2004 Model Foreign Investment and Protection Agreement, both of which detail a number of human rights provisions. On the uneven bargaining power between states, see Philip De Man & Jan Wouters, *Improving The Framework Of Negotiations On International Investment Agreements*, 19 (Leuven Ctr. For Glob. Governance Stud., Working Paper No. 84, 2012) ("[T]he noted asymmetry in bargaining power between developed and developing countries is arguably greater in a bilateral setting . . . which might explain why weaker States have signed into heavily one-sided BITs . . . ").

[156] *E.g.*, JAN KLABBERS et al., THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 215 (2009).

[157] For a good overview of the investment arbitration process, see Barton Legum, *An Overview of Procedure in an Investment Treaty Arbitration*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 91 (Katia Yannaca-Small ed., 2010).

4.3.2. Adopting the BHR Agenda for IIAs

The avenues by which the BHR agenda can be adopted by IIAs are numerous. Human rights observance can be included during the initial drafting of the treaties or by revoking an existing treaty right before it is set to expire.[158] In addition, IIAs can be terminated at any time with the consent of all the treaty parties[159] and some IIAs can also be terminated unilaterally at any time after an initial term of the treaty has been completed.[160] Termination can, thus, provide further opportunities to redraft IIAs to include human rights provisions. Moreover, UNCTAD reports that opportunities to revoke IIAs before expiration or to terminate them unilaterally at any time are increasing and expects around 1600 treaties to be able to be renegotiated by the end of 2018.[161] Consequently, the time for inserting human rights provisions into IIAs is ripe.

In fact, there are a number of different avenues by which human rights provisions can be inserted into IIAs. These include the use of preambles or objectives, substantive obligations, human rights chapters and alternative remedies.

Preambles/Objectives

Preambles referencing BHR issues is one method by which human rights considerations by businesses can be inserted into IIAs and influence their interpretation. The importance of preambular language has been underscored in previous investment disputes where investment arbitral tribunals have specifically noted the importance of interpreting standards of treatment in IIAs by reference to the treaties' objects and purpose, which is arguably ascertained from the preamble.[162] Consequently, inserting state-

158 UNCTAD, *International Investment Policymaking In Transition: Challenges And Opportunities Of Treaty Renewal IIA*, *Issues Note No. 4*, at 3 (2013) [hereinafter UNCTAD International Investment Policymaking In Transition].

159 *E.g.*, Vienna Convention Law of Treaties, art. 54(b), May 23, 1969, 1155 U.N.T.S. 331.

160 UNCTAD International Investment Policymaking In Transition, *supra* note 158, at 3.

161 *Id.* at 4.

162 *See, e.g.*, Siemens A.G. v. The Arg. Republic, ICSID Case No. ARB/02/6, Decision on Jurisdiction, ¶ 81 (Aug. 3, 2004) ("The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble . . ."). *See also* Lauder

ments that recognize the importance of human rights, and specifically corporate responsibility for the protection of human rights, is pertinent.

Preambles of IIAs could include language such as recognition of: the importance of corporate social responsibility,[163] the need to realize investment objectives "without relaxing health, safety and environmental measures,"[164] the importance of "internationally recognized labor rights,"[165] the undertakings in the United Nations Convention against Corruption,[166] and the fact that the protection and promotion of investment fosters sustainable development.[167] Furthermore, preambles could acknowledge the importance of good corporate governance as well as affirm the need to require corporations to observe internationally recognized standards of good corporate conduct.[168]

Preambles could also be used to signal the context within which IIAs are being concluded. Thus, they could refer to the im-

v. Czech Republic, UNCITRAL, Final Award, ¶ 292 (Sept. 3, 2001) (defining "fair and equitable treatments" by using the treaty as a starting point); Continental Cas. Co. v. The Arg. Republic, ICSID Case No. ARB/03/9, Decision on Jurisdiction, ¶ 80 (Feb. 22 2006) (relying on the treaty for the purposes of interpretation); Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, ¶ 299 – 300 (Mar. 17, 2006) (examining the purpose of the treaty).

163 *See, e.g.*, Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, Can.-Burk. Faso, Apr. 20, 2015, Glob. Affairs Can., [hereinafter Canada-Burk. Faso BIT] (noting internationally recognized standards of corporate social responsibility).

164 *E.g.*, Agreement between Japan and Ukraine for the Promotion and Protection of Investment, Japan-Ukr., Feb. 5, 2015, Ministry of Foreign Affairs; Agreement between the Government of The Republic of Colombia and the Government of The Republic of Turkey Concerning Reciprocal Promotion and Protection of Investments, Colom.-Turk, July 28, 2014, UNCTAD.

