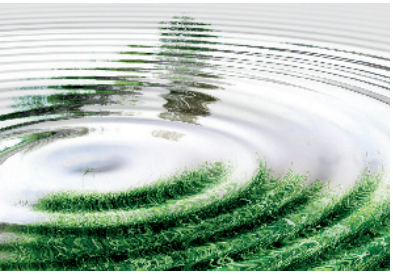
UNIVERSITÄT DUISBURG ESSEN

Human Rights
Corporate Responsibility
Sustainable Development




International Investment Agreements and Human Rights

Marc Jacob

INEF Research Paper Series
Human Rights, Corporate Responsibility And Sustainable Development
03/2010

INEF
Institute for Development and Peace

Funded by:

Federal Ministry
for Economic Cooperation
and Development

Author:

Marc Jacob, LL.M. (Harvard)

Senior Research Fellow
Max Planck Institute for Comparative Public Law and International Law

E-Mail: mjacob@mpil.de

Bibliographical Note:

Jacob, Marc (2010): International Investment Agreements and Human Rights. INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development 03/2010. Duisburg: Institute for Development and Peace, University of Duisburg-Essen.

ISBN: 978-3-9813367-2-6

Imprint

Editor: Institute for Development and Peace (INEF)
University of Duisburg-Essen

Author: Marc Jacob

© Institute for Development and Peace
Geibelstraße 41, D - 47057 Duisburg
Phone +49 (0)203 379 4420, Fax +49 (0)203 379 4425
E-Mail: inef-sek@inef.uni-due.de
Homepage: http://inef.uni-due.de

INTERNATIONAL INVESTMENT AGREEMENTS AND HUMAN RIGHTS

Marc Jacob

INEF Research Paper Series

Human Rights, Corporate Responsibility and Sustainable Development

03/2010

The Project:

Human Rights, Corporate Responsibility and Sustainable Development

The research project "Human Rights, Corporate Responsibility and Sustainable Development" is funded by the Federal Ministry for Economic Cooperation and Development and conducted by the Institute for Development and Peace (INEF).

It aims at supporting companies in realizing their human rights responsibility and in linking their actions more closely to processes of sustainable development.

Three subprojects address the interdependent levels of international law, voluntary corporate responsibility for human rights, and state regulation, with their different potentials and functions for the development and implementation of norms.

Project Manager: Dr. Brigitte Hamm

Members of Staff: Diana Burghardt, M.A., Christian Scheper, M.A.

Human Rights
Corporate Responsibility
Sustainable Development

http://www.humanrights-business.org

ABSTRACT

This paper deals with the intersection of international investment law and human rights. What previously appeared to two specialist communities as a distant fringe phenomenon is rapidly gaining critical traction as a legitimate topic in its own right. Following a review of the history and rationale of investment protection and the main substantive and procedural features of investment treaties, the study examines how the modern investment regime can affect a host state's capacity to regulate. It finds that to date investment law and arbitration display fragmentary tendencies and have the potential to exert a negative impact on the human rights situation of host states. The paper then analyses different proposals how investment protection could better respect human rights. Its main thesis is that these two fields of international law are not hermetically separate disciplines that cannot interact in a meaningful way. For all their contextual and ideological dissimilarities, investment law and human rights are two fields of international law pursuing the same powerful project of a global rule of law.

ZUSAMMENFASSUNG

Die vorliegende Studie befasst sich mit der Schnittstelle zwischen dem internationalen Investitionsschutzrecht und den Menschenrechten. Was bisher von zwei hochgradig spezialisierten Personengruppen zumeist lediglich als Randphänomen wahrgenommen wurde, gewinnt zusehends an Brisanz und kritischer Würdigung im Sinne eines eigenständigen Forschungsbereichs. Nach einem Überblick über die Geschichte und die theoretischen und dogmatischen Grundlagen des Investitionsschutzes widmet sich die Studie der Frage, inwieweit das moderne Investitionsschutzregime die staatliche Regulierungsfreiheit einzuschränken vermag. Dabei wird festgestellt, dass dem Investitionsschutzrecht und den dazugehörigen Schiedsverfahren die Neigung innewohnt, sich vom breiteren öffentlichen Rechts- und Politikdiskurs abzusondern. Des Weiteren ist durchaus ein latentes Potential vorhanden, die Menschenrechtssituation im Gaststaat nachteilig zu beeinflussen. Im Anschluss daran werden Wege aufgezeigt, durch die der Investitionsschutz und die Achtung und Förderung der Menschenrechte besser in Einklang gebracht werden können. Dem liegt die These zugrunde, dass diese beiden Bereiche des Völkerrechts nicht hermetisch isolierte Disziplinen sind, die sich gegenseitig nicht beeinflussen können. Trotz aller kontextbezogener und ideologischer Differenzen sind das Investitionsschutzrecht und der Menschenrechtsschutz nach wie vor beide Teil eines größeren völkerrechtlichen Projekts und somit dem Gedanken einer überstaatlichen *rule of law* verpflichtet.

Content

Abbreviations

BIT	bilateral investment treaty
COMESA	Common Market for Eastern and Southern Africa
DIA	Direktinvestitionen Ausland
ECGD	Export Credit Guarantee Department
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
FCN	friendship, commerce and navigation treaty
FDI	foreign direct investment
FET	fair and equitable treatment
FTA	free trade agreement
HGA	host government agreement
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes / Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ILC	International Law Commission
IISD	International Institute for Sustainable Development
MAI	Multilateral Agreement on Investment
MFN	most-favoured-nation
MIGA	Multilateral Investment Guarantee Agency
MPoI	Minimum Platform on Investment
NAFTA	North American Free Trade Agreement
NT	national treatment
OPIC	Overseas Private Investment Corporation
SCC	Stockholm Chamber of Commerce
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties

1. Introduction to the BIT Regime

1.1 History and rationale of BITs

Transnational investment has long been a feature of an increasingly globalized world in which opportunities for foreign investment often exceed the prospects of home state investment.[1] The quickening of modern transnational relations only serves to accelerate this process. These foreign investors, i.e. nationals of states other than the host state, have traditionally been considered to be particularly vulnerable to risks of a non-commercial nature such as nationalization and other regulatory measures interfering with the investors' legitimate expectations.[2]

The traditional remedy for aggrieved foreign investors was to petition their home state to take up their case on their behalf. This solution, known as diplomatic protection or espousal, however suffers from various drawbacks and has hence only played a comparatively marginal role. It subjects investors to the goodwill of their governments and the vagaries of international relations, putting control of litigation out of their hand.[3] Moreover, it does not in itself resolve the question of whether the host state's action was actually unlawful, which is a question of the law governing the investment and not a matter of the specific protection technique.

Apart from the potentially suspicious domestic law of the host state, such rules governing the treatment of aliens and their property are found in public international law. Since customary international law standards on the protection of foreign investment were frequently marred by incessant disagreement, international treaties emerged as the principal source of norms in the international investment context.[4] This treaty protection for investors first developed in the context of Friendship, Commerce, and Navigation (FCN) treaties; modern investment agreements are designed to facilitate the commercial interpenetration of nations.[5]

---

[1] E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 American Journal of International Law 517, 518.

[2] R Dolzer and C Schreuer, Principles of International Investment Law (Oxford Univ. Press, Oxford 2008) 3-7 (noting at p.4 that "once … negotiations are concluded and the investor's resources are sunk into the project, the dynamics of influence and power tend to shift in favor of the host state.").

[3] V Lowe, International Law (1. edn Clarendon law series, Oxford Univ. Press, Oxford 2007) 197-199.

[4] P Muchlinski (ed), The Oxford Handbook of International Investment Law (1. edn Oxford Univ. Press, Oxford 2008) 16.

[5] DF Vagts, WS Dodge and HH Koh, *Transnational Business Problems* (3. edn Foundation Press, New York 2003) 455.

Bilateral investment treaties (BITs) are the most numerous among these instruments, currently numbering well over two and a half thousand agreements worldwide since conclusion of the first BIT between Germany and Pakistan in 1959.[6] As treaties between states they fall squarely within Art.38(1)(a) of the Statute of the International Court of Justice as a primary source of public international law.[7] They are thus conceptually different, if similar in purpose, from Host Government Agreements (HGAs), which are concluded directly between private investors and foreign governments and do not affect the host state's obligations under public international law. Similar investment agreements between states are found in investment chapters of trade agreements such as the North American Free Trade Agreement (NAFTA) or the Energy Charter Treaty (ECT). BITs are nowadays widely considered to be a fundamental cornerstone of a less volatile environment for foreign investors.[8]

Modern investment law and arbitration has recently gained much attention due to the perception of large-scale foreign investment occasionally cutting across other essential interests such as human rights and environmental protection. After all, this field is a particularly dynamic example of the blurring of national and international law, general and specific norms, and public and private spheres.[9] The explosive growth of BITs and investment arbitrations in recent years – 120 investment disputes were listed as pending at the International Centre for Settlement of Investment Disputes (ICSID) alone in mid-October 2009, with 178 cases concluded since the early 1970s[10] – highlights these concerns. But before this interrelation is addressed, the typical features of BITs will be briefly canvassed.

---

[6] UNCTAD, 'Transnational Corporations, Agricultural Production and Development' (World Investment Report 2009) puts the figure at 2,676 (at p.32). Some variance must be allowed to account for developments since publication of the Report.

[7] Statute of the International Court of Justice, 26 June 1945, 1 UNTS XVI.

[8] SM Schwebel, 'The Overwhelming Merits of Bilateral Investment Treaties' (2009) Suffolk Transnational Law Review 263 (stating at p.265 that compared to the uncertainties of customary international law, BITs "vaulted over and bridged the great gulf between the positions of developed and developing countries."); I Brownlie, Principles of Public International Law (7. edn Oxford Univ. Press, Oxford 2008) 545; JW Salacuse and NP Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 Harvard International Law Journal 67, 70, 90. But note that the capacity of BITs to attract foreign direct investment (FDI) is not uncontested. See M Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment?' (2003) 3121 World Bank Policy Research Working Paper, 18-23.

[9] F Orrego Vicuña, 'Of Contracts and Treaties in the Global Market' (2005) 8 Max Planck Yearbook of United Nations Law 341, 349.

[10] ICSID, List of ICSID Cases <http://icsid.worldbank.org/> accessed 14.10.2009.

1.2 Typical structure and contents of BITs

The central principles embodied by BITs include investment protection, encouragement of investments, and market liberalization. While the exact provisions will of course vary from treaty to treaty, they are united by two main attractions to foreign investors, namely (a) substantive rights concerning the treatment of foreign investment and (b) dispute settlement procedures. Notably, foreign investors traditionally have no enforceable obligations under BITs.[11] In a similar vein and barring a few limited exceptions which will be referred to later, most investment treaties are silent as to the rights of non-investors.

1.2.1 Substantive rights

The core repertoire of most BITs furnishes investors of the other contracting party with promises of protection against expropriatory, unfair, and discriminatory conduct by the host state. Further provisions include basic police protection and the prohibition of performance requirements as well as restrictions on the free transferability of funds.

1.2.2 Procedure for the settlement of disputes

Apart from these substantive rights, modern BITs afford investors another crucial benefit. They grant private investors direct access to international arbitration with the treaty partner's government as an alternative to settling an investment dispute in the host state's domestic courts. This differs from the state-state arbitration process of areas such as trade law. Investor-state arbitration avoids many of the (actual or imagined) pitfalls of the traditional international law rule concerning the exhaustion of local remedies and lends the investment agreement practical functionality. Usually the host state has offered its consent to arbitration in the BIT, which can later be perfected through acceptance by an aggrieved investor.[12] Among the arbitration rules routinely chosen are those of the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), and other bodies dealing primarily with regular commercial arbitration such as the International Chamber of Commerce (ICC), and the

---

[11] H Mann, 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities' (International Institute for Sustainable Development, 2008) 4; LE Peterson, 'Human Rights and Bilateral Investment Treaties' (Investing in Human Rights, International Centre for Human Rights and Democratic Development, 2009) 12.

[12] C Schreuer, 'Investment Disputes' Max Planck Encyclopedia of Public International Law <http://www.mpepil.com/> accessed 10.10.2009, paras.22-25.

Stockholm Chamber of Commerce (SCC). Apart from the UNICTRAL rules, they all additionally offer institutional frameworks to facilitate and administer the arbitration proceedings. Arbitral awards rendered are final and binding. By and large, these dispute resolutions mechanisms have reassured investors and have contributed greatly to the effectiveness of contemporary international investment law.[13]

1.3 What role does human rights protection play in existing BITs?

1.3.1 Express reference to human rights

Investment agreements could address human rights concerns either by directly imposing obligations on investors or by referring to state duties. In practice very few, if any, investment agreements mention human rights or associated fields.[14] For instance, no explicit reference to human rights is found in the Model BITs of Germany (2008), France (2006), China (2003), India (2003), the United Kingdom (2005), or the United States (2004).[15] The multilateral investment agreement for the Common Market for Eastern and Southern Africa (COMESA), adopted in 2007, lists minimum human rights standards relating to investment as a potential future agenda item for a meeting of ministers.[16] In a similar vein, the EU-Russia Partnership and Cooperation Agreement, which among other things envisages the establishment of a framework for the promotion of investment between the parties, loosely provides that the treaty parties "endeavour to cooperate on matters pertaining to the observance of the principles of democracy and human rights" by way of regular political dialogue.[17]

---

[13] Lowe 200; B Cremades and D Cairns, 'The Brave New World of Global Arbitration' (2002) 3 Journal of World Investment 173, 176.

