

Boston College International and Comparative Law Review

Volume 27

Issue 2 *Interrelationships: International Economic Law
and Developing Countries*

Article 8

5-1-2004

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Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. Int'l & Comp. L. Rev. 429 (2004), <http://lawdigitalcommons.bc.edu/iclr/vol27/iss2/8>

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BALANCING HUMAN RIGHTS AND INVESTOR PROTECTION: A NEW APPROACH FOR A DIFFERENT LEGAL ORDER

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Abstract: Recognizing the political need to show that transnational investors should shoulder “responsibilities” in addition to the international “rights” to which they are granted access under investment protection treaties, this Article proposes a sort of “counterclaim” mechanism for use in future treaties. The mechanism would permit individuals who live in countries receiving foreign investment to bring claims against foreign investors for the violation of serious international rules by their agents or employees operating in the host country. Such rules would include safeguards for international human rights that might be violated in the operation of an investment, as has been documented recently before U.S. courts operating under the Alien Tort Claims Act. The Article concludes by providing an appendix with draft text that could be adopted by the negotiators of future bilateral investment treaties.

INTRODUCTION

Over the past five decades, the character of the international legal order has changed considerably in terms of norm development, the scope of regulated activity, and the actors upon whom international obligations fall. These changes have been brought about through an evolutionary process most often referred to as “globalization,” whereby enhanced telecommunications, data technology developments, and dramatically increased flows in trade and transnational investment have altered the socioeconomic relationships that exist among states and between states and non-state actors.

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These technological advances, along with the adoption of international economic obligations under multilateral trade and bilateral investment treaties, have facilitated dramatic increases in global trade and investment and have permitted private economic actors to take advantage of more efficient global operations. International economic obligations have been designed to facilitate global trade, and thus can be seen as safeguarding the interests of private firms, even though their prosecution can only be undertaken through state-to-state dispute settlement. Moreover, through the development of a web of approximately 2000 bilateral treaties among approximately 170 countries, private actors have been provided with the right to prosecute core economic obligations through direct arbitration with a state.

Mixed arbitration for the protection of foreign investors has actually existed for centuries, but until the 1960s it was normally pursued on an ad hoc basis through subrogation of a private actor's claim by its "home" state (i.e., the state of citizenship or incorporation). The exponential multiplication of bilateral investment treaties that has taken place since the 1960s—which gained considerable steam in the 1980s—has institutionalized the right of non-state actors to pursue mixed arbitration. Thus, on the economic front, international treaty norms have taken on a character that is clearly different from the state-centered obligations of past centuries.

Over roughly the same period, international human rights norms have also blossomed at an exponential rate. Much like economic obligations, most of these international human rights obligations possess the constitutional character of norms designed to protect individuals as against activities of the state. Analogous to economic obligations, international human rights obligations have become, in many cases, prosecutable by non-state actors before impartial, international decision-making bodies. However, despite the fact that international economic and human rights obligations share a focus on protecting non-state actors and often provide an individualized mechanism for enforcement, there is one notable distinction: the effectiveness of enforcement.

Much has been written about the relative effectiveness of World Trade Organization (WTO) dispute settlement process vis-à-vis other forms of dispute settlement. But less has been written about the superior effectiveness of investor-state arbitration, under which a state must submit itself to commercial arbitration with a foreign investor (based upon a general statement of consent contained within the relevant treaty). While a mixed claims tribunal can only award com-

pensation as relief, its award is normally eminently enforceable in most developed countries.¹

With its inclusion in the North American Free Trade Agreement (NAFTA), mixed claims arbitration has become increasingly more popular, as investors have brought claims under investment rules that heretofore would have been brought (if at all) by their home states. Increased usage of these mechanisms has brought with it increased notoriety. Mixed claims arbitration has thus become the cause célèbre of anti-globalization groups concerned that the phenomenon of globalization has had a deleterious effect on living conditions throughout the world, particularly in the developing world. When it became widely known that states holding membership in the Organization of Economic Co-operation and Development (OECD) had begun negotiations on a multilateral investment protection agreement in 1996, concerned activists argued that the agreement would constitute a “corporate bill of rights” with no corresponding obligations to regulate the activities of its beneficiaries.²

What these activists were essentially calling for is a *quid pro quo*: in exchange for international protection from potential abuses at the hands of host governments, corporations were to be held accountable for abuses for which they would be responsible under international law. This is different from the exchange that has historically typified such relationships, where the corporation submits itself to the disciplines of local law in exchange for international protection for its investment. In other words, the exchange had always been international protection in exchange for a foreigner’s commitment to invest. Has the time come for a change?