165 *E.g.*, Treaty between he Government of The United State of America and the Government of The Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, Feb 19, 2008, USTR; Agreement between The Republic of Guatemala and The Republic of Trinidad and Tobago on the Reciprocal Promotion and Protection of Investments, Guat.-Trin. & Tobago, Aug. 13 2013, UNCTAD.

166 Canada-Burk. Faso BIT, *supra* note 163, at pmbl.

167 *Id.* ("Understanding that investment is a form of sustainable development that . . . is critical for the future of national and global economies as well as for the pursuit of national and global objectives for development").

168 *See, e.g.*, Free Trade Agreement, EFTA States-Montenegro, pmbl., Nov. 14, 2011, EFTA ("Acknowledging the importance of good corporate governance and corporate social responsibility for sustainable development, and affirming their aim to encourage enterprises to observe internationally recognised guidelines and principles in this respect . . . ").

portance of continuing to strengthen and promote human rights[169] or reference the promotion of "sustainable development" as an aligned objective of foreign investment.[170] These contextual identifiers could be used to demonstrate the importance of human rights or sustainable development even in a trade or investment context.

In addition, any of the preamble language previously identified could also be formally used to signal the objectives of an IIA for those agreements that specify their aims or objectives, a common practice in free trade agreements (FTAs).[171] For instance, the *EFTA-Bosnia and Herzegovina FTA* notes that the treaty's objectives are based on the respect of human rights and the furtherance of trade "in such a way as to contribute to the objective of sustainable development."[172] Given the importance tribunals have given to interpreting standards of treatment in light of their object and purpose, specifying human rights respect or protection, or similar language, in the objectives of the treaty ensures that the interpretation of other indeterminately worded treaty provisions are interpreted in line with human rights goals.[173]

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169 *See* Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the One Part, and Georgia of the Other, EU-Geor., Aug 30, 2014, O.J. (L 261) 4 [hereinafter EU-Geor. Association Agreement] (stating the commitment of the parties "to further strengthening respect for fundamental freedoms, human rights, including the rights of persons belonging to minorities, democratic principles, the rule of law, and good governance, based on common values of the Parties"); *see also* Free Trade Agreement, EFTA States-Bosn. & Herz., June 24, 2013, EFTA [hereinafter EFTA-Bosn. & Herz. FTA] ("[r]eaffirming their commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including as set out in the United Nations Charter and the Universal Declaration of Human Rights"); *see also* Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Federal Republic of Nigeria, Austria-Nigeria, pmbl., Aug. 4, 2013, UNCTAD (referring to the international obligations and commitments concerning respect for human rights).

170 Model Text for the Indian Bilateral Investment Treaty, pmbl., Mar. 2015 [hereinafter India Model BIT].

171 *See, e.g.*, EU-Geor. Association Agreement, *supra* note 169, at art. 1 (outlining the objectives of the agreement); *see also* EFTA-Bosn. & Herz. FTA, *supra* note 169, at art. 1 (discussing the objectives of the FTA).

172 EFTA-Bosn. & Herz. FTA, *supra* note 169, at art. 1.

173 Treaties should be interpreted in good faith in accordance with the treaty terms' ordinary meanings and in light of their object and purpose. Vienna Convention Law of Treaties art. 31(1), May 23, 1969, 1115 U.N.T.S. 18232. *See also* JONATHAN BONNITCHA, SUBSTANTIVE PROTECTION UNDER INVESTMENT TREATIES: A LEGAL AND ECONOMIC ANALYSIS 351 (James Crawford & John S. Bell eds., 2014) (describing the background of the object and purpose provision).

Substantive Obligations

A second avenue by which human rights observance by businesses can be inserted into IIAs is by specifying substantive obligations for investors that align with human rights protection. For instance, several IIAs now include provisions entitled "Corporate Social Responsibility."[174] These provisions range in content from requiring the treaty parties to promote the concept of corporate social responsibility to obliging treaty parties to encourage corporations to incorporate internationally recognized standards of corporate social responsibility in their practices and policies.[175] While these provisions are directed at states–making them responsible for controlling corporate conduct–the Brazil-Malawi IIA imposes corporate social responsibility obligations on the investors themselves. Thus, the IIA requires investors to develop "best efforts" to, among other obligations, respect the human rights of those involved in the companies' activities, stimulate economic, social, and environmental progress, create employment opportunities and facilitate access of workers to professional training, and develop and apply effective self-regulatory practices and management systems that foster trust between companies and society.[176]

The Brazil-Malawi IIA presents an interesting template for imposing human rights obligations directly on investors. While the list of human rights obligations for investors is far from complete, it provides a good starting point by listing human rights obligations relating to the protection of dignity, labor rights, and environmental rights. Moreover, imposing human rights-related obligations on investors on a 'best efforts' basis is a pragmatic compromise between those who may not want to impose any obli-

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[174] *E.g.*, Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi, Braz.-Malawi, June 25, 2015, UNCTAD, [hereinafter Brazil-Malawi BIT]; Canada-Burk. Faso BIT, *supra* note 163, at art. 16; Norway Model BIT, art. 31, May 2015; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the Other Part, EU-Mold., Aug. 30, 2014, 2014 O.J. (L260) 4 [hereinafter EU-Mold. Association Agreement]; Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the Other Part, art. 196, Oct. 30, 2008, 2008 O.J. (L 289/I) 3 [hereinafter CARIFORUM-EU Economic Partnership Agreement].