[14] Mann 9; OECD, 'International Investment Agreements: A Survey of Environmental, Labour and Anti-Corruption Issues' (2008) (reviewing a sample of 296 agreements signed by 30 OECD member countries and 9 non-member countries that adhere to the OECD Declaration on International Investment and Multinational Enterprises).

[15] C Reiner and C Schreuer, 'Human Rights and International Investment Arbitration' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law* (Oxford University Press, Oxford 2009) 82 (further noting the lack of mention thereof in NAFTA and ECT). For Model BIT texts see the Annexes of Dolzer and Schreuer or the UNCTAD website on international investment agreements ("IIA Compendium"): <http://www.unctadxi.org/templates/DocSearch 780.aspx>. Another useful web resource is the investment treaty arbitration section of the University of Victoria Faculty of Law: <http://ita.law.uvic.ca/investmenttreaties.htm>. Both last accessed 21.12.2009.

[16] Art.7(2)(d)(iii).

[17] Art.6.

To an extent this dearth of express references is a corollary of the one-sided design of BITs that does not address investor obligations. The absence of overt human rights responsibilities of states is rooted in the fact that BITs are monothematic commercial instruments. Nevertheless, modern investment protection and international human rights law share a common heritage. Both address the same troubling asymmetry, namely the impotence of the individual vis-à-vis state power.[18] Indeed, the rights of aliens are in many ways precursors of modern human rights.[19] The clearest remnants of this overlap are those provisions of human rights conventions protecting property.[20] However, the systemic difference – and thus the cause of the wildly different perception of these two fields of law – is that most contemporary investors are juridical persons possessing financial and political leverage easily dwarfing that of ordinary individuals and in some cases even rivalling that of states. On the other hand, as one scholar has pointed out, all states posses the inherent power to regulate within their jurisdiction, putting even the largest investors at risk.[21]

A notable exception to this dearth of human rights references is the draft 2007 Norwegian Model BIT, which contains preambular language reaffirming the treaty parties' "commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights."[22] Comparable, if slightly less elaborate, wording is contained in the preamble of the 2002 Free Trade Agreement between the European Free Trade Association (EFTA) and Singapore.

Such preambular wording however does not amount to substantive provisions. Rather, it is merely an indication of the treaties' objects and purposes and hence an aid to interpretation.[23] It cannot by itself compel a foreign investor or states.

---

[18] M Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford 2009) 98, 114.

[19] P-M Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' Ibid. 49.

[20] E.g. Universal Declaration of Human Rights 1948 Art.17.2; European Convention on Human Rights, First Protocol, Art.1; American Convention on Human Rights Art.21.

[21] Lowe 203.

[22] Draft Version 191207. It appears this draft model BIT was recently abandoned following public consultation yielding critical feedback. See D Vis-Dunbar, *Norway Shelves its Draft Model Bilateral Investment Treaty* (8 June 2009), Investment Treaty News, available at: http://www.investmenttreatynews.org/cms/news/archive/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty.aspx.

[23] VCLT Art.31(2). Cf. *Asylum (Colombia/Peru)* 1950 ICJ Reports 266, 282; *Rights of Nationals of the United States in Morocco* 1952 ICJ Reports 176, 196.

1.3.2 Related provisions

Turning to related provisions, certain societal issues such as labour standards, environmental protection, anti-corruption and the economic empowerment of historically disadvantaged groups, i.e. individuals belonging to traditionally underprivileged sectors of society, are occasionally mentioned in BITs.[24] This is again sometimes done by preambular language. Most post-millennial Finnish BITs for instance posit that "the development of economic and business ties can promote respect for internationally recognised labour rights" and that the objectives of the BITs "can be achieved without relaxing health, safety and environmental measures of general application".[25]

Besides the preamble, similar wording can occasionally be found in actual treaty provisions. The most prominent examples are the BITs concluded by the United States or Canada following NAFTA. Under the US Model BIT (2004) treaty parties thus acknowledge that it is "inappropriate" to encourage investment by weakening or reducing the protections afforded in domestic environmental or labour laws.[26] In light of this, "each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory." The Canadian Model BIT (2004) contains a parallel provision in its Art.11 concerning domestic health, safety and environmental measures.

Summing up, plain reference to human rights provisions in BITs is at present virtually unknown.[27] Associated areas are increasingly mentioned in several more recent investment agreements or templates, yet always with state regulation – rather than investor obligations – in mind.

---

[24] OECD 143, Table 3.1; L Liberti, 'Investissement et Droits de l'Homme' in P Kahn and W Ben Hamida (eds), *Les Aspects Nouveaux du Droit des Investissements Internationaux* (Nijhoff, 2007) 791-852.

[25] See e.g. Finland-Guatemala BIT (2005).

[26] Arts.12 and 13.

[27] Cf. Reiner and Schreuer 83 ("peripheral at best"); Mann 9, 11, 15.

2. Impact of the BIT Regime on the Enforcement and Realization of Human Rights

2.1 Intersecting regimes

In a broad sense and as such rather unremarkably, the law of international investment, like much of public international law, is designed to limit certain types of state action. Sometimes, however, such state action is based on legitimate human rights concerns. Competing regimes are not a novel phenomenon, but the issue rears its head rather prominently in the investment law context, given the extent of modern investor protection and the frequently very deeply intertwined involvement of international investors in matters of great public concern.[28] The following section seeks to draw out potential effects of the BIT regime on human rights protection and promotion. Three brief preliminary points merit attention before embarking on this analysis.

First, it should be made clear that an assessment of the consequences of foreign investment *per se* for the human rights situation in host countries lies beyond the scope of this paper. An undertaking of such ambition would require vast data collection, extensive macro-economic modelling, and large-scale socio-political theorising. Instead, the focus here lies on the impact of the international law of investment protection and its dispute settlement process on human rights.

Second, it is in no way averred that the investment regime cannot also have positive spillover effects concerning the human rights situation in host states. Nonetheless, this paper deliberately shines the spotlight on those areas of the investment law system where there is room for improvement.

Third, it has at times been claimed that the conflicts alluded to in this discussion are often "hypothetical" and that the unease voiced by critical commentators is thus premised on "counterfactual" reasoning.[29] It is of course always helpful to avoid sweeping generalisations and to bear in mind the actual likelihood of a danger materialising. But it is hard to see exactly why the bare

---

[28] B Simma and T Kill, 'Harmonizing Investment Protection and Human Rights: First Steps Towards a Methodology' in C Binder, U Kriebaum and A Reinisch (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, Oxford 2009) 678-679 (listing various examples of actual and potential conflicts); R Suda, 'The Effect on Bilateral Investment Treaties on Human Rights Enforcement and Realization' in O de Schutter (ed) *Transnational Corporations and Human Rights: Symposium* (NYU School of Law, New York 2005) 58.

[29] JD Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) Duke Journal of Comparative & International Law 77, 79 (avowedly seeking to "undermine the general consensus that investment arbitration negatively impacts human rights").

fact of whether an issue has already been arbitrated or otherwise publicly come to a head should be the authoritative criterion for determining whether a specific concern is real or a general critique is valid. Crucially, not only the actual but also the potential financial and political cost of investor-state arbitration or the threat thereof might suffice to cause a "chilling effect" on national regulation.[30] Short of governments intervening to prevent human rights abuses by foreign investors themselves, the host states' right to regulate becomes a proxy for human rights in this context.[31]

The paucity of reported cases to date involving clear invocations of human rights is attributable to various factors.[32] Investors are often adequately protected by the BITs themselves, which impose no obligations on them. Host states cannot request arbitration independently since this is also a preserve of investors. As will be explained below, limiting concepts such as jurisdiction and applicable law can provide further obstacles. What is more, it is unclear to what extent a non-state party would even be subject to human rights obligations. Human rights are hence most likely to appear as defences justifying state measures impacting foreign investment. Furthermore, states might be complicit in a human rights violation or fear setting an inconvenient precedent through their commitment to human rights arguments. *Amicus curiae* briefs, i.e. submissions by non-disputing parties with a strong interest in the outcome of a case, are however increasingly accepted. Be that as it may, the fact that there are only an exceedingly small number of reported cases in which BIT claims and human rights arguments have been openly addressed is in itself worrying, given the many conflicts realistically imaginable.

2.2 BIT provisions affecting state regulation

State regulation that affects foreign investments negatively, usually by way of a future change of law or administrative action, is susceptible to challenge under certain BIT provisions. This might also be the case when such regulation is motivated by human rights concerns or obligations. An aggrieved investor could base his claim on several typical clauses, which shall be discussed in the following.

---

[30] J Waincymer, 'Balancing Property Rights and Human Rights in Expropriation' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Arbitration* (Oxford University Press, Oxford 2009) 309; R Bachand and S Rousseau, 'International Investment and Human Rights: Political and Legal Issues' (International Centre for Human Rights and Democratic Development, 2003) 1.

[31] Mann 17; Simma and Kill 678.

[32] Reiner and Schreuer 88-94.

2.2.1 Expropriation

While BITs do not as such attempt to outlaw the ultimately probably too deeply-ingrained practice of expropriation, the direct or indirect taking of property must generally be non-discriminatory, for a public purpose, and accompanied by prompt, adequate and effective compensation, itself to be assessed at fair market value.[33] Such clauses can make it prohibitively expensive for states to regulate for human rights reasons in areas such as labour rights, land use, the environment, and public health and safety where this would – deliberately or inadvertently – cause a sufficient economic impact on foreign investments.[34]

For example, in the recent *Biwater Gauff* arbitration, Tanzania was *inter alia* held to have violated the expropriation clause of the UK-Tanzania BIT (1994).[35] A British-German consortium had been awarded a bid to upgrade and run water and sanitation infrastructure in Dar es Salaam, which the World Bank had previously described as "precarious" at the time. The consortium however underestimated the difficulty of the project due to poor planning and sought to renegotiate the contract after it had run into management and implementation difficulties. Tanzania declined and ultimately sought to take things into its own hands by occupying the water facilities and usurping management control. While no compensation was awarded in the end on account of causation issues (the consortium had sued Tanzania for around $20 million, but the tribunal considered the loss inevitable), the arbitrators held Tanzania liable for breaching the BIT. Similarly, several disputes have arisen from South American state measures affecting the privatization of water supplies, e.g. by fixing water pricing, arguably pitting investor rights against the increasingly recognized right to water.[36]

Even more acutely, in the recent *Piero Foresti* case, European investors challenged South African legislation seeking to improve participation and ownership of historically disadvantaged South Africans in the mining sector.[37] The claimants alleged among other things that the Mineral and Petroleum Resources and Development Act of 2002 violated the expropriation provisions of the Italy-South Africa BIT and the Benelux-South Africa BIT by effectively

---

[33] Dolzer and Schreuer 91.

[34] Waincymer 309.

[35] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB 05/22, Award, 24 July 2008.

[36] See e.g. *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3 and *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* ICSID Case No. ARB/03/17. More generally P Thielbörger, 'The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford 2009) 487-510.

[37] *Piero Foresti, Laura de Carli and others v Republic of South Africa*, ICSID Case No. ARB(AF)/07/1.

expropriating their existing mineral rights by turning them into "new order rights", which the investors claimed were less valuable.[38]

Such tensions are often greatest with respect to indirect expropriation, i.e. expropriation beyond formal takings of property. The law here is far from settled, with the battle lines drawn between those who claim the purpose of a state measure plays a crucial role in deciding on its lawfulness and those denying this.

On the one hand, expropriation clauses are not seen as watertight investment insurance. Some arbitral decisions almost seem to have ruled out expropriation completely in the context of non-discriminatory regulatory action in an attempt to reign in excessive risk-isolation of foreign investors. It is thus occasionally said that no liability (and hence no duty to compensate) attaches to economic injury that is a consequence of *bona fide* regulation within accepted limits, i.e. whenever a state is exercising its sovereign powers for the general welfare within the framework of its inherent police powers.[39] In the *Methanex* case, a Canadian methanol producer initiated dispute settlement proceedings under the investment chapter of NAFTA in response to a Californian ban on the use of a specific chemical compound. The arbitral tribunal however granted state regulatory powers considerable breathing space. Although it held that regulation affecting investment still had to be non-discriminatory, for a public purpose, and enacted in accordance with due process, it would not be deemed expropriatory and compensable "unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."[40]

But even if one accepts some room for police powers, what exactly falls within this permissible and non-compensable regulatory power of states remains rather unclear. An emerging consensus would seem to tentatively include non-excessive *bona fide* taxation, forfeiture for crime, public health, public safety, and perhaps the protection of cultural property.[41] Environmental regulation remains hotly contested. As to human rights, it would appear that

---

[38] LE Petersen, *More Details Emerge of Miner's Case Against South Africa*, Investment Treaty News, 30 November 2007, available at: http://www.iisd.org/pdf/2007/itn_nov30_2007.pdf. It now appears that this particular claim might be discontinued, presumably because of the barrage of negative publicity it received.

[39] *Sedco, Inc v Iran*, 9 Iran-US Claims Tribunals Reports 248, para.275; *Técnicas Medioambientales Tecmed SA v Mexico (Tecmed)*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, (2004) 43 ILM 133, para.119; *Saluka Investmetns BV (The Netherlands) v Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para.255.