This Article explores the nature and modalities of the appropriate exchange that should be taking place today in light of the changes to the international legal order that globalization has wrought. This new legal order is one that increasingly recognizes individual rights, as against state action, in an almost quasi-constitutional pattern. This new legal order is one in which a plethora of treaties and interna-

¹ Enforcement is maintained through the inclusion of provisions in investment treaties that permit enforcement under international conventions. See generally *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 330 U.N.T.S. 38.

² See, e.g., Andrea Durbin & Mark Vallianatos, ‘*Transnational Corporate Bill of Rights*’—*Negotiations for a Multilateral Agreement on Investment (MAI)*, <http://www.globalpolicy.org/socecon/bwi-wto/mail.htm> (Apr. 1997); see also Public Citizen, *The Alarming Multilateral Agreement on Investment (MAI) Now Being Negotiated at the OECD*, at <http://www.citizen.org/trade/issues/mai/Opposition/articles.cfm?ID=5625> (last visited Apr. 26, 2004).

tional judicial doctrine have established and refined minimum standards for government action. However, notable cleavages remain between the effectiveness of enforcement mechanisms in the economic fields of trade and investment, as compared to the equally important fields of human rights, environment, and labor.

Part I of this Article outlines the lack of respect for human rights that has been attributed to the operations of foreign-owned enterprises in the developing world. Part II describes the voluntary codes of corporate conduct that have been adopted in response and addresses their fundamental weaknesses. Part III advances a solution to address these weaknesses—the inclusion of a human rights claim mechanism in all future international investment protection agreements—and then outlines some of the fundamental elements of the proposed mechanism (including the basis for finding liability and awarding compensation). While Part IV explores different bases of liability under a human rights claim mechanism, Part V analyzes the choice of obligations under the proposed mechanism and objections to its use. The Appendix of this Article presents draft treaty provisions that, if added to bilateral investment protection agreements, would serve to implement a human rights claim mechanism.

I. THE NATURE OF THE PROBLEM: LACK OF RESPECT FOR HUMAN RIGHTS BY MNEs

Critics of foreign direct investment in developing countries argue that there is a pressing need for rules governing the conduct of multinational enterprises (MNEs). As one author has noted: “such entities are inherently difficult [domestic] regulatory targets, with enormous economic and political strength and the ability to move assets and operations around the world.”³ Other critics have stated:

Many MNEs’ revenues today surpass the gross domestic products of several independent nation-states. MNEs’ wealth, resources, and information technology make them key players not only within the nation-states in which they operate, but also in the international arena. Some MNEs have more to say about policies that govern international trade and finance than do many of the less developed countries. Yet, driven by the search for profit, MNEs are often unaware of,

³ Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT’L & COMP. L. REV. 401, 401 (2001).

or simply disregard, the adverse impact that their activities may and often do have on the spectrum of human rights.⁴

[The] international scene is no longer just about formal, diplomatic relations between states—it has witnessed the emergence of increasingly powerful non-state actors; powerful in the sense that their activities have a major and direct impact on the lives of millions of people The problem is that their power is not matched by a corresponding degree of responsibility and accountability. Some MNEs have a budget that far exceeds that of many developing countries—and still, there is no mechanism to hold them accountable for the violations of human rights that their activities generate. In many developing countries where these MNEs operate, the rule of law is ineffective; there are no legal remedies, and no possibilities of redress—which goes to say that the MNEs can act in near-total impunity.⁵

It has accordingly been argued that a downward regulatory spiral (or a “race to the bottom”) has ensued from competition among developing countries in order to attract foreign direct investment. Faced with competition, developing countries may relax or fail to enforce domestic regulatory standards—including human rights standards—to the detriment of the health and well-being of their citizens. Whether the proof exists to sufficiently justify these theories on a macroeconomic level is an open question. Is it fair to say that foreign direct investment, once it has been committed to a particular country, is as highly mobile as these theories would suggest? Is it also fair to say that large, wealthy transnational corporations are really more powerful than the governments or leaders of numerous developing countries?