[175] EU-Mold. Association Agreement, *supra* note 174; Canada-Burkina Faso BIT, *supra* note 163.

[176] Brazil-Malawi BIT, *supra* note 174, at art. 9.

gations on investors and those who want to impose more. A 'best efforts' approach requires investors to take reasonable efforts to pursue an aim, but does not necessarily require them to achieve it.[177] Thus, it imposes positive duties on investors to actively seek to engage in fostering human rights but evaluates their efforts in doing so, not their results. This compromise may be essential to garnering corporate support for these types of provisions in IIAs.

However, for IIA treaty parties more ambitious than Brazil and Malawi, human rights obligations for investors could be made mandatory without a "best efforts" caveat. Thus, investors and their investment could be *required* to respect human rights; stimulate economic, social and environmental progress; create employment opportunities, etc. Alternatively, as UNCTAD has suggested, investors' mandatory obligations could be passive in nature, such as a requirement to refrain from "activity that would violate human or labour rights, damage the environment, or constitute corruption."[178]

In terms of which human rights should form the catalogue of rights in the IIAs, it may be prudent to draw from areas of international law with a significant amount of state consensus on these issues in order to bolster state support. Thus, rights should be drawn from the Universal Declaration of Human Rights,[179] the United Nations International Covenant on Civil and Political Rights,[180] the ILO Declaration on Fundamental Principles and Rights at Work ("ILO"),[181] and the United Nations Framework Convention on Climate Change, each of which has significant state support.[182] While not all of the rights from each of these treaties would be appropriate to include, to the extent that the treaty right reflects customary international law[183] it should arguably be in-

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[177] *See generally* Duncan French & Tim Stephens, *Due Diligence in International Law*, INT'L. L. ASSOC., Mar. 7, 2014, at 10-11 (discussing the due diligence obligations of foreign investors in international law).

[178] *Development Implications of International Investment Agreements*, *IIA Monitor No. 2*, at 6, UNCTAD (2007).

[179] Universal Declaration of Human Rights, *supra* note 31.

[180] International Covenant on Civil and Political Rights, *supra* note 32.

[181] ILO *Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, adopted on June 18, 1998, ILO (annex revised on June 15, 2010).

[182] *The Ten Principles of the UN Global Compact,* UN Global Compact, https://www.unglobalcompact.org/what-is-gc/mission/principles [https://perma.cc/5DAH-PXQJ] (last viewed on Oct. 28, 2016).

[183] The rights espoused in the Universal Declaration of Human Rights are

cluded as its universal nature is more likely to find support from states. Support for these types of rights should also be more forthcoming from corporations since the UN Global Compact, which enjoys strong corporate support, similarly draws its principles from the Universal Declaration of Human Rights, the ILO, and from international environmental law.[184]

In addition to requiring investors to adhere to human rights obligations, human rights obligations can further be imposed on investors *prior* to establishing their investment.[185] Thus, states can condition establishment of an investment into their territory on the completion of a human rights impact assessment[186] or an environmental impact assessment.[187] Impact assessments enable investors

viewed as customary international law, while only certain rights from the International Covenant on Civil and Political Rights (such as the right to life, the right to be free from torture, the prohibition on slavery, etc.) and from the ILO (such as the prohibition against systemic racial discrimination; prolonged arbitrary detention, etc.) are viewed that way. In international environmental law, the duty to prevent, reduce and control the risk of environmental harm to other states as well as the precautionary principle are, among other principles, considered custom. *See* Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19.5 EUR. J. INT'L. L. 903, 913 (2008) (discussing customary international law in the Universal Declaration of Human Rights); *see also* UN Human Rights Committee, *General Comment No. 24: Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) (discussing customary international law in the context of reservations); *see also* SIOBHAN MCINERNEY-LANKFORD, et al., HUMAN RIGHTS AND CLIMATE CHANGE: A REVIEW OF THE INTERNATIONAL LEGAL DIMENSIONS 22 (2011) (acknowledging that the UDHR contains principles that could serve as customary international law); PHILLIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 116 (3rd ed. 2012); WORKERS' RIGHTS AS HUMAN RIGHTS 121 (James A. Gross, ed., 2003) (2006);.