[40] *Methanex Corporation v United States (Methanex)*, ICSID Case No ARB/98/3, Pt IV, ch.D, para.7.

[41] A Reinisch, 'Expropriation' in P Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, Oxford 2008) 432-438; AS Weiner, 'Indirect Expropriation: The Need for a Taxonomy of "Legitimate" Regulatory Purposes' (2003) 5 International Law Forum 166 , 168; *Generation Ukraine, Inc v Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, 44 ILM 494 (2005), para.20.29.

the more elementary the need is that is being addressed, the more likely it will be considered acceptable.

On the other hand, many arbitral decisions do not view such public purpose exceptions favourably. Indeed, under customary international law, state intent is traditionally irrelevant in the expropriation context.[42] According to this orthodox view, it is solely (or, more recently, primarily) the effect of the impugned state measure on the investor's property rights that matters, not its purpose. State obligations to pay can be triggered "no matter how laudable and beneficial to society as a whole" regulatory measures may be.[43] In *Metalclad*, a tribunal declined to consider the intent or motivation of an ecological decree barring the use of a site as a landfill and gave an extremely broad definition of expropriation, encompassing any incidental interference with the use of property which deprives the user in whole or in significant part not only of the use but also of the reasonably-to-be-expected economic benefit of said property.[44]

Gradually, a middle way seems to be emerging between the two positions sketched above, with neither view gaining unqualified acceptance. One tribunal branded a straightforward public purpose exception "insufficient" by itself.[45] A recent NAFTA decision however displayed sensitivity to the wider context in which investment takes place and took care to highlight its public dimension.[46] Generally speaking, a more nuanced, and hence also somewhat nebulous concept of expropriation is evolving, which among other things takes into account the impact of regulation, its purpose, legitimate investor expectations, the degree and intensity of interference, the importance of the interests at stake, and even-handedness in the application of state measures.[47]

Summing up, there remains ample uncertainty in the law of expropriation. While the purpose of regulation is increasingly being factored into arbitral decisions, public welfare is by no means a definite trump card. States managing public affairs with human rights in mind will likely continue to find themselves at the receiving end of expropriation claims.

---

[42] GC Christie, 'What Constitutes a Taking of Property Under International Law?' (1962) British Yearbook of International Law 307 .

[43] *Compañia del Desarrollo de Santa Elena, SA v Republic of Costa Rica*, Award, 17 February 2000, 5 ICSID Reports 153, para.192 (but note that this was a case of direct expropriation for conservation purposes). Cf. *Tecmed* para.121 and *Compania de Aguas de Aconquija SA and Vivendi Universal v Argentina*, ICSID Case No ARB/97/3-20, Award, 20 August 2007.

[44] *Metalclad Corporation v United Mexican States*, NAFTA Ch.11 Tribunal, 30 August 2000, 40 ILM 36 (2001), paras.103, 111.

[45] *Azurix Corp v Argentine Republic,* Award, 14 July 2006, ICSID ARB/01/12, para.310.

[46] *Glamis Gold, Ltd v United States of America (Glamis)*, NAFTA Ch.11 Tribunal, Award, 8 June 2009, paras.5-8.

[47] *SD Myers, Inc v Government of Canada (Myers)*, Partial Award, 13 November 2000, 40 ILM 1408 (2001) paras.282-283; Waincymer 308; SW Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) Journal of International Abitration 469, 473-474.

2.2.2 Fair and equitable treatment

The lynchpin of most BITs is the minimum standard of treatment, also known as fair and equitable treatment (FET).[48] Aimed at providing stability and predictability, some of these FET clauses also refer to treatment in accordance with principles of international law or other treaty provisions. Others simply stand alone. FET provisions are extremely flexible and context-specific, making across the board definition difficult. The open-textured nature of these clauses affords arbitrators a large margin of appreciation.[49] Nevertheless, despite its fluidity the standard has a technical legal meaning of its own and is not to be equated with deciding *ex aequo et bono*, i.e. purely from equity and conscience. It is a matter of some contention whether conventional clauses go beyond the customary standard. Issues litigated under the FET heading have, for example, revolved around basic vigilance and protection, transparency, legitimate expectations, procedural propriety, good faith, and abuses of authority.[50] The piecemeal nature of international investment arbitration is particularly glaring in the FET context, where some tribunals seem to demand that an investor is to know beforehand all rules and regulations that will govern its investments, whereas other tribunals appear to place more weight on the state's right to exercise its sovereign regulatory powers, noting that "any businessman or investor knows that laws will evolve over time. What is protected however is for a state to act unfairly, unreasonably or inequitably in the exercise of its legislative power."[51]

An FET clause could intersect with human rights whenever administrative, legislative, or judicial activity by the host state that is motivated by human rights concerns or norms fails to observe the minimum standard, hence sparking an investment claim. Given the vast extent of modern governmental regulation and the broadness of the FET standard, such conflicts could arise in many spheres, including – but not limited to – labour rights, indigenous rights, public health and safety, environmental regulation, sustainable development and the right to water.[52] FET protection is by no means only engaged in extreme situations involving "mistreatment of aliens in South American jails, or the

---

[48] S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 The British Yearbook of International Law 99, 113-114.

[49] *Mondev International Ltd v United States of America*, ICSID, Final Award, 11 October 2002, ARB(AF)/99/2, para.112.

[50] TJ Grierson-Weiler and IA Laird, 'Standards of Treatment' in P Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, Oxford 2008) 272-290.

[51] For the former see e.g. *MTD Chile, SA v Republic of Chile (MTD Chile)*, ICSID Case No. ARB/01/7, Award, 25 May 2004, section 4. For the latter see *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para.332.

[52] I Knoll-Tudor, 'The Fair and Equitable Treatment Standard and Human Rights Norms' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford 2009) 339 (enumerating various arbitral decisions).

failures in the investigation of crimes against the person".[53] For example, in the pending *Piero Foresti* arbitration, investors further seem to be alleging that new legislation requiring quarry operators to hire historically disadvantaged South Africans violates FET provisions.

In this context it has been suggested in the investment law literature that it would be unacceptable for competing human rights obligations to preclude a finding of a violation of an FET clause.[54] Rather, human rights should according to that understanding merely factor into the calculation of compensation to be paid by the host state. Little to no guidance is to be derived from the BITs themselves and no consistent arbitral jurisprudence has developed on this point. Arguably, the reference to equitable treatment introduces a high degree of elasticity in order to accommodate conflicting interests.[55] But against this it might be said that BIT obligations are not reciprocal. All told, the vast catch-all nature of such clauses, evinced by the many different contexts in which FET has successfully been invoked, makes them an attractive option for investor claims and thus a potential fetter on the regulatory autonomy of states. [56]

2.2.3 Non-discriminatory treatment

Besides the absolute standard of FET protection just mentioned, investors are further commonly entitled under BITs to treatment that is as favourable as that accorded to the host state's investors or other third-country investors, respectively known as national treatment (NT) and most-favoured-nation (MFN) treatment. These are relative standards because they guarantee comparable treatment. They do not provide for a specific degree of protection but rather simply ensure that foreign investors are not treated less favourably than domestic investors (NT) and not discriminated against vis-à-vis foreign investors from third countries (MFN). Under the latter, it is occasionally possible to secure substantive and procedural advantages contained in other investment agreements signed by the host state.[57] Some BITs also include an additional non-discrimination provision.

Despite sounding deceptively simple, these standards raise many thorny legal questions.[58] In reaching a finding on discrimination in the investment context, it first has to be established who the appropriate comparator is. In the

---

[53] C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford Univ. Press, Oxford 2007) 202.

[54] Knoll-Tudor 340-343.

[55] G Schwarzenberger, *Foreign Investments and International Law* (Stevens, London 1969) 114.

[56] SG Gross, 'Inordinate Chill: Bits, Non-NAFTA Mits, and Host-State Regulatory Freedom: An Indonesian Case Study' (2003) 24 Michigan Journal of International Law 893, 934.

[57] See e.g. *MTD Chile* and *Siemens v Argentine Republic*, ICSID Case No. ARB/02/8 (2004).

[58] McLachlan, Shore and Weiniger 263.

Occidental case, Ecuador was held to have breached an NT clause because the claimant oil company was denied the value-added tax refunds domestic seafood and flower producers were receiving.[59] While other tribunals have taken a narrower view as to what is comparable, the broad *Occidental* approach – holding that all companies were ultimately exporters and hence comparable – could serve to challenge specific state regulation aimed at furthering particular causes by supporting different sectors or groups of society. This might still be the case even according to a more relaxed understanding if the investors in question operated within the same economic sector.

The second step is then to determine how the subjects for comparison have actually been treated. If treatment has differed, it thirdly has to be decided whether the impugned governmental action can be justified, i.e. has a reasonable connection to a rational policy of the host state. Factors variably at play in this last stage of the exercise are the language of the impugned regulatory measure, the effect on the investor (which can be direct or indirect), and the intent of the host state.[60]

Once again the issue of public purpose justifications of state regulation looms large, and once again clear and uniform jurisprudence has yet to emerge to guide policymakers on this point. The proper balance between investor protection and the state's right to regulate remains similarly elusive with respect to these clauses.[61] Until clearer normative benchmarks have been established, it is likely that the discrimination provisions will curtail host state measures seeking to effectively implement various human rights-related policies in the spheres of labour, industrial, environmental, fiscal, and health regulation, to name but a few. As one prominent commentator put it, the potential impact on human rights "is not difficult to perceive".[62]

Turning to justifications, environmental justifications for divergent treatment of foreign investors were for instance rejected in the *Myers* arbitration. The tribunal appears to have second-guessed the defendant state's motivation and ruled on the evidence that the host state possessed discriminatory protectionist intent.[63] This can be contrasted with other tribunal decisions focusing chiefly on the effect of regulation on the investor and placing little importance on the motivation of the state.[64] Initiatives seeking to promote equal opportunities or diversity might hence be caught between the hammer of discriminatory intent and anvil of affecting the investor.

---

[59] *Occidental Exploration and Production Co v Ecudaor (Occidental)*, LCIA Case No UN2467, Award, 1 July 2007.

[60] F Ortino, 'Non-Discriminatory Treatment in Investment Disputes' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford 2009) 349-350.

[61] Grierson-Weiler and Laird 298.

[62] Ortino 344, 365.

[63] *Myers* para.162.

[64] *Occidental* para.177.

Finally, it has been argued by NGOs that it would be difficult under MFN clauses to successfully pursue divestment strategies (e.g. as in the 1980s regarding apartheid South Africa), since it would be impermissible to impose restrictions on a specific group of investors only.[65]

2.2.4 Miscellaneous provisions

Through so-called "umbrella clauses" the host state guarantees to the home state that it will abide by the contractual promises given to a foreign investor. A typical example can be found in Art.7(2) of the German Model BIT (2008). The effect of such clauses is that violations of contractual promises given to an investor are elevated to violations of the host state's international legal obligations. Situated directly at the public-private fault lines, umbrella clauses have come under heavy fire in recent arbitral decisions for potentially allowing a flood of lawsuits before international tribunals perhaps best litigated elsewhere and providing a vastly wider scope of host state liability than provided for in the BITs themselves.[66] This critical view has in turn been sharply attacked by other tribunals and commentators, making confident predictions difficult.[67] Nevertheless, there is some force in the contention that the original anxiety which gave rise to such clauses, i.e. the trepidation about private investors dealing with states on the international plane, and hence the across the board double-layered risk-insulation of investors, is perhaps no longer fully warranted today. NAFTA and the US Model BIT (2004) once again lead the way and thus no longer contain umbrella clauses.

Moreover, it is very likely that the prohibition of performance requirements on investors found in many BITs will prevent certain progressive state measures seeking to foster sustainable local development through the involvement of foreign investment.[68] Due to space constraints this point cannot be dealt with here in full, but the South African natural resources measures seeking to better integrate historically disadvantaged parts of the population once again spring to mind.

---

[65] M Sforza, 'MAI Provisions and Proposals: An Analysis of the April 1998 Text' (Public Citizen's Global Trade Watch, Public Citizen, Washington D.C. 1998) Part I, Sec.1.A.2.

[66] See e.g. *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, 42 ILM (2003) 1290.

[67] On the debate generally see M Dimsey, *The Resolution of International Investment Disputes: Challenges and Solutions* (Eleven International Publishing, Utrecht 2008) 61-62.

[68] Mann 36-37.

2.3 Investment contract provisions affecting state regulation

While the focus of this paper is on BITs, one closely related term commonly encountered in HGAs deserves particular mention. "Stabilization clauses" are special choice of law clauses shielding an investor by stipulating either that the law governing the investment shall be that in force at a particular point in time or that future changes in the law of the host state will not be applied to the investor's disadvantage. The practical effect of this freezing of the host state's legal system with respect to the investment "clearly… implies a reduction of the host state's sovereign power."[69] Even the rather accommodating *Methanex* tribunal conceded that non-discriminatory regulation in the public interest enacted with due process would be deemed expropriatory and compensable if specific commitments had been given.[70] Stabilization clauses arguably fit this bill. Once again, legal uncertainty further compounds this problematic interface between sovereign rights and investor rights.

2.4 Systemic concerns regarding the BIT regime

Some of the substantive difficulties highlighted above are compounded by various systemic issues, which will now be sketched.