While it may not be clear that transnational corporations (both large and small) wield the power alleged by some of their harshest critics, there is a considerable amount of evidence to suggest that foreign enterprises operating investments in the developing world have committed, or been complicit in, environmental, labor, and human rights abuses. Human Rights Watch has published extensive reports that pur-

⁴ Christina Baez et al., *Multinational Enterprises and Human Rights*, 8 U. MIAMI INT’L & COMP. L. REV. 183, 184–85 (2000) (citations omitted).

⁵ Anne-Christine Hubbard, *The Integration of Human Rights in Corporate Principles*, in ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GUIDELINES FOR MULTINATIONAL ENTERPRISES 99 (2001) [hereinafter OECD GUIDELINES].

port to document human rights abuses undertaken in connection with foreign direct investment in numerous locations. For example, in India, a subsidiary enterprise of Enron Corporation has allegedly maintained extremely close ties to a local government that has allegedly engaged in the violent and unlawful repression of local protesters against the development of a hydroelectric project.⁶ Similarly, in the Niger Delta, political protests against the participation of transnational oil companies, such as Chevron and Shell, have allegedly met with brutal, systemic repression by government security forces.⁷ Others have noted how transnational corporations have benefited from the lower production costs that can be obtained through systemic violations of core labor and antidiscrimination standards in Asia and Latin America.⁸

II. THE ALLEGED SOLUTION: VOLUNTARY CODES OF CORPORATE CONDUCT

In response to such high-profile reports, individual corporations, international organizations, and industry groups have developed and implemented a series of codes of corporate conduct. Some codes focus particularly on the trading activities of individual firms (i.e., the procurement and foreign outsourcing practices), adopting basic labor and nondiscrimination standards. Others are industry-specific and govern both trade practices and the conduct of foreign investment enterprises. Finally, there is a class of codes developed by international organizations that intends to apply universally to all transnational and local business organizations. This latter class of codes includes instruments developed by state-controlled organizations, such as the OECD Guidelines for Multinational Enterprises or the United Nations (U.N.) Global Compact and instruments developed by industry-controlled organizations, including the Global Sullivan Principles and the Social Accountability 8000 (SA 8000) Standard.

⁶ Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations*, at <http://www.hrw.org/reports/1999/enron/> (last visited Apr. 26, 2004).

⁷ HUMAN RIGHTS WATCH, *THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES* (1999), <http://www.hrw.org/reports/1999/nigeria/> [hereinafter *THE PRICE OF OIL*].

⁸ Jenness Duke, *Enforcement of Human Rights of Multinational Corporations: Global Climate, Strategies and Trends for Compliance*, 28 DENVER J. INT'L L. & POL'Y 339, 343-44 (2000); *Principles Relating to the Human Rights Conduct of Companies: Working Paper Prepared by Mr. David Weissbrodt*, U.N. ESCOR Commission on Human Rights, 52d Sess., Provisional Agenda Item 4, para. 3, U.N. Doc. E/CN.4/Sub.2/2000/WG.2/WP.1 (2000).

One key characteristic shared by each of these codes is their voluntary character. Other shared characteristics of these codes include the active participation of non-state actors in developing them and their common reference to human rights obligations contained within international treaties. The adoption of a voluntary approach to the regulation of transnational corporations in such an important area as human rights seems to indicate a tacit acknowledgement by the drafters of these codes that there exists only the most limited of means whereby these norms can be enforced. This is not to say that such means do not exist, for every state maintains the sovereign political and regulatory authority to adopt and enforce human rights codes; rather, it is only that their adoption and universal enforcement does not appear imminent. This is true notwithstanding the reality that the changing international legal order urgently requires a delineation of the rights and responsibilities of non-state actors, such as transnational corporations and the investment enterprises that they own or control abroad:

Large, highly visible corporations now coexist alongside smaller companies that also have international reach. The borders of the firm have become blurred, as companies have deepened and extended relationships in supply chains as well as other business partnerships. As a result, the [OECD] Guidelines and other global instruments for corporate responsibility face the task of giving meaning to the concept of business responsibility in a context where business entities themselves are often quite fuzzy and where the associated challenges of control and monitoring—both by companies and by societies—have become more complex. This heightens the challenge of putting in place an appropriate framework for global governance.⁹

Voluntary codes can be a useful element of a larger regulatory regime when used in an educative role and in coordination with other tools for maintaining compliance. For example, moral suasion can be brought to bear upon transnational corporations through information campaigns in their “home” markets, and local tort law may be used to retroactively address alleged abuses.¹⁰ However, it is essential