184 *See The Ten Principles of the UN Global Compact*, UN Global Compact, https://www.unglobalcompact.org/what-is-gc/mission/principles [https://perma.cc/KN8W-AEC8] (last visited Oct. 28, 2016).

185 *See, e.g.*, J. ANTHONY VAN DUZER et al., INTEGRATING SUSTAINABLE DEVELOPMENT INTO INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE FOR DEVELOPING COUNTRY NEGOTIATORS 104 – 110 (2013) (discussing establishment options for IIAs).

186 UN, HUMAN RIGHTS TRANSLATED: A BUSINESS REFERENCE GUIDE, xvii (2008) [hereinafter UN, HUMAN RIGHTS TRANSLATED] (defining human rights impact assessment). *See also* Desiree Abrahams & Yann Wyss, *Guide to Human Rights Impact Assessment and Management*, INT'L BUS. LEADERS FORUM AND INT'L FIN. CORP., (2010) (providing an extensive guide to conducting and evaluating human rights impact assessments).

187 *See* Arianna Broggiato, *Exploration and Exploitation of Marine Genetic Resources in Areas Beyond National Jurisdiction and Environmental Impact Assessment,* 4

to identify, and to respond to, potential human rights or environmental impacts of the business activities prior to establishing their investment.[188] Consequently, completing an impact assessment can enable investors to proactively minimize human rights or environmental problems.

Human Rights Chapter

An alternative practice for increasing BHR content in IIAs would be to add a human rights chapter, akin to specialized labor or environment chapters that appear in modern FTAs.[189] This chapter could be used to delineate states' commitments to the major international human rights treaties, outline areas in which BHR issues can be cooperated on and promoted by the state parties,[190] as well as specify BHR obligations relating to trade and investment. A human rights chapter could further require state parties to adopt, into their domestic laws, certain BHR obligations. Thus, states could be mandated or encouraged to ensure that their domestic laws and policies provide for, and encourage, high levels of corporate respect for human rights[191] or be required to adopt regu-

EUR. J. RISK REG. 247, note 12 (2013) (discussing issues related to ordering an environmental impact assessment); *see also* Erika L. Preiss, *The International Obligation to Conduct an Environmental Impact Assessment: The ICJ Case Concerning the Gabcikovo-Nagymaros Project*, 7 N.Y.U. ENVTL. L.J. 307, 310 (1999) (discussing the failure of the ICJ to order or mention an environmental impact assessment in its decision in the Gabcikovo-Nagymaros Project case).

[188] *Id.*; UN HUMAN RIGHTS TRANSLATED, *supra* note 186, at xvii.

[189] *See, e.g.*, TPP, *supra* note 153, at Ch. 19 (Labor) and Ch. 20 (Environment) (containing human rights chapter); The United States-Panama Trade Promotion Agreement, U.S.-Pan., June 28, 2007, Ch. 16 (Labor) and Ch. 17 (Environment) (discussing human rights in the context or labor and environmental issues); *see also* Free Trade Agreement, U.S.-Colom., Nov. 22, 2006, Ch.17 (Labor) and Ch. 18 (Environment) (incorporating human rights to labor and environmental matters); *see also* Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, Ch. 17 (Labor) and Ch. 18 (Environment) (introducing human right components in relation to labor and the environment).

[190] *See, e.g.*, EU Textual Proposal: Trade and Sustainable Development, EU-U.S. TTIP Negotiations, art. 20(4), Nov. 6, 2015, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf (discussing a cooperation requirement between the treaty parties in promoting corporate social responsibility).

[191] This is taken from the language in the Environment Chapter of the TPP, which states that "[e]ach Party shall strive to ensure that its environmental laws and policies provide for, and encourage, high levels of environmental protection and to continue to improve its respective levels of environmental protection." TPP, *supra* note 153, at art. 20.3.

lations governing corporate responsibility for human rights.[192] This would leave the onus on the state to self-determine which regulations are necessary for corporations to respect human rights or the scope of corporate responsibility.

Alternatively, parties could specify the precise obligations that states and corporations should bear in this regard, leaving less discretion to the individual state on the means of implementation. Thus, states could be required to adopt regulations which mandate that, for instance, corporations conduct due diligence on their supply chains, adopt codes of conduct, disclose their greenhouse gas emissions or conduct a human rights impact assessment for every corporate project over a certain financial threshold.

Remedies

Finally, as BHR treaty proponents are eager to improve access to remedies for human rights victims, a remodeling of the dispute settlement mechanism in IIAs could provide a solution. Currently, in many IIAs, investment arbitration only permits investors to initiate actions against the state for breaches of treaty standards. Nevertheless, the process of investment arbitration could be reconfigured to allow either individual claimants or states to pursue claims against the investor for failure to comply with the human rights obligations of the treaty. The award rendered could be in the form of monetary damages directly paid to the victims or paid out to the state, which would then be in charge of distributing the remedy.