2.4.1 One-sidedness

To begin with, the investment regime is one-sided in at least two respects.[71] For one, the BIT technique is bilateral only with respect to state responsibilities. But even here it is not difficult to see that the legal provisions of BITs will be of greater use to capital-exporting states than to those importing capital. The beneficiaries are slowly shifting with the emergence of new global players, but the systemic bias remains. Moreover, viewed in isolation, investors are privileged in traditionally only being afforded rights without being subject to obligations under these investment treaties, which has led a commentator to call NAFTA's investment chapter "a human rights treaty for a special interest group".[72] The question hence arises to what extent counterweights to this imbalance already exist and how these can be given greater effect.

---

[69] Dolzer and Schreuer 75.

[70] *Methanex* para.7.

[71] Bachand and Rousseau 16.

[72] J Alvarez, 'Critical Theory and the North American Free Trade Agreement's Chapter Eleven' (1997) 28 University of Miami Inter-American Law Review 303, 308.

2.4.2 Participation deficit

Another potential concern is the fact that, despite the ultimately far-reaching impact of major international investments (e.g. power plants, water and sewage infrastructure, landfills, mining pits etc.), the BITs providing the basic legal framework for such large-scale projects have traditionally been negotiated and concluded outside the public sphere. This acute participation deficit of concerned sectors of society and NGOs is of course not uncommon when it comes to international treaties. One curt answer to this is that the citizens' consent can be indirectly derived from their respective governments' participation in the treaty-making process.[73] This places a potentially unwarranted degree of faith in national governments' ambitions to promote and protect human rights, which some states will unhesitatingly subordinate to economic development. Another reply furtively questions the wisdom of even having the public participate in all aspects of what is essentially a highly specialised technocratic exercise. While an in-depth discussion of this point is not called for here, it is important to note that public awareness and participation, and therefore ultimately democracy and legitimacy, have traditionally been sidelined in erecting the fundamental tenets of the current investment regime. This is all the more pressing given that it is nowadays hard to deny that the arbitral tribunals effectively shape the specificities of international investment law through their ever-growing jurisprudence. Moreover, this objection should not be taken lightly in times of certain Latin American countries withdrawing from parts of the investment regime, regardless of the merits of these individual cases. Recent initiatives in Norway, the US, and South Africa, however, slowly seem to be breaking the mould by circulating draft investment agreements in an attempt to solicit input from a wider range of society.[74]

2.4.3 Lack of expertise

The BIT regime and international arbitration in general pose many intricate legal problems. In addition, their exact economic and political significance can be very difficult to gauge. What might hence also give rise to concern is that many countries, in particular capital-importing ones, frequently do not at first possess sufficient expertise regarding the consequences of BITs or adequate

---

[73] Cf. Fry 104.

[74] See e.g. D Vis-Dunbar, *United States Reviews its Model Bilateral Investment Treaty* (5 June 2009), Investment Treaty News, available at: http://www.investmenttreatynews.org/cms/news/archive/2009/06/05/united-states-reviews-its-model-bilateral-investment-treaty.aspx

policy frameworks when negotiating and concluding investment agreements.[75] Even if renegotiations and other later corrections are not impossible, such initial misalignment is likely to produce unfavourable results.

2.4.4 Downward regulatory spiral

A further general problem is the potential downward regulatory spiral that the conclusion of BITs can occasion. The more unencumbered investment protection an agreement offers, the more likely it is to be attractive to foreign investors. Hence a capital-importing country will gain a competitive advantage over other states in a similar situation if it grants more generous concessions through its BIT programme. Of course the attractiveness of a host state for foreign investment will in the end depend on a myriad of other legal and non-legal circumstances, but there is some truth to the view that, from a regulatory perspective, BITs involve a type of "prisoner's dilemma": states would be better off if they collectively rejected restrictions of their regulatory capacity in the form of BITs, but capital-importing states are individually tempted to conclude investment agreements to gain a competitive advantage.[76]

2.5 Deficiencies of investment dispute settlement procedures

Investment claims are regularly vindicated through international dispute settlement. Viewed with human rights in mind, the investor-state arbitration mechanism itself is likewise capable of improvement.[77] Areas of heightened concern are outlined in this section.

2.5.1 Transparency

Probably the most common criticism of investment disputes relates to the confidentiality of proceedings, which limits attempts to fully monitor, assess, and ultimately accept not only the arbitral process but also the operation of

---

[75] See e.g. Department of Trade and Industry of the Republic of South Africa, 'Bilateral Investment Treaty Policy Framework' (Government Position Paper, Department of Trade and Industy of the Republic of South Africa, Pretoria 2009) 5, available at: http://www.thedti.gov.za/ads/bi-lateral_policy.pdf.

[76] AT Guzmán, 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Virginia Journal of International Law 639, 669-680.

[77] See generally LE Petersen and KR Gray, 'International Human Rights in Bilateral Investment Treaties and Investment Treaty Arbitration' (International Institute for Sustainable Development, 2003) 3.

international investment law in general.[78] While there are a few noteworthy exceptions such as Art.38 of the Canadian Model BIT (2004) and Art.10 of the US Model BIT (2004), investment agreements do not normally contain provisions on the transparency of disputes. This then falls to the individual procedural rules under which the arbitrations take place. International arbitration is traditionally conducted behind closed doors.[79] The popular UNCITRAL rules provide that awards are not to be published without the parties' consent. Indeed, the existence of UNICTRAL arbitrations is often not even widely known. The ICC rules do not expressly address transparency either. Equally, very little information on SCC arbitrations is in the public domain. Of the procedures commonly chosen, only ICSID lists pending and concluded cases in its publicly inspectable docket, which also mentions basic details of registered arbitrations including subject matter, party names, date of registration, composition of the tribunal, and the procedural stages. But scant, if any, information is available on the arguments made, the minutes, and other records of the proceedings. What is more, the parties may still agree to keep the actual award confidential. Barring such agreement, a party may release the award to the public. While ICSID is increasingly moving towards greater transparency and a majority of awards are now published either by the parties elsewhere or directly through ICSID, systematic and comprehensive publication remains elusive. Consequently, even some ICSID awards are inaccessible.[80]

2.5.2 Uncertainty and lack of review

Investment disputes are arbitrated in a variety of fora under diverse procedural rules. Even within the same institutional and procedural framework individual panels will always be constituted *ad hoc* for the specific case. Coupled with the lack of stabilising elements such as a strong respect for precedent or an appellate process that could reconcile different jurisprudential strands this poses a significant source of irregularities and legal uncertainty, no matter how much occasional tribunals may be concerned to impose a modicum of coherence on the case law.[81] This is not only problematic in terms of predictability, knowledge imbalance and state planning but in all likelihood also contributes to the many popular anxieties surrounding investment arbitration, in particular when observers do not share the business community's

---

[78] Cf. OECD, 'Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures: Statement by the OECD Investment Committee' (2005) 1.

[79] M Hwang and K Chung, 'Defining the Indefinable: Practical Problems of Confidentiality in Arbitration' (2009) 26 Journal of International Abitration 609, 638 (noting that „virtually all [arbitral] institutions recognise confidentiality in some way").

[80] C Schreuer, *The ICSID Convention: A Commentary* (2. edn Cambridge Univ. Press, Cambridge 2009), paras.48.110-119.

[81] Dolzer and Schreuer 37.

general preference for finality over correctness.[82] After all, as one commentator has noted, unlike in pure commercial arbitration, there frequently is not just money at stake in investment arbitration but the public policy of an elected government.[83]

2.5.3 Arbitrator selection

The first point in this respect is largely practical in nature. Most arbitrators that are selected by the parties have commercial backgrounds and do not regularly deal with matters pertaining to human rights law, making it difficult for them to assertively deal with such issues even if they thought it appropriate.[84] On the other hand, not many human rights experts have sufficient expertise of the technical and business-related aspects of investment law. Be that as it may, many arbitrators in investment disputes display a narrow positivistic focus, rooted in a tradition of international commercial arbitration that is solely concerned with the effective *ad hoc* legal resolution of business disputes. Workability is key, and the paradigm remains private, consensual, and of limited perspective. Proper respect for human rights on the other hand essentially requires taking into account the externalities of the investment regime, in particular since matters concerning the public interest are transferred to the international level. This ultimately public understanding of the investment system is hard to fit into the self-denying ethos of conventional arbitration, but one recent NAFTA tribunal visibly signalled a novel readiness to undertake its mandate "with an awareness of the context within which it operates".[85]

A second problem similarly relates to the fairly small and closely-knit community of arbitrators. One need not go as far as one critic who imputes that arbitrators are not only obsessed with contractual sanctity but also with "the securing of their next appointment to a tribunal on the basis of their display of commercial probity and their loyalty to the values of multinational business".[86] Merely the appearance of a self-serving dynamic or correlating predisposition, rather than any actual bias, causes concern. This unease is further exacerbated by the fact that arbitrators frequently also act as counsel to parties in other

---

[82] A Cosbey and others, 'Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements' (International Institute for Sustainable Development, 2004) 7.

[83] J Werner, 'Limits of Commercial Investor-State Arbitration: The Need for Appellate Review' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford 2009) 116.

[84] I Knoll-Tudor, 'The Fair and Equitable Treatment Standard and Human Rights Norms' Ibid. 357-358.

[85] *Glamis* para.7.

[86] M Sornarajah, 'The Clash of Globalizations and the International Law of Foreign Investment: The Simon Reisman Lecture in International Trade Policy' (2003) 10 Canadian Foreign Policy 2-10.

cases. To be quite clear, no aspersions are cast here on the professional standards of individual arbitrators. But in an arena in which arbitrators – willingly or unwillingly – no longer simply act as the agents of two contracting parties but in fact serve a greater global community, the old adage that justice must not only be done but also seen to be done rings particularly true.

3. Can Human Rights Arguments be Raised in BIT Arbitrations?

3.1 Direct invocation

Several hurdles need to be taken in order to directly make human rights-based arguments in investment arbitration.

3.1.1 Jurisdiction

First, a tribunal must have the power to decide such matters. Rules of jurisdiction are in essence constitutional rules of a tribunal. International investment tribunals are constituted on a case-by-case basis by consent of the parties.[87] The agreement to arbitrate contained in a BIT or elsewhere thus defines the ambit of a tribunal's jurisdiction. The German Model BIT (2008) for instance provides in Art.10 that "disputes concerning investment" shall, failing amicable settlement, be submitted to arbitration at the request of the investor. Coupled with additional limits on jurisdiction contained in the arbitration rules chosen and the widespread absence of human rights provisions in investment agreements, the practical effect of the traditional consent principle and the restrictive wording used is to deny tribunals the competence to deal with free-standing affirmative human rights claims.[88] But the door is not shut completely. Conversely, contingent human rights contentions that – depending on the precise formulation of the dispute resolution clause – concern or relate to the investment, such as violations of the investor's human rights or defences of a host state based on human rights norms, are within the jurisdiction of the tribunal.[89] In line with this, in the *Maffezini* arbitration for instance the tribunal

[87] See 1.2.2 above.

[88] *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, (1993) 97 ILR 183; *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)*, Jurisdiction and Admissibility, Judgment, 3 February 2006, ICJ Reports, paras.65, 88 (on the fundamental role of the consent principle).

[89] Reiner and Schreuer 84; Knoll-Tudor 336-337.

took into account arguments based on European and Spanish environmental law in deciding whether an environmental impact assessment had impermissibly infringed the claimant's rights, evidently satisfied that this was a controversy relating to the investment.[90]

3.1.2 Choice of law

Having established jurisdiction over certain human rights matters, the next question becomes which human rights claims are part of the law applicable to the substance of an investment dispute. The simplest way would again be to include human rights provisions in BITs. Failing that, human rights norms could enter the legal bloodstream of BIT arbitrations through choice of law provisions, such as Art.40 of the Canadian Model BIT (2004), which provides that tribunals shall decide "in accordance with this agreement and applicable rules of international law". NAFTA and the ECT anticipate the application of international law alone. To the extent that they are part of international law, human rights could thus be taken into account. Where there is no express choice of law clause in the BIT, such as in the German Model BIT (2008) for instance, the selected procedural rules might contain provisions to that extent. Art.42(1) of the ICSID rules proclaims that, besides the law of the contracting state party to the dispute, "such rules of international law as may be applicable" shall govern the dispute. The UNCITRAL rules however are less predisposed to international law and simply hold that the conflict of law rules considered applicable by the tribunal shall determine the governing rules. In spite of that, it would still technically always be possible, if highly unlikely, for the parties to mutually agree for international human rights law to be applicable in a specific dispute.

3.2 Indirect invocation through interpretation

Given the limitations outlined above and the fact that most BITs do not contain substantive human rights provisions, the question arises if human rights could otherwise be relevant to an investment dispute. A slightly circuitous, but nevertheless extremely important way for this to happen is through interpretation and methods akin to supplementary analogy. International courts and tribunals have developed various "fall back" techniques when dealing with arguments not covered by the treaties in question.[91] This could be the case in at least three situations.

---

[90] *Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Final Award, 13 November 2000, paras.65-71

[91] J Pauwelyn, 'Fragmentation of International Law' Max Planck Encyclopedia of Public International Law <http://www.mpepil.com/> accessed 14.10.2009, paras.29-31; Simma and Kill 682-702.