⁹ *Summary of Roundtable Discussion, in OECD GUIDELINES, supra note 5, at 51–52 (summarizing comments made by Pieter Kroon).*

¹⁰ Of course, this avenue can be limited by deficient local legal regimes. There is also the potential application of the U.S. Alien Tort Claims Act, 28 U.S.C. § 1350 (1994), but the exorbitant costs of litigation and the vagaries of U.S. procedural law—such as the re-

under any regulatory model (international or otherwise) that a credible threat of enforcement exists that can be implemented with adequate monitoring and verification processes.¹¹ This fact has not been lost on the critics of corporate responsibility as manifested in voluntary codes, one of whom recently noted:

[C]ompanies *do not spontaneously* want to be regulated . . . one cannot grant them the benefit of the doubt when it comes to the implementation of such charters For companies to satisfactorily implement their charter, the same type of pressure as that which led to its adoption has to be applied, which means that *an independent and credible enforcement procedure* has to be put in place.¹²

The enforcement of these codes is only possible through sufficient monitoring and reporting activities. Some firm-specific codes make use of third party auditing; however, many of the universal codes (such as the U.N. Global Compact) appear to be relying exclusively upon the interest and ability of non-governmental organizations (NGOs), such as Human Rights Watch or Amnesty International, to assume this role without allocating any resources for the performance of these crucial duties.¹³ Moreover, without the availability of an independent adjudicator to interpret and apply the norms contained within any given corporate code, self-serving corporations or their agents could easily use the indeterminacy of language as a means of establishing “public relations compliance” rather than the real thing.

Given the apparent weaknesses of the plethora of voluntary codes that have appeared over the past decade, a sessional working group of a sub-committee of the U.N. Commission on Human Rights recently commissioned a report by Professor David Weissbrodt on the possibility of developing a binding code of conduct for transnational corporations

quirement of personal jurisdiction and *forum nonconveniens*—can limit the availability of this remedy to all but a few claimants. See Stephens, *supra* note 3, at 407–12.

¹¹ See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); JOHN BRAITHWAITE & PETER DRANDS, *GLOBAL BUSINESS REGULATION* (2000).

¹² Hubbard, *supra* note 5, at 101 (emphasis in original).

¹³ Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Kofi Annan, United Nations Secretary-General (July 28, 2000), <http://www.hrw.org/press/2000/07/hrw-ltr-july.htm>.

based upon international human rights standards.¹⁴ The product of Professor Weissbrodt's work—a draft “Guidelines” document—does not appear to be headed for formal adoption by U.N. members as a binding code any time soon. Nonetheless, pursuant to a decision of the subcommittee on August 15, 2001, refinement of the document will continue under the supervision of Professor Weissbrodt and the working group.¹⁵ For the time being, however, there exists no immediate prospect of a multilateral code that could govern the universal application of human rights norms to the activities of transnational corporations.

III. HUMAN RIGHTS CLAIM MECHANISM: AN ALTERNATIVE SOLUTION?

As discussed earlier, there have been suggestions that a quid pro quo exchange of obligations should be imposed upon transnational investors who wish to take advantage of the protections afforded by an international investment treaty. While the prospect of a multilateral agreement on investment appears to be far off,¹⁶ states continue to agree upon bilateral investment protection treaties. The potential exists for insertion of an enforcement mechanism in these bilateral agreements—an enforcement mechanism, such as the one proposed in the Appendix, for the prosecution of human rights violations committed by private parties whose activities will be protected under such agreements.

The major flaw of existing codes of corporate conduct and of the use of domestic tort mechanisms, such as the U.S. Alien Tort Claims Act, is their lack of enforceability.¹⁷ For corporate codes, additional flaws exist in the lack of an impartial, independent adjudicatory mechanism to forge meaning out of indeterminate legal terms. Inclusion of an enforcement mechanism in bilateral investment agree-

¹⁴ *The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations*, U.N. ESCOR Commission on Human Rights, 51st Sess., Agenda Item 4(c), para. 34, U.N. Doc. E/CN.4/Sub.2/1999/9 (1999).

¹⁵ *The Effects of the Working Methods and Activities of Transnational Corporations on the Enjoyment of Human Rights*, ESCOR Commission on Human Rights, 57th Sess., para. 4, U.N. Doc. E/CN.4/Sub.2/RES/2001/3 (2001).

¹⁶