Alternatively, breaches of the human rights obligations imposed on investors could be remedied in the courts of the home state of the investor. An early draft of the 2015 Indian Model BIT included a provision to this effect, stating that investors:

> [S]hall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State.[193]

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[192] This language is found in the TPP's Labor Chapter: "Each Party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." TPP, *supra* note 153, at art. 19.3(2).

[193] Model Text for the Indian Bilateral Investment Treaty, art. 13.1, March

This provision was followed by the requirement that the host state ensures that its laws allow for the adjudication of extra-territorial disputes.[194]

Moreover, breaches of human rights obligations can be adjudicated through investment arbitration by way of the state bringing a counter claim in an investment dispute initiated by the investor. The ICSID Convention already permits states to bring counterclaims connected to the subject-matter of the dispute and the recently negotiated Trans-Pacific Partnership Agreement (TPP) allows states to use counterclaims as a set off mechanism.[195] Thus, human rights issues stemming from the investment dispute in question are already subject to counterclaims and could be used as a set-off vehicle where the TPP is in question. However, the scope for counterclaims could be further expanded to enable states to initiate a counterclaim for breach of any human rights or related treaty provision without the requirement that it have a connection to the subject-matter of the dispute, a practice for which the TPP arguably acts as a precedent.[196]

Besides relying on investment arbitration, unique mechanisms for remedying human rights violations could be specified in the agreements themselves. For example, in the TPP's Environment chapter, parties are required to "ensure that judicial, quasi-judicial or administrative proceedings for the enforcement of its environmental laws are available under its law and that those proceedings are fair, equitable, transparent and comply with due process of law."[197] Thus, states are required, as part of the agreement's obligations, to have in place, or to create, proper judicial mechanisms to address environmental issues. An IIA could similarly contain

2015, [hereinafter India Model BIT]. The text of the Model BIT was revised in December 2015 and this provision was removed. Model Text for the Indian Bilateral Investment Treaty Annex.

194 India Model BIT, *supra* note 193, at art. 13.2. ("The Home State shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before their domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investments or Investors in relation to their Investments in the territory of the Host State."). This provision was also removed when the Model BIT was revised in December 2015.

195 ICSID Convention, art. 46; TPP, *supra* note 153, at art. 9.18(2).

196 An earlier version of the India Model BIT enabled states to bring counterclaims for a range of treaty breaches. *See* India Model BIT, *supra* note 193, at art. 14.11 (discussing counterclaims under the India Model BIT).

197 TPP, Environment Chapter, *supra* note 153, at art. 20.7(3).

language requiring states to have or to create judicial/quasi-judicial/administrative mechanisms to ensure that corporate human rights obligations are addressed.

Alternatively, remedies for corporate human rights violations could be addressed through a consultation process. The TPP's Labour chapter, for instance, provides that state parties may enter into consultations on any matter specified in the labour chapter, and if unable to resolve the matter through consultations, may seek the input of the Labour Council–composed of governmental representatives from each state party–for assistance in its resolution.[198] Similarly, an IIA could establish a Human Rights Council, composed of representatives from each state party, whose objective would include the development of practices and policies relating to BHR issues, and to have this Council resolve BHR issues–through conciliation or mediation–if state parties are unable to do so through consultations.

Beyond these reconfigurations of IIAs, there remain a host of possibilities of further inciting IIAs to align with human rights–including emphasizing the host state's ability to regulate,[199] carving out human rights issues from investment treaty obligations,[200] and relying on exception provisions,[201] among others.[202] Yet, because these possibilities do not focus on providing direct obligations for businesses to further human rights issues, they extend beyond the comparable duties that a BHR treaty would seek to impose on

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198 TPP, Labour Chapter, *supra* note 153, at art. 19.15.

199 *See, e.g.*, EU-Geor. Association agreement, *supra* note 169, at art. 228 (discussing domestic labor and environmental protections).

200 *See, e.g.*, Free Trade Agreement between the government of Australia and the government of The People's Republic of China, Austl.-China, Dec. 20, 2015, Dep't Foreign Affairs and Trade (creating a general exception for human measures necessary to protect human health); *see also* Can.-Burk. Faso BIT, *supra* note 163, at art. 18 (establishing a general exception for human health protection).

201 Barnali Choudhury, *Exception Provisions as a Gateway to the Incorporation of Human Rights in International Investment Law*, 49 COLUM. J. OF TRANSN'TL. L. 670 (2011).