3.2.1 Determining the meaning of BITs

BIT provisions are notoriously vague. One need only recall the invariable demand for "fair and equitable treatment" of the investor. But being creatures of international law themselves, BITs are to be interpreted on the basis of international law interpretation principles.[92] Besides ordinary meaning, context, object and purpose, subsequent practice, and other means of interpretation, "external rules of law" are often looked at in order to understand a particular treaty term. It is sometimes also assumed that the parties will have appreciated that the content of a legal term would change over time as the law evolves.[93] Human rights jurisprudence thus can and has in the past been adduced to clarify the meaning of both substantive and procedural BIT terms.[94] For example, in the *Tecmed* arbitration, the panel referred to case law of the European Court of Human Rights (ECtHR) to spell out various aspects of legitimate regulatory takings in the public interest. But this phenomenon should be taken with a grain of salt, since such reference by tribunals not infrequently seeks to benefit the investor, for instance when arbitrators establish the concept of legitimate expectations as a potential trump against domestic regulation or opine that states have to defray their own legal costs even if they prevail.[95] Moreover, at least one tribunal flatly denied the relevance of external rules of law in investment arbitration.[96] Nevertheless, there is definitely room for introducing human rights angles through the interpretation of treaty terms. How this flexibility is then utilised in practice is of course a different question.

3.2.2 Presumption of compliance with international law

The idea behind this venerable principle is that the treaty parties would not have intended that their agreement offends existing rules of international law.[97] Unless specifically made clear, the general import of a BIT will according to this

---

[92] *Asian Agricultural Products LTD v Republic of Sri Lanka*, ICSID Case Bo. ARB/87/3, Award, 27 June 1990, 32 ILM (2001) 580, 594, para.39.

[93] *Kasikili/Sedudu Island (Botswana v Nigeria)*, Judgment (Declaration of Judge Higgins), 13 December 1999, ICJ Reports (1999), 1045, 1113, para.2.

[94] Fry 82-99.

[95] *International Thunderbird Gaming Corp v United Mexican States*, NAFTA Ch.11 Tribunal, 26 January 2006, Separate Opinion of Thomas W. Wälde, paras.26, 141.

[96] *Tradax Hellas SA (Greece) v Republic of Albania*, ICSID Case No. ARB94/2, Decision on Jurisdiction, 24 December 1996, 14 ICSID 161 (1999), 194.

[97] *Territorial Jurisdiction of the International Commission of the River Oder*, Judgment, 10 September 1929, PCIJ, Series A, No.23 (1929) 20; *Electronica Sicula SpA (ELSI) (USA v Italy)*, Judgment, 20 July 1989, ICJ Reports (1989) 14, 42, para.50.

interpretative approach not be taken to have tacitly dispensed with the elemental human rights protection of customary international law. In essence, this presumption leans towards reading the different areas of international law in coherence with each other. Such a take on BITs could for example provide vital guidance in defining the limits of what an acceptable exercise of police powers by the host state is in the context of an alleged expropriation. It would be a reckless investor indeed who would seek to argue that a BIT deliberately prohibits governmental regulation fulfilling peremptory norms (*jus cogens* obligations) such as putting an end to modern day slavery or torture. Even if the measures in question do not cross into the realm of *jus cogens*, the burden would at least be shifted to the investor to claim that the parties intended to cut across international law in this particular instance.

3.2.3 Vienna Convention on the Law of Treaties Art.31(3)(c)

According to this provision, "any relevant rules of international law applicable in the relations between the parties" should be taken into account together with the particular context in interpreting a treaty.[98] This provision did not at first receive much attention, despite the fact that it is occasionally seen as a potential tool for reconciling the ostensibly fragmented international legal order.[99] While there is insufficient support for understanding Art.31(3)(c) as a "master key" to open the flood gates and wash away all limits of jurisdiction and applicable law and rewrite the parties' obligations, it does allow for the introduction of a certain degree of harmonization into the various sub-fields of international law.[100] It would certainly seem arguable that *erga omnes* obligations, i.e. universal obligations owed to the community of states as a whole, are such relevant rules applicable between the parties and should hence be taken into account in interpreting BITs. If certain human rights obligations could be classified as *erga omes* (to which no claim is made here), they could in all likelihood hence be raised indirectly in investment arbitration.

3.3 Actual conflicts between international law and BIT provisions

Following the interpretive techniques outlined above should greatly reduce the danger of disputes in which investment law and human rights law actually (rather than just apparently) collide. This will only be the case where BITs and human rights law suggest different ways of dealing with a problem and these

---

[98] Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 1155 UNTS 331.

[99] P Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' (1998) 1 Yale Human Rights and Development Law Review 85, 87.

[100] Simma and Kill 694.

inconsistencies cannot be resolved through harmonizing interpretation. Ergo, assuming investment and human rights obligations truly are both relevant and at loggerheads, what then? In other words, is the highly specialized field of international investment law, owing to its particular functional focus, a self-contained and independent legal regime?

Unfortunately, there is little, if any, agreement among arbitral tribunals on how to deal with competing non-investment obligations.[101] Investment tribunals generally hesitate to deal with such conflicts and prefer to disallow human rights arguments for procedural reasons rather than engage with the substance of the matter, as happened in the *Azurix* and *Siemens* cases brought against Argentina. The question therefore immediately acquires a conspicuously academic slant. Potential answers will nevertheless be sketched here to point out underlying complications and foreshadow possible future arguments.

At the outset, it is almost trite to note that, like every other treaty, BITs are an attempt to create special legal relations between the parties and that these can in theory "contract out" of general public international law other than *jus cogens*.[102] But the observation that BITs constitute *lex specialis* between pairs of states dealing with investment promotion and protection is not tantamount to arguing that they reject all other potentially relevant norms of international law.[103] Indeed, BITs are silent on most matters of international law. At a more fundamental level, it is highly doubtful whether special treaty-based regimes (i.e. BITs) could even have legal effect without reference to another system of law that could provide them with such validity (i.e. public international law).[104]

It is clear that conflicting provisions contained in investment treaties cannot contravene superior rules. They would, for example, have to yield to fundamental human rights that are protected through Art.103 of the UN Charter or peremptory norms of international law.[105] If however invalidity also does not resolve the situation and the conflicting non-investment obligation is also a primary source of international law (i.e. found in a treaty or customary international law), various other "tiebreakers" can be employed.

Most straightforward is an explicit conflict clause in the investment treaty. An example of such express instruction would be Art.16 of the US Model BIT (2004), which affords primacy to outside international legal obligations entitling an investor to treatment that is more favourable than that accorded by the

---

[101] Knoll-Tudor 340.

[102] VCLT Arts.53 and 64.

[103] Simma and Kill 705.

[104] R Higgins, 'A Babel of Judicial Voices? Ruminations From the Bench' (2006) 55 International and Comparative Law Quarterly 791, 803; International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (ILC Study), Report of the Fifty-sixth Session of the International Law Commission, GA Official Records, 59th Sess, Supp No 10 (A/59/10), p. 290, para.318.

[105] Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

BIT.[106] Other conflict clauses avoid laying down plain hierarchies, e.g. Arts.12 and 13 of the US Model BIT, according to which the treaty parties "shall strive to ensure" that they do not derogate from domestic environmental and labour laws. More oblique still are clauses amounting to little more than a restatement of general rules of interpretation.

In the absence of conflict clauses contained in the agreements, general principles can be invoked in an attempt to resolve the conflict. The VCLT, in this respect itself codified customary law, contains such treaty conflict rules.[107] Art.30 and 59 for instance regulate the relationship between successive treaties. But requirements relating to the identity of the subject-matter and the parties, as well as potentially unwelcome consequences resulting from interference with multilateral treaty regimes essentially foreclose a simple imposition of BITs as *lex posterior*.[108]

3.4 Interim conclusion

Despite uneven arbitral reception, human rights arguments featuring in investment disputes are a steadily growing trend. While the effectiveness of doing so is far from guaranteed, there is much to support the view that non-investment obligations can be relevant to investment arbitrations even in the absence of express inclusionary wording. The fundamental rationale is that BITs are not created in a legal vacuum but in a system of public international law. It remains to be seen to what extent prudent use will be made of this possibility by participants to investment arbitrations.

4. Political Risk Guarantees

When deciding whether to invest abroad, political risk will need to be assessed carefully from various angles, sometimes with the help of specialised consulting firms.[109] A cautious investor will not only rely on the extent and effectiveness of the legal rules in place. In line with such comprehensive risk management strategies, it is frequently possible to acquire investment insurance against non-commercial risks. This complements the protection afforded through BITs by typically covering perils such as expropriation, contractual non-compliance, political violence, currency incontrovertibility, and transfer risks.

---

[106] See also Art.11 UK Model BIT (2005).

[107] A Aust, *Modern Treaty Law and Practice* (2. edn Cambridge Univ. Press, Cambridge 2007) 228.

[108] Cf. A Verdross and B Simma, Universelles Völkerrecht: Theorie und Praxis (3. edn Duncker & Humblot, Berlin 1984) paras.787-788.

[109] Vagts, Dodge and Koh 458.

Investment insurance is offered by various sources. They differ as to the details of their rates, insurable interests, and risk covered. Many states seek to foster outward investment by providing subsidized or self-sustaining investment insurance through governmental bodies, such as the Overseas Private Investment Corporation (OPIC) in the US, the Export Credit Guarantee Department (ECGD) in the UK, or the German federal investment guarantee programme *Direktinvestitionen Ausland* (DIA). These domestic programmes are essentially part of the home state's foreign and economic policy and frequently tied to nationality requirements. Besides the obvious indemnity benefits, this form of governmental backing has a preventative dimension by lending additional heft to an investor operating abroad. In the interest of potential recovery, such public guarantees tend to only insure investments in countries that have signed BITs or special investment guarantee agreements with the home states.[110] Art.6 of the German Model BIT (2008) for instance contains a subrogation clause whereby an investor's right or claim against the host state is assigned to the home state making a payment under a guarantee. The home state then becomes entitled to assert that right or claim. This symbiotic relationship strengthens the national BIT network since states will feel additional compulsion to conclude investment agreements without which foreign investors would not be able to take out investment insurance, thus foreclosing an ostensibly alternative method of investor protection. In other words, the potential of insurance as another route of assuring investors without having to utilise potentially stifling BITs is eliminated where the former's availability is necessarily tied to the existence of a BIT.

The Multilateral Investment Guarantee Agency (MIGA), a member of the World Bank Group, provides comparable protection with a particular focus on development. The private sector also offers insurance services. Co- and reinsurance between these three layers is not uncommon.

Human rights and related concerns can play a role in limiting the scope of investments covered. OPIC for example does not insure investments that fail to meet certain environmental standards and respect labour rights.[111] The German DIA programme similarly posits minimum standards relating to the environment in deciding whether to insure a project. In addition, it would theoretically be possible to stipulate in the terms and conditions of the insurance contract itself that certain conduct infringing human rights or host state violations relating to the project render the contract voidable and absolve the insurer from any potential indemnity requirement. Such provisions already exist with respect to criminal activity and corruption, as for example in para.15 of the General Terms & Conditions of the German investment guarantee programme. This might provide a stronger incentive than the loose references

[110] Dolzer and Schreuer 209.

[111] MB Perry, 'A Model for Efficient Foreign Aid: The Case for the Political Risk Insurance Activities of the Overseas Private Investment Corporation' (1996) 36 Virginia Journal of International Law 511, 522.

to the legally non-binding OECD Guidelines for Multinational Enterprises one occasionally encounters in the investment insurance context.

5. Recalibrating the BIT Regime to Respect and Promote Human Rights

5.1 Methods of modifying BITs

Bringing BITs in line with modern human rights law and thinking could be achieved through various legal techniques. It however almost goes without saying that all of this will inevitably be hostage to the political intentions of the treaty parties. Nevertheless, it seems that capital-exporting countries are increasingly waking up to the reality that they too might have their room for manoeuvre constrained by investment agreements.[112] Interestingly, in defending their own regulatory spheres, they thus become proxies for human rights advocates, as one observer has noted.[113] The *Vattenfall* saga unfolding in Germany at the moment is illustrative of this development.[114]

Most obviously, completely new BITs could be negotiated and concluded. But this takes time. BITs generally remain in force for a duration of ten years or more, see e.g. Art.13(2) of the German Model BIT (2008). At the end of that period, they normally continue indefinitely until denounced by one of the parties and a subsequent notice period has passed (often 12 months). But even following successful termination prior investments continue to enjoy the protection of the BIT provisions for a fairly long time (20 years from the date of termination under the German Model BIT).

Amending existing BITs, while technically possible, is also not without complications. Generally speaking, investors are entitled to rely on the treaty provisions as long as the treaty remains in force.[115] Neverthess, it is of course much easier to amend a bilateral treaty than one involving many state parties.

A third method would be for the parties to leave the text of an existing investment agreement intact and issue binding interpretations of certain provisions, as was the case when the three NAFTA parties issued a statement

---

[112] SP Subedi, 'The Challenge of Reconciling the Competing Principles Within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation"' (2006) 40 The International Lawyer 121, 132.

[113] Waincymer 303.

[114] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany*, ICSID Case No. ARB/09/6, Registered 17 April 2009.

[115] Dolzer and Schreuer 23.

limiting the ambit of FET under NAFTA.[116] The US Model Bit (2004) even explicitly provides for this possibility in Art.30.