202 Other possibilities include periodic review of the IIA for compliance with corporate social responsibility *(e.g.,* Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment, Japan-Uru., Jan. 26, 2015) or the filing of annual human rights reports reporting on the human rights effect of the IIA in the country (*e.g.,* Agreement Concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia, Can.-Colom., May 27, 2010, Global Affairs Can.).

MNCs and are therefore beyond the scope of the present discussion.

5. EVALUATING RECONFIGURED INTERNATIONAL INVESTMENT AGREEMENTS

Reconfiguring IIAs to promote the business and human rights agenda will undoubtedly not achieve all the same goals as a treaty devoted only to business and human rights. IIAs are vehicles for investment and trade liberalization, meaning that their aims and scope will differ from a treaty focused only on business and human rights issues. Yet despite its more limited scope, the question remains whether a reconfigured IIA can effectively address the most important business and human rights issues that would be found in a BHR treaty. This Part first evaluates the extent to which IIA reconfiguration can address BHR treaty goals as well as the relative importance of focusing on IIAs over a BHR treaty and then addresses the pragmatic difficulties IIA reconfiguration may pose.

5.1. IIA Reconfiguration versus A BHR Treaty

Of the six main arguments put forward by BHR treaty proponents for the creation of a treaty—addressing governance gaps, cataloguing BHR issues in one central source, creating binding law, leveling the playing field, and providing access to effective remedies—a reconfigured IIA would address all but the cataloguing of BHR issues in one place. This is because as non-multilateral agreements, IIAs do not centralize their obligations and, accordingly, they would not be able to centralize a catalogue-list of BHR issues. Nevertheless, FTAs—particularly mega-regional agreements akin to the TPP—could comprehensively detail BHR issues for a number of different countries in one location.

Moreover, because IIAs are concluded on a bilateral or regional basis—rather than on a multilateral basis as the BHR treaty would be—governance gaps, uneven playing fields, and access to effective remedies could remain if states fail to reconfigure their IIAs to include BHR issues. However, if the TPP and the *Transatlantic Trade and Investment Partnership* (TTIP) are representative of global trends, more and more countries are moving toward multi-party

IIAs with definitive nods to human rights issues, suggesting that governance gaps resulting from IIAs may be fewer and far between.

Indeed, from a practical standpoint, one of the primary reasons to focus on reconfigured IIAs over a dedicated BHR treaty is because the former involves the consent of a fewer number of states as opposed to the roughly 200 states that must consent to the latter. Yet there are other reasons why reconfigured IIAs may, in fact, even be preferable to focusing on a specialized BHR treaty.

One important reason for focusing on IIAs is because of the importance of foreign investment to the global marketplace. Foreign direct investment ("FDI") is one of the key drivers of the world's economy and the growth in FDI has been accompanied by a corresponding growth in MNCs.[203] Thus, many of the human rights problems a BHR treaty would seek to correct are propagated, or at least facilitated, by MNC use of FDI practices. Moreover, the regulatory framework for FDI—of which IIAs are a significant portion—governs the rights of MNCs without imposing any obligations upon them.[204] It therefore seems prudent to impose obligations on MNCs in the same treaties which facilitate their corporate activities and provide them with significant rights, rather than resorting to a separate treaty.

In fact, creating a separate BHR treaty seems to reinforce the idea that foreign investment and human rights issues are two distinct issues.[205] As argued in Part I of this article, the fragmented development of investment and trade law, on the one hand, and human rights law on the other, enables the regulatory framework

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[203] Global Agenda Council on Global Trade and FDI, *Foreign Direct Investment as a Key Driver for Trade, Growth and Prosperity: The Case for a Multilateral Agreement on Investment*, 11 (2013), http://www3.weforum.org/docs/GAC13/WEF_GAC_GlobalTradeFDI_FDIKeyDriver_Report_2013.pdf; STEPHEN D. COHEN, MULTINATIONAL CORPORATIONS AND FOREIGN DIRECT INVESTMENT 12 (2007).

[204] Indeed, a recent study has found that large MNCs are the primary beneficiaries of investment arbitration. *See* Gus Van Harten & Pavel Malysheuski, *Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants,* Osgoode Legal Studies, Research Paper No. 14, 2016, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2713876.

[205] *See* Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission*, A/CN.4/L.682, 65-99 (Apr. 13, 2006) (showing that human rights and international investment law are considered separate self-contained regimes).

in each of the areas to develop in isolation and perpetuates governance gaps within which MNCs can continue to violate human rights with impunity. Given the amount of FDI activity by MNCs,[206] the need to further delineate human rights obligations for MNCs in IIAs is highly imperative. Indeed, for this reason, in some ways, while continuing to develop BHR issues in a specialized regime remains important, further legalizing BHR issues into IIAs may be even more prudent.