5.2 Revising BIT provisions

Based on the deficiencies identified above and irrespective of the precise treaty technique chosen, several potential revisions of investment treaty terms could serve to ameliorate some of the human rights concerns. It is important to note that most of the following changes could, even individually, have an immense impact on the investment climate so that they should merely be seen as a non-exhaustive selection of tools at the drafters' disposal, rather than a mandatory prescription of changes.

5.2.1 Preamble

Preambles to treaties, while not capable of creating substantive rights, are important in interpretation. Drawing on the above then and expanding the initiatives of recent Scandinavian and North American investment agreements, future BITs could in preambular language expressly reaffirm their commitment to the general system of public international law, declare that they do not intend to create an isolated legal regime, and state that they recognize other relevant norms and values of international law such as human rights, sustainable development, and environmental protection. It would also be worth emphasising an intention to seek an adequate balance between investment protection and the frequent necessity of positive state measures to implement those norms and values. Finally, it might be advisable to draw attention to the common heritage of investment protection and human rights law to dispel any lingering myths of irreconcilability.

5.2.2 Scope of agreement

Turning to the substantive provisions, BITs make frequent use of definitions to lay down the fundamental scope of the investment agreement. Of particular note here is the definition of "investment". One important modification to many of the formulations commonly encountered at present would be to provide that an investment for the purposes of the agreement is only one that is made in accordance with the domestic law that governs the investment (akin to what recent South African BITs are providing) or the law of the host state.

[116] Mann 24.

Investment can further be limited to direct investment as opposed to portfolio investment. Moreover, whole sectors or areas of economic activity could be excluded from the scope of application of the BIT.

5.2.3 Expropriation

At present, many expropriation clauses spend more time stipulating details of compensation payments than clarifying the hazy fringes of (indirect) expropriation. Future BITs could follow in the footsteps of Annex B of the US Model BIT (2004) and NAFTA and specify when exactly non-discriminatory regulatory actions designed and applied to protect human rights and legitimate public welfare objectives such as public health and safety and the environment do not constitute indirect expropriations. Alternatively, it could be stipulated that human rights obligations mandating infringing regulatory measures reduce any compensation award.

5.2.4 Standards of treatment

Explanation of what is meant by FET would go a long way towards securing legal certainty and predictability for all parties involved. A first step would be to stipulate whether this is the same as the minimum standard of treatment of customary international law or whether this is an autonomous treaty concept. Secondly, while it is of course impossible to spell out all forms of unfair and inequitable treatment in a tidy formulation, it might be helpful to enumerate typical categories of FET breaches, list factors that can give rise to a breach of the standard, and include factors that militate against such a finding.

As to the relative standards of treatment, a progressive BIT could provide for an express exception to an NT violation for limited cases of affirmative action (positive discrimination), i.e. programmes designed to promoting equality and advancing those sectors of society that have been historically disadvantaged or unfairly discriminated against. Such a clause is found in the South Africa-Tanzania BIT (2005) for instance. MFN clauses could be tweaked to tone down the implantation of procedural benefits from other BITs for tactical reasons – sometimes referred to as "cherry-picking" – where this was not intended.

5.2.5 Miscellaneous clauses

Further or alternatively to the restraining modifications outlined in the preceding paragraphs, one could draft a general exception clause that seeks to preserve states' right to regulate in vital areas, thus appreciating that a commitment to human rights and related interests frequently requires more than mere omission. A few modern BITs already include similar provisions.

Nevertheless, exclusionary wording can presently be found in some of these BITs that effectively emaciates ostensibly progressive provisions. An example hereof is Art.10(1)(b) of the Canadian Model BIT (2004), which under the heading of "General Exceptions" provides among other things that "nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary … (b) to ensure compliance with laws and regulations *that are not inconsistent with the provisions of this Agreement*" (emphasis added). That final caveat severely undermines the whole concept of a regulatory exception by superimposing the terms of the BIT and should hence be deleted. At the very best it is redundant, since laws and regulations not inconsistent with the BIT would appear to be permissible anyway.

With respect to choice of law clauses, clear reference to applicable principles of international law besides the BIT itself would enable arguments based on human rights law to be made more easily and frequently and lessen the dependence on second-order rules contained in procedural regimes (which are by their multilateral nature much more difficult to amend), *ad hoc* agreements by the parties on the governing law, or interpretive techniques. Similarly, the compromissory clause – whereby the parties agree to settle a dispute arising out of the treaty by arbitration and hence the basis of a tribunal's jurisdiction – could be widened to afford tribunals the authority to also take into account non-BIT obligations in investment disputes.

5.2.6 Investor obligations

A highly contentious point is whether BITs should also include investor obligations or specific home state responsibilities, possibly coupled with an abrogation of their rights in cases of non-compliance. Introducing such provisions might seem tempting as a quick solution to redress the imbalance referred to earlier. However, various considerations need to be borne in mind and analysed carefully. Inevitably, this would have enormous economic ramifications, which would need to be assessed in detail beforehand. One therefore has to decide at the outset what the purpose of these agreements should be. There can be little doubt that responsible and commensurate investment protection has a rightful role to play. To pretend otherwise would be to naively cast states as the perennial champions of human rights. The question is then how to achieve this balance.

One answer would be to introduce even more legal provisions, and hence complexity, into a fairly focused, albeit already rather intricate, legal instrument. It is submitted that the better way of going about these deficiencies would be to enhance and strengthen the existing provisions and jurisprudence of international and domestic human rights protection and allow them to play a meaningful role in investment law and arbitration, rather than to create duplicates thereof in investment treaties. What matters is the bigger picture, not the individual instrument. The alternative would prompt a large amount of uncertainty and concede too willingly that human rights law and investment law are hermetically separate fields that cannot interact meaningfully. That

view is both mistaken and undesirable. Investment law was never meant to address issues of great public concern. At the same time it is not absolved from other aspects of the international legal system. Crucially, such drastic gestures would run the serious risk of driving businesses out of the public system of international law and into the even less transparent, accountable, and legitimate realms of private regulation and non-legal dispute settlement. Despite all its faults and the need to recalibrate it, investment law is at the end of the day still a regime rooted in the fundamental idea of a global rule of law and thus an attempt to put right over might.

5.3 Reforming dispute settlement procedures

Given their key role in shaping the system, various procedural aspects of BITs and commonly used arbitration rules should be reconsidered when attempting to achieve a healthy interaction between the investment regime and other important concerns. For one, *amicus curiae* participation could be further widened in order to bring a broader perspective to the table, in particular when neither investor nor state are minded to invoke human rights points. Participation by observers without a direct interest in the case can be of great assistance to a tribunal by drawing attention to relevant matters not pleaded by the parties and through the furnishing of special expertise. The US Model BIT (2004) for instance explicitly provides for a tribunal to have the authority to accept submissions from non-disputing parties. This is further bolstered by the provision of documents to the wider public, without which *amicus curiae* participation might well be rendered all but symbolic. Transparency is another priority. This could be improved through better public access to documents, in which commercially sensitive data could easily be redacted. A higher degree of consistency could be achieved through greater use of requests for binding interpretations, an appellate process, or a multilateral investment court composed of independent jurists. Short of that, arbitrators could be selected in a more neutral manner through the procedural frameworks of choice, which would further strengthen the legitimacy and acceptance of the process. The question whether an exhaustion of local remedies should be mandatory is more difficult to answer. While it is certainly true that large investment arbitrations are not exactly speedy proceedings and not all host state courts are incapable or unwilling to grant fair trials, it seems overly optimistic to conclude that the mills of justice grind the same the world over.

6. Assessment of Proposed Reforms and Potential Initiatives

6.1 The IISD Model International Agreement on Investment for Sustainable Development

Many of the proposals flagged above have found their way into the IISD Model BIT, last revised in April 2006.[117] This Model BIT encompasses a total of 59 Articles (in 11 Parts) and 6 Annexes, so that only a few central features can be commented upon in the space available here.

Most fundamentally, the drafters of the IISD Model BIT do not believe that the entire system of investment agreements should be thrown over board. Rather, they advocate a new modified agreement for the 21st century, recognizing the importance of investment in the wider global economic and developmental context.

The Model in its preamble commendably refers to transparency, accountability, and legitimacy as driving principles. It links investment very closely to development, almost to the point of turning foreign investors into the handmaidens of host state development programmes. Investment protection is mentioned for the first time only in the fifth paragraph of the preamble. It is doubtful whether this would resonate well with the larger business community. It might be more advisable to firmly place investment in a dynamically evolving context, which underlines and facilitates intertemporal interpretation. While this can of course cut both ways over time, this would allow progressive interpretative techniques without instrumentalizing investment, and hence alienating investors and capital-exporting countries, to the extent done in the Model. Reference is made to an "overall balance of rights and obligations". It might be prudent to instead directly refer to the importance of human rights protection rather than to use such vague formulations.

As to the foundational provisions, the gist of the preamble is repeated in Art.1, which sets out the objective of the treaty to be the promotion of foreign investment that supports sustainable development. A discussion of such a political ambition is beyond the purview of the present paper. It should however be noted that this is a radical departure from the traditional BIT logic, which initially intended BITs to be minimalistic agreements shielding investors operating in a foreign environment. In the drafters' conception the agreement is no longer a shield but a (benevolent) sword. This goes well beyond a mere intention to curb excessive investor protection.

---

[117] IISD Model International Agreement on Investment for Sustainable Development, 2. edn, available at: http://www.iisd.org/investment/model (accessed 28.10.2009).

In other notable introductory matters of Part 1, portfolio investments are not covered. A home state definition seeks to prevent so-called "treaty-shopping" through "home states of convenience". Investors occasionally claim countries which are not their principal place of business as their home state based on the fact that said country has only minimal legal obligations but favourable investment protection agreements. This can be considered evasive or at least a distortion of competition where there is no genuine link between the investor and his newly adopted "home state". Finally, rights of establishment are not granted to potential investors and specific sectors can further be excluded from the agreement.

Turning to the standards of treatment of foreign investors, Part 2 specifies with respect to NT what it means for investors to be "in like circumstances", clearly an attempt to avoid the *Occidental* problem, where an overly broad NT interpretation resulted in big multinational corporations being able to claim the regulatory benefits intended to support small domestic producers. The criteria listed nevertheless introduce a degree of subjectivity that the traditional blanket application avoids. The aims, and not just the effects, of a measure are for instance also to be taken into account, possibly with a view to exempting certain measures not covered by the general exception of Art.51. The MFN clause attempts to limit the practice of treaty-shopping to future international agreements only. MFN clauses have in the past been used to obtain a wide range of benefits not covered in the immediately applicable investment treaty but in the rules available to other foreign investors. If this were limited only to prospectively concluded agreements, the possibility of excessive "cherry-picking" (i.e. choosing rules from a wide array of treaties as one sees fit) would be toned down. At the same time, the investor is assured that he will not be treated less favorably than another prospective foreign investor. FET is tied to customary international law. As to expropriation, an exception akin to the Canadian Model BIT (2004) is included for certain *bona fide* regulatory takings protecting or enhancing public interests.

A considerable innovation is the inclusion of investor obligations (Part 3), host state rights and obligations (Parts 4 and 5) and home state rights and obligations (Part 6). Abrogation of rights is also provided for in certain situations (Art.18(3)). This comprehensive attempt to give teeth to the idea of good governance is laudable in its intent, but the problems relating to overloading an investment agreement have already been alluded to above (see 5.2.6). There will inevitably be overlap with other external guidelines and rules. Once again, it needs to be decided if one wants to open up the investment regime to other non-investment obligations, or if one wants to turn the investment protection creature into a wholly different beast. If the latter approach is preferable, then the Model does well to include host states in its prescriptive scheme, thereby avoiding the uncritical cliché of the innocent and powerless host state.

Art.34(c) re-affirms the parties' obligations under international environmental and human rights agreements, dispelling any notion of an exclusive *lex specialis*. (Although this could be widening to simply refer to "law" rather than giving the impression of a limitation to conventional sources.) In

light of the two basic options outlined in the previous paragraph, the Model can thus be said to adopt a "belt and braces" approach.

With respect to dispute settlement provisions (Part 9), there is a considerable pre-arbitration mediation procedure. Investor-state arbitration is then tied to a prior exhaustion of remedies. Potential injustice is sought to be taken care of through an expedited procedure in cases of "demonstrable lack of independence or timeliness" (Art.45(c)). While this is an attempt to blaze a middle path between the two polar opposites currently encountered in international law, viz. having to arduously exhaust all available domestic remedies first or being allowed to bring proceedings before an international tribunal immediately, it could be difficult for an investor to satisfy that special requirement.

The modern approach of the Model is further stressed through transparency provisions, a generous applicable law clause (Art.48), and a general exceptions clause for affirmative action (Art.51). Further innovations worth noting are that the Model creates a significant institutional framework (Part 8) and highlights the importance of funding.

In sum, it can be said that implementing only a few parts of this vast reform package would be a considerable achievement in the progressive development of investment agreements.

6.2 Multilateral Investment Agreements

The attractions of a multilateral investment agreement are not difficult to come up with. Coherence and uniformity could be greatly enhanced. Wildly oscillating bilateral power imbalances might arguably be restrained, thereby promoting fairness and legitimacy through wider participation. Treaty-shopping (via MFN clauses or home states of convenience) could be curtailed. All of this could result in tangible stability and predictability benefits, simplify planning for businesses and states alike, and perhaps drive down legal and regulatory costs.

The idea of such a global, or at least regional, solution is not new. But it has never come to fruition in form of a multilateral treaty purely focusing on investment. Famously, in the mid to late 1990s, the OECD member states negotiated the ill-fated Multilateral Agreement on Investment (MAI), which was abandoned following stern criticism from NGOs and sectors of civil society alleging it was too investor-friendly and promoted economic liberalisation too aggressively. When certain states refused to back the MAI, chiefly France and India, the initiative was scrapped.[118] In more recent discussions on the matter, it is also frequently states that are not traditional capital-exporters that lead the

[118] JW Salacuse, 'Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain' in N Horn (ed) *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Kluwer Law International, The Hague 2004) 84.

critical vanguard, most commonly citing fears of impediments to state regulation.[119]

Nevertheless, what is cast in doubt here is the material content of individual proposals and not so much the concept of multilateralism itself. The problem is political rather than legal. As is always the case on the international stage, if one succeeded in bringing all stakeholders on board during negotiations and managed to adequately take their views into account, chances of a mutually agreeable solution would increase dramatically. Be that as it may, at present there is little political appetite for another attempt at a multilateral investment treaty.

6.3 Comprehensive free trade agreements

More promising appears the move to embed investment in a larger package of economic relations. Investment protection is increasingly seen not simply as a privilege for a special group of people but as one component of a state's foreign and economic policy network on matters such as trade, industry, the mobility of persons and capital, development, and the environment. Besides the obvious point that it is easier to find a common denominator amongst the limited parties to Free Trade Agreements (FTAs), this allows for a more holistic perspective and could better accommodate the concerns of countries that do not traditionally export investment by providing other concessions. NAFTA is a prototype of such a wider approach. Its multi-faceted design might help to explain why its investment chapter and consequently also certain NAFTA arbitrations do not seek to push investment protection to the maximum, a tendency individual BITs are more prone to succumb to. Another example would be the Australia-United States FTA of 2004, which, reflecting the developed domestic legal systems of both countries, does not include special provisions for investor-state dispute settlement.

6.4 Centralized solutions

With the Lisbon Treaty now in force, the European Union is for the first time afforded competences over foreign direct investments under its common commercial policy (TFEU Art.207).[120] Leaving aside thorny questions relating to the extent and possible delegation of this competence and the legal status of

---

[119] R Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2005) 37 New York University Journal of International Law & Politics 953, 969.

[120] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed at Lisbon, 13 December 2007, Official Journal, C306/50, 17.12.2007; Consolidated Version of the Treaty on the Functioning of the European Union, Official Journal, C115/50, 9.5.2008.

existing BITs between EU member states and third country states should the Community seek to make use of this provision, such a centralised competence might in future enable the EU to conclude agreements that include investment chapters. This arguably lends greater negotiating power to smaller states of the Community and allows for a more homogenous policy approach integrating investment and trade.[121] There might also be harmonization and efficacy benefits since fewer treaties would have to be concluded, simplifying the at times bewildering maze of BITs.

The Council of the EU further adopted a Minimum Platform on Investment (MPoI) to this extent in November 2006, which essentially is a template for investment FTA negotiations similar to national Model BITs. Accordingly, its legal status is also tied to the conclusion of any actual agreement. The MPoI is more narrow than most member state BITs.[122] It does not include portfolio investments. Certain economic activities are excluded from its scope, e.g. mining. Expropriation is also not covered and there remains a possibility for parties to enlist reservations. In one respect however the MPoI's ambit is wider than that encountered in current European BITs: it also deals with market access rather than just post-access protection, reflecting its deeper embedding in the comprehensive approach to economic relations identified above.

One problem of such a centralized solution however relates to dispute settlement mechanisms, specifically ICSID. It appears that blocs such as the EU could not at present become members of ICSID according to the wording of ICSID's Art.67 other than through a rather creative interpretation of signature "on behalf of States" or treaty amendment. Investor-state disputes under a Community investment treaty could thus not make use of the framework that currently offers the largest degree of transparency of those available.

Going further still, centralised institutional frameworks could lay down substantive and procedural rules for investment protection, either independently or through a regional economic integration organisation. All the concerns mentioned above in relation to the MAI would however apply, multiplied by the general dislike of many states for such forms of international integration. A multinational investment court might thus be more agreeable, since it would epitomise the "procedure over substance" formula that is key to ICSID's success. It might also be worth further analysing the potential of a future independent investment-related human rights compensation claims mechanism for host state nationals. In the end, the prospects of such proposals however remain uncertain in times of apprehension about an excessive proliferation of specialised adjudicatory bodies and tribunals.

---

[121] M Burgstaller, 'European Law and Investment Treaties' (2009) 26 Journal of International Abitration 181, 215.

[122] N Maydell, 'The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence' in A Reinisch and C Knahr (eds), *International Investment Law in Context* (Eleven International Publishing, The Hague 2008) 80.

6.5 Domestic law

In an important but frequently forgotten way, much of the international law of investment protection has already become domestic law through national constitutional arrangements relating to the internal status of public international law. But perhaps the simplest solution would be to create specific standards of investment protection within domestic law, thereby quelling investor anxieties and the call for BITs in the first place and achieving a higher degree of integration of investment law and other norms. Such a strategy would however demand an adequate legal framework to be fully effective and convince the system's current users of such a model's feasibility. Albania, Egypt, and Venezuela for instance have gone down this road, but these precedents have not been widely embraced.[123]

6.6 Voluntary codes of corporate conduct

Numerous codes of conduct of varying ambition have attempted to remedy a perceived imbalance by setting out duties of corporate investors. Policy initiatives to that extent have over time been launched by the OECD, ILO, UN ECOSOC, and various UN agencies. From a legal point of view, such codes are not binding. Their practical effect on companies' behaviour is difficult to assess. The standards themselves are not performance tools and generally lack monitoring capacities. While these codes are commendable for raising awareness of important issues and for involving investors directly, it remains to be seen whether they can usher in an "age of corporate moral purity".[124] Until investors (and other corporations, for the matter) learn to appreciate that human rights are good for business, criticism is unlikely to abate.

7. The Role of International Actors

International organisations and NGOs are critical catalysts in pushing for further developments. They fill a vital gap in what is otherwise a largely self-serving clientele by pointing to concerns that do not traditionally interest the principal actors (i.e. investors and states), such as transparency, accountability, legitimacy, and non-investment obligations. They can provide invaluable assistance through studies, model legal texts, and by drawing attention to other stakeholders as *amicus curiae* in arbitral proceedings. In particular the balanced investigation and documentation of investment arbitrations together with their

[123] Dimsey 16.

[124] Lowe 203.

contexts and consequences and the education of the wider international public are crucial tasks that fill the gaps left by what occasionally resembles private commercial arbitration but is in essence a fundamentally public affair. In all of that, it is however imperative for these actors to ensure that the debate is kept focused, responsible, and of the highest possible quality. BIT users and the wider arbitral community are rarely impressed by sweeping socio-political theorising.

8. Recommendations

The following recommendations are made in light of the above. Future investment agreements should first and foremost strive for a responsible balance between state regulation and investment protection, recognising that both are legitimate endeavours. It is crucial in this respect to neglect neither the general interest in a global rule of law and property protection nor the role investment plays in sustainable development, while at the same time allowing for the worldwide realization of human rights and related concerns.

In order to facilitate an approach by arbitral tribunals that grants states more regulatory leeway in this regard it is therefore suggested that in future investment agreements direct reference to international law is made in preambular language and treaty texts, in particular in applicable law clauses and statements of intent and purpose.

The protection of human rights should feature as a separate clause in German BITs so that its importance is beyond doubt. States should thereby declare that it is not compatible with international human rights protection to attract and promote investment by lowering recognized minimum standards. Furthermore, the parties should assert that nothing in the agreement can be understood to hinder a state from complying with its human rights obligations under international law.

It is further recommended with a view to reducing the anxiety about an award of damages and therefore in order to enable necessary state regulation, that the expropriation provision of the German Model BIT is concretized with respect to indirect expropriation. The Model treaty should be brought more in line with the Canadian and US Model BIT so that legitimate, non-discriminatory regulatory interests can be pursued. Neither the rightful and acknowledged regulatory space of sovereign states nor the international protection of human rights and the environment should be cast into doubt.

Concerning material standards of protection, exceptions should be created for particularly pressing matters of positive action required to create equal opportunities in the host state. A general clause affirming regulatory sovereignty likewise appears appropriate. Alternatively, a clause could exhaustively list those areas of regulation to which the state's obligations under the treaty specifically do not apply. It should further not be open to the parties to utilise MFN protection as a backdoor to secure procedural advantages.

As to FET clauses, it should be made clear whether these are a restatement of international customary law or whether they impose an autonomous treaty standard. Moreover, FET clauses should ideally contain typical examples of what will be considered a violation of this otherwise precariously vague standard. It would be advisable in this respect to list both factors indicating a breach and those militating against such a finding.

The compromissory clause contained in the German Model BIT should also state that an investment tribunal is competent to decide matters of public international law or human rights law that might arise in the course of an arbitration.

A greater degree of transparency should be central to future procedural provisions. This includes the publication of state laws and regulations affecting the investment as well as access to documents in arbitral proceedings.

The criteria for supporting foreign investment via political risk insurance through the German government programme should not only be tied to environmental matters, but also to obligations under human rights law and the improvement of the human rights situation in the host state. This should also find its way into the general terms and conditions applicable to the insurance policy, e.g. as an obligation permitting the insurer to deny a claim in cases of non-compliance.

Turning to alternative models of investment protection, it is recommended that, as far as possible, the German BIT network is in the long run fused into more comprehensive forms of economic integration. The new EU competence for FDI could present an excellent opportunity in this respect. Closer cooperation between the Ministry of Economics and Technology, the Ministry for Economic Cooperation and Development, and the Foreign Ministry would be highly desirable with respect to formulating a broader investment policy for the Federal Republic of Germany. To date it has largely appeared as if investment protection has mainly been treated as an economic instrument for the promotion of foreign trade and thus almost exclusively as a matter of trade policy. But the other dimensions of investment protection besides the creation of a stable environment for German investors abroad should also find recognition, in particular the human rights situation in the host state and the perception of the Federal Republic by the critical global public. Accordingly, it is not only the Ministry of Economics and Technology that should be involved in investment protection. Finally, global and regional initiatives pushing for multilateral investment arrangements deserve to be supported.

What is more, the responsible actors should participate actively in the international debate on the progressive development of the international law of investment protection and strive for closer cooperation with capital-importing countries, NGOs, representatives of civil society and research institutes. In particular comprehensive empirical studies of the concrete effects of investment treaties on human rights in host countries would be most welcome. In a similar vein, it would also be appropriate to carefully analyse the impact of such international agreements on regulatory interests within Germany, given that it is very likely that this topic will only become more and more controversial in the future.

9. Handlungsempfehlungen

Auf Grundlage des Vorangegangen werden somit folgende Handlungsempfehlungen ausgesprochen. Primär sollte in zukünftigen Investitionsabkommen ein verantwortungsvoller Ausgleich zwischen staatlicher Regulierung und Investoreninteressen getroffen werden. Dabei sollte weder das allgemeine Interesse an globaler Rechtsstaatlichkeit und grundrechtlichen Eigentumsgarantien noch die Bedeutung der Auslandsinvestitionen für die nachhaltige Entwicklung vieler Länder und die weltweite Verwirklichung der Menschenrechte sowie verwandter Belange vernachlässigt werden.

Somit wird empfohlen, in den Präambeln und dem Vertragstext zukünftiger Investitionsabkommen direkten Bezug auf das geltende Völkerrechtsregime zu nehmen, insbesondere in Klauseln zum anwendbaren Recht und den generellen Zielbestimmungen der Abkommen, um Schiedsgerichten eine regulierungsfreundlichere Auslegung zu ermöglichen.

Damit der Menschenrechtsschutz in deutschen BITs eine gebührend wichtige Rolle spielt, sollte er explizit in einer separaten Klausel Erwähnung finden. Dabei sollten die Vertragsstaaten anerkennen, dass es nicht mit dem völkerrechtlichen Menschenrechtsschutz vereinbar ist, Investitionen dadurch zu fördern, dass entsprechende Mindeststandards gesenkt werden. Weiterhin sollten sie erklären, dass nichts in jenem Abkommen so verstanden werden kann, dass ein Staat daran gehindert werden kann, seinen völkerrechtlichen Verpflichtungen im Bereich der Menschenrechte nachzukommen.

Um die Angst vor Entschädigungszahlungen zu mindern und so wichtige staatliche Maßnahmen zu ermöglichen, wird ferner geraten, die Enteignungsvorschriften im deutschen Muster BIT (2008) hinsichtlich indirekter Enteignung zu konkretisieren. Der Mustervertrag sollte daher näher an das kanadische (2004) oder US-amerikanische Muster (2004) angepasst werden, um so legitimen, nicht-diskriminierenden Regelungsinteressen nachzukommen und weder rechtmäßige und anerkannte staatliche Regulierungshoheit noch den internationalen Menschenrechts- und Umweltschutz in Frage zu stellen.