5.2. Practical Difficulties with Reconfigured IIAs

Reconfigured IIAs may therefore address many of the aims of a BHR treaty while also reinforcing the importance of human rights in relation to MNCs foreign investment activity. Yet while focusing on reconfiguring IIAs may be prudent, practical difficulties with the process of reconfiguring IIAs remain.

One of the problems with focusing on reconfiguring IIAs is the rare, but accelerating departure of several states from their IIAs. Ecuador, Venezuela and Bolivia have exited the entire IIA system altogether, and South Africa has begun to terminate its IIAs as well in order to focus on developing a domestic investment law framework instead.[207] Several other states have terminated individual BITs and some states have indicated an intention to terminate BITs in the near future.[208] Nevertheless, exits from IIAs represent only a very small percentage of IIAs,[209] indicating that the vast majority of states will continue to participate in the IIA system and will therefore be able, at least theoretically, to reconfigure their IIAs.

A second problem is state interest in reconfiguring IIAs. As with the conclusion of the BHR treaty, it is likely that not every state will be interested in reconfiguring their IIAs. However, un-

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[206] *See, e.g.*, UNCTAD, World Investment Report, *supra* note 104, at xiv (showing that FDI activity by MNCs from developing countries alone accounted for USD 454 billion).

[207] White & Case, LLP, *Treaty Developments Related to Bolivia, Ecuador, and Venezuela*, LEXOLOGY, Oct. 1, 2007, http://www.lexology.com/library/detail.aspx?g=5361feec-5c73-48c1-9414-482671f97326 [https://perma.cc/X5HL-RAG2]; Kathryn Gordon & Joachim Pohl, *Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World* 7, OECD, (Working Papers on Int'l Investment, Paper No. 2, 2015).

[208] Gordon & Pohl, *supra* note 191, at 18-19.

[209] *Id*. The authors estimate treaty exit of one percent.

like the BHR treaty, state interest in further including social rights into IIAs is not limited to primarily developing countries. Thus, the United States, Canada, the European Union, Japan and China, among other states, have sought to include human rights, labor rights, environmental rights, and other social issues into the IIAs they conclude.[210] In fact, the texts of the TPP and proposed text of the TTIP, suggest an enlarged recognition of many of these non-economic issues.[211] While these states may not adopt the full range of suggestions for a reconfigured IIA, given their past efforts to improve the social policy dimensions of IIAs they may be willing to adopt at least some of the recommendations.

Moreover, those states that choose to reconfigure their IIAs may be able to impose these obligations on less willing states because of the often asymmetrical bargaining power that arises in the conclusion of IIAs, which enables the more dominant state to impose their will on the weaker state.[212] In addition, even if some states choose not to reconfigure their IIAs, the human rights obligations may be transferable to non-party MNCs if the state concludes a reconfigured IIA with a third party state. This is because the most-favored nation clause found in most IIAs allows parties to obtain benefits granted to third parties. Assuming that imposing human rights obligations on MNCs can be considered a state benefit, a state may be able to claim entitlement to this benefit found in a third-party treaty in the same way investors have been able to claim investor benefits found in other IIAs.[213]

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[210] *See, e.g.*, 2012 U.S. Model BIT, *supra* note 132 (referencing environmental and labor rights); Canada-Burkina Faso BIT, *supra* note 163 (referencing human rights, environmental issues and corporate social responsibility); *see also* EU-Georgia Association Agreement, *supra* note 169 (referencing human rights, environmental rights, and preservation of cultural heritage); *see also* Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China, Austl.-China, Dec. 20, 2015, Dep't Foreign Affairs and Trade (referencing environmental issues and preservation of culture); *see also* Agreement between Japan and Mongolia for Economic Partnership, Japan-Mong., Feb. 10, 2015, Ministry of Foreign Affairs (referencing labor and environmental rights).

[211] *See, e.g.*, Trans Pacific Partnership, *supra* note 153, at ch. 19, 20; Transatlantic Trade and Investment Partnership, Trade and Sustainable Development, Nov. 6, 2015.

[212] De Man & Wouters, *supra* note 155, at 19.

[213] *See generally* Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails,* 2(1) J. INT'L DISP. SETTLEMENT 97 (2011) (discussing how investors have sought to make use of the MFN clause).

Finally, use of investment arbitration as a means of providing access to a remedy for human rights victims may be problematic. The first problem relating to this issue arises if an IIA permits states or individuals to initiate arbitration against an MNC for violating its human rights obligation. As arbitration is based on consent—and an MNC would be unlikely to provide its consent in this instance—the arbitral tribunal would not have jurisdiction to preside over the dispute.[214] For that reason, the idea of allowing the host state to adjudicate the MNC's responsibility or allowing a state to initiate a counterclaim against an MNC for violating its human rights obligations is preferable.[215] Similarly, enabling an IIA's Human Rights Council to mediate or conciliate over such a dispute or allowing states to engage in consultations over the issue could be a superior solution. Alternatively, if states wish to use the practice of being able to initiate arbitrations against MNCs, IIAs would need to contain a provision indicating that foreign investors have *ex ante* consented to arbitration in instances of human rights violations.[216]

Second, human rights victims seeking a remedy through a counterclaim in investment arbitration would have their dispute settled by an investment arbitral tribunal—tribunals that are usually composed of investment experts and that may not have a thorough knowledge of human rights law. In fact, there has been a marked lack of appreciation by tribunals of the interconnections between investment and human rights law in several previous disputes.[217] Thus, it is unclear whether an investment arbitral tribunal

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[214] UNCTAD, Dispute Settlement – 2.3 Consent to Arbitration, UNCTAD, 1 (2003) ("Arbitration is always based on a consent agreement between the parties…[in] ICSID arbitration…the host State may make a general offer to foreign investors … to submit to arbitration …To perfect a consent agreement, the investor has to accept this offer…").

[215] However, it is recognized that enabling only the state to bring an action against the MNC (as the latter suggestion contemplates)—and not individual victims—may compromise victims' access to remedies in states which are unwilling or unable to act against the MNC. That being said, if the state is being sued by the MNC in international arbitration, it may be more willing to act against the MNC that under normal circumstances.

[216] *See* UNCTAD, Dispute Settlement, *supra* note 214 (stating that in an investment arbitration, there is a standing offer to arbitrate from the state). To use investment arbitration against investor interests, a similar provision would need to be drafted specifying that foreign investors have undertaken a general offer to submit to arbitration in instances of human rights violations and that to perfect the consent agreement, the state has to accept this offer.

[217] *See, e.g.*, *Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine*

would be able to adequately adjudicate the MNCs human rights obligations. However, this shortcoming could be addressed by either appointing arbitral tribunal members with a strong human rights background or by providing the tribunal with expert opinions on the human rights implications of the dispute. Moreover, if the newly proposed permanent international investment court[218] gains wider support[219] and becomes the new mechanism for resolving investment disputes, it is likely that human rights arguments will be more accepted in the context of investment disputes as the judges of the court are required to have a knowledge of public international law (which includes international human rights law) and not just investment or trade law.[220] In addition, both judges of the international investment court and arbitral tribunal members are likely to be better able to understand the human rights obligations of an MNC in an investment dispute in instances where the underlying treaty clearly outlines the MNC's human rights obligations.

6. CONCLUSION

The symbolic importance of concluding a BHR treaty cannot be underestimated. Compiling the obligations of business relating to human rights in one central document and with the approval and understanding of all the world's states would be an incredible accomplishment. It would be the first wide-scale treaty to not only impose binding human rights obligations on corporations but to provide redress to the multitude of human rights victims who have, in the past, not been able to seek an effective remedy. Moreover, it would reinforce the notion that the advantages of globalization that corporations have managed to benefit from are also accompanied by obligations.

Republic, ICSID Case No. ARB/03/19, Decision on Liab. (2010); *Bernhard Von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order 2 (2012); Glamis Gold, *supra* note 147.

218 Transatlantic Trade and Investment Partnership, U.S.-EU, Nov. 12, 2015, Office of the U.S. Trade Representative.

219 *See* European Commission, *The EU and Vietnam Finalise Landmark Trade Deal* (Dec. 2, 2015) (stating that currently the court has been accepted as the new standard for resolving investment disputes by the EU and by Vietnam).

220 TTIP, *supra* note 218, at articles 9(4) and 10(7).

At the same time, compartmentalizing BHR issues into a specialized treaty risks norm development through IIAs undermining human rights issues when the issues intersect. Moreover, as the regulatory framework for international trade and investment evolves without due attention to human rights issues, it facilitates the creation of governance gaps within which MNCs can violate human rights. For this reason, the BHR agenda should be inserted into IIAs, particularly since the pragmatic difficulties with drafting a BHR treaty as well as having it ratified are, at the moment, extensive.

Reconfiguring IIAs to better reflect BHR issues also offers advantages that the BHR treaty may not be able to provide. For one, they can offer the opportunity to impose human rights obligations on corporations from the outset, allowing human right issues to be addressed proactively. Second, they contain a robust enforcement mechanism that could provide effective remedies to human rights victims. Most importantly, however, they provide a tool in which corporate rights stand parallel to their obligations.

Undoubtedly, a BHR treaty is an admirable goal, one that may be worth fighting for, but given the history of the BHR movement it may be a goal that remains out of reach in the foreseeable future. Reconfigured IIAs, on the other hand, serve many of the same goals as the BHR treaty and ensure that IIAs and human rights norms evolve concurrently, and for these reasons, may be worth the attention of BHR treaty proponents.