Was die Normierung der materiellen Schutzstandards angeht, sollten hinsichtlich des zu erstrebenden Ausgleichs Ausnahmen für besonders dringende positive Maßnahmen zur Verwirklichung von Chancengleichheit im Gaststaat geschaffen werden. Eine Generalklausel zur Herstellung von Regelungsfreiheit in dieser Hinsicht erscheint ebenso ratsam. Alternativ sollte eine Klausel, die bestimmte Regulierungsbestände abschließend aufzählt, genutzt werden. Ein Rückgriff auf Meistbegünstigungsklauseln sollte nicht zur Sicherung prozessualer Vorteile erfolgen dürfen.

Bezüglich FET-Klauseln sollte klar gemacht werden, ob damit ein völkergewohnheitsrechtlicher oder ein vertragsautonomer Standard gemeint ist. Weiterhin sollten FET-Klauseln mit typischen Beispielen für die Missachtung dieses ansonsten prekär unpräzisen Standards versehen werden.

Dabei wäre es ratsam, sowohl Indizien anzuführen, die auf einen Verstoß hinweisen, als auch solche, die dagegen sprechen.

Die Investor-Staat-Schiedsgerichtsklausel im deutschen Muster BIT (2008) sollte zudem deutlich machen, dass ein befasstes Schiedsgericht auch für etwaige menschenrechtliche oder sonstige völkerrechtliche Fragen, die sich im Laufe einer Investitionsstreitigkeit stellen, zuständig ist.

Ein höheres Maß an Transparenz sollte zudem Kernpunkt zukünftiger verfahrensrechtlicher Bestimmungen sein. Dies umfasst sowohl die Veröffentlichung von Gesetzen und Regelungen, die Investitionen betreffen, als auch einen verbesserten öffentlichen Zugang zu Dokumenten in Schiedsverfahren.

Zudem sollte die Förderungswürdigkeit von Investitionsgarantien seitens der Bundesregierung nicht nur an Umweltbestimmungen, sondern auch an menschenrechtliche Verpflichtungen und die nachhaltige Verbesserung der Menschenrechtssituation am Investitionsstandort gekoppelt werden. Dies sollte auch in den Allgemeinen Bestimmungen Niederschlag finden, die dem Garantieverhältnis zugrunde liegen, z.B. als mögliche Vertragsverletzung.

Hinsichtlich alternativer Modelle des Investitionsschutzes wird empfohlen, soweit durchführbar, das deutsche BIT-Geflecht auf lange Sicht in umfassendere Formen der wirtschaftlichen Integration zu überführen. Eine baldige Möglichkeit hierzu könnte sich in Form der neuen EU-Direktinvestitionskompetenz bieten. Eine koordinierte Abstimmung zwischen BMWi, BMZ und AA wäre bei der Ausarbeitung einer breiteren Investitionspolitik erstrebenswert. Bislang erscheint es zuweilen, dass der Investitionsschutz vornehmlich als reines Instrument zur Förderung der Außenwirtschaft und somit fast ausschließlich als Teil der Handelspolitik gesehen wird. Neben der Schaffung stabiler Rahmenbedingungen für deutsche Investoren sollten jedoch die anderen Dimensionen des Investitionsschutzes Beachtung finden, insbesondere die menschenrechtliche Situation im Gaststaat und die Wahrnehmung Deutschlands in der kritischen Weltöffentlichkeit. Somit kommt neben dem BMWi auch anderen verantwortlichen Ressorts eine tragende Rolle im Bereich des Investitionsschutzes zu. Des Weiteren sollten globale und regionale Initiativen zu multilateralen Investitionsabkommen unterstützt werden.

Darüber hinaus sollten sich die verantwortlichen Stellen aktiv am internationalen Dialog über die progressive Fortentwicklung des Völkerrechts im Bereich des Investitionsschutzes beteiligen und mit Entwicklungsländern, Nichtregierungsorganisationen, Vertretern der Zivilgesellschaft und wissenschaftlichen Einrichtungen eng zusammenarbeiten. Dabei wären insbesondere umfassende empirische Studien über die konkreten Auswirkungen von Investitionsabkommen auf die Menschenrechtslage in Gastländern angebracht. Zudem sollten die Auswirkungen solcher völkervertragsrechtlicher Abkommen auf regulatorische Interessen innerhalb der Bundesrepublik Deutschland genauer analysiert werden, da es sehr wahrscheinlich ist, dass dieser Themenkomplex zusehends an Brisanz gewinnen wird.

10. Bibliography

J Alvarez, 'Critical Theory and the North American Free Trade Agreement's Chapter Eleven' (1997) 28 University of Miami Inter-American Law Review 303

A Aust, *Modern Treaty Law and Practice* (2. edn Cambridge Univ. Press, Cambridge 2007)

R Bachand and S Rousseau, 'International Investment and Human Rights: Political and Legal Issues' (International Centre for Human Rights and Democratic Development, 2003)

I Brownlie, *Principles of Public International Law* (7. edn Oxford Univ. Press, Oxford 2008)

M Burgstaller, 'European Law and Investment Treaties' (2009) 26 Journal of International Abitration 181

GC Christie, 'What Constitutes a Taking of Property Under International Law?' (1962) British Yearbook of International Law 307

A Cosbey and others, 'Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements' (International Institute for Sustainable Development, 2004)

B Cremades and D Cairns, 'The Brave New World of Global Arbitration' (2002) 3 Journal of World Investment 173

Department of Trade and Industry of the Republic of South Africa, 'Bilateral Investment Treaty Policy Framework' (Government Position Paper, Department of Trade and Industy of the Republic of South Africa, Pretoria 2009)

M Dimsey, *The Resolution of International Investment Disputes: Challenges and Solutions* (Eleven International Publishing, Utrecht 2008)

R Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2005) 37 New York University Journal of International Law & Politics 953

R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford Univ. Press, Oxford 2008)

P-M Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford 2009)

JD Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) Duke Journal of Comparative & International Law 77

TJ Grierson-Weiler and IA Laird, 'Standards of Treatment' in P Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, Oxford 2008)

SG Gross, 'Inordinate Chill: Bits, Non-NAFTA Mits, and Host-State Regulatory Freedom: An Indonesian Case Study' (2003) 24 Michigan Journal of International Law 893

AT Guzmán, 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Virginia Journal of International Law 639

M Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment?' (2003) 3121 World Bank Policy Research Working Paper

R Higgins, 'A Babel of Judicial Voices? Ruminations From the Bench' (2006) 55 International and Comparative Law Quarterly 791

M Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford 2009)

M Hwang and K Chung, 'Defining the Indefinable: Practical Problems of Confidentiality in Arbitration' (2009) 26 Journal of International Abitration 609

I Knoll-Tudor, 'The Fair and Equitable Treatment Standard and Human Rights Norms' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford 2009)

L Liberti, 'Investissement et Droits de l'Homme' in P Kahn and W Ben Hamida (eds), *Les Aspects Nouveaux du Droit des Investissements Internationaux* (Nijhoff, 2007)

V Lowe, *International Law* (1. publ. edn Clarendon law series, Oxford Univ. Press, Oxford 2007)

H Mann, 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities' (International Institute for Sustainable Development, 2008)

N Maydell, 'The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence' in A Reinisch and C Knahr (eds), *International Investment Law in Context* (Eleven International Publishing, The Hague 2008)

C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford Univ. Press, Oxford 2007)

P Muchlinski (ed), *The Oxford Handbook of International Investment Law* (1. publ. edn Oxford Univ. Press, Oxford 2008)

OECD, 'International Investment Agreements: A Survey of Environmental, Labour and Anti-Corruption Issues' (2008)

OECD, 'Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures: Statement by the OECD Investment Committee' (2005)

F Orrego Vicuña, 'Of Contracts and Treaties in the Global Market' (2005) 8 Max Planck Yearbook of United Nations Law 341

F Ortino, 'Non-Discriminatory Treatment in Investment Disputes' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford 2009)

J Pauwelyn, 'Fragmentation of International Law' Max Planck Encyclopedia of Public International Law <http://www.mpepil.com/> accessed 14.10.2009

MB Perry, 'A Model for Efficient Foreign Aid: The Case for the Political Risk Insurance Activities of the Overseas Private Investment Corporation' (1996) 36 Virginia Journal of International Law 511

LE Petersen and KR Gray, 'International Human Rights in Bilateral Investment Treaties and Investment Treaty Arbitration' (International Institute for Sustainable Development, 2003)

LE Peterson, 'Human Rights and Bilateral Investment Treaties' (Investing in Human Rights, International Centre for Human Rights and Democratic Development, 2009)

C Reiner and C Schreuer, 'Human Rights and International Investment Arbitration' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law* (Oxford University Press, Oxford 2009)

A Reinisch, 'Expropriation' in P Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, Oxford 2008)

E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 American Journal of International Law 517

JW Salacuse, 'Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain' in N Horn (ed) *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Kluwer Law International, The Hague 2004)

JW Salacuse and NP Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 Harvard International Law Journal 67

P Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' (1998) 1 Yale Human Rights and Development Law Review 85

SW Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) Journal of International Abitration 469

C Schreuer, *The ICSID Convention: A Commentary* (2. edn Cambridge Univ. Press, Cambridge 2009)

C Schreuer, 'Investment Disputes' Max Planck Encyclopedia of Public International Law <http://www.mpepil.com/> accessed 10.10.2009

G Schwarzenberger, *Foreign Investments and International Law* (Stevens, London 1969)

SM Schwebel, 'The Overwhelming Merits of Bilateral Investment Treaties' (2009) Suffolk Transnational Law Review 263

M Sforza, 'MAI Provisions and Proposals: An Analysis of the April 1998 Text' (Public Citizen's Global Trade Watch, Public Citizen, Washington D.C. 1998)

B Simma and T Kill, 'Harmonizing Investment Protection and Human Rights: First Steps Towards a Methodology' in C Binder, U Kriebaum and A Reinisch (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, Oxford 2009)

M Sornarajah, 'The Clash of Globalizations and the International Law of Foreign Investment: The Simon Reisman Lecture in International Trade Policy' (2003) 10 Canadian Foreign Policy

SP Subedi, 'The Challenge of Reconciling the Competing Principles Within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation"' (2006) 40 The International Lawyer 121

R Suda, 'The Effect on Bilateral Investment Treaties on Human Rights Enforcement and Realization' in O de Schutter (ed) *Transnational Corporations and Human Rights: Symposium* (NYU School of Law, New York 2005)

P Thielbörger, 'The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford 2009)

UNCTAD, 'Transnational Corporations, Agricultural Production and Development ' (World Investment Report 2009)

DF Vagts, WS Dodge and HH Koh, *Transnational Business Problems* (3rd edn Foundation Press, New York 2003)

S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 The British Yearbook of International Law 99

A Verdross and B Simma, *Universelles Völkerrecht: Theorie und Praxis* (3., völlig neubearb. Aufl. edn Duncker & Humblot, Berlin 1984)

J Waincymer, 'Balancing Property Rights and Human Rights in Expropriation' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Arbitration* (Oxford University Press, Oxford 2009)

AS Weiner, 'Indirect Expropriation: The Need for a Taxonomy of "Legitimate" Regulatory Purposes' (2003) 5 International Law Forum 166

J Werner, 'Limits of Commercial Investor-State Arbitration: The Need for Appellate Review' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford 2009)

The Institute for Development and Peace (INEF)

The Institute for Development and Peace (INEF), which was founded in 1990, is an institute of the University of Duisburg-Essen (Faculty of Social Sciences) with a strong focus on policy-related and policy-relevant research. It closely collaborates with the Development and Peace Foundation (SEF), Bonn, established in 1986 at the initiative of former German chancellor and Nobel peace prize winner Willy Brandt.

INEF combines basic research with applied and policy-related research in the following areas: Global Governance and Human Security, Fragile States, Crisis Prevention and Civilian Conflict Management, Development, Human Rights and Corporate Social Responsibility.

The specific approach of INEF, as the only German research institute to combine basic with applied research in peace and development research, is also reflected in the range of third-party funding bodies. INEF carries out research programs and systematically explores available international expertise and world reports, often in cooperation with national and international partners. INEF also conducts smaller projects for NGOs and NGO networks. The institute is integrated in a strong and viable international research network.

Directors and Executive Board

Director: Prof. Dr. Tobias Debiel
Executive Director: Dr. Cornelia Ulbert

Members of the Executive Board: Prof. Dr. Tobias Debiel (spokesperson); Prof. Dr. Thomas Heberer (acting spokesperson); Prof. Dr. Heinz-Jürgen Axt; Prof. Dr. Gerhard Bäcker (Dean of Faculty of Social Sciences); Prof. Dr. Othmar Haberl; Dr. Brigitte Hamm; Prof. Dr. Christof Hartmann; Anja Kopyra; Prof. Dr. Dirk Messner; Prof. Dr. Werner Pascha; Ursula Schürmann; Prof. PhD. Karen Shire; Prof. Dr. Lothar Zechlin; advisors: apl. Prof. i.R. Michael Bohnet; Prof. i.R. Dr. Peter Meyns; Prof. em. Dr. Franz Nuscheler.

Human Rights
Corporate Responsibility
Sustainable Development

UNIVERSITÄT DUISBURG ESSEN

UNIVERSITY OF DUISBURG-ESSEN
FACULTY OF SOCIAL SCIENCES

INEF

Institute for Development and Peace (INEF)
Geibelstraße 41, D - 47057 Duisburg
Telephone +49 (0)203 379 4420, Fax +49 (0)203 379 4425
E-Mail: inef-sek@inef.uni-due.de
Homepage: http://inef.uni-due.de

ISBN: 978-3-9813367-2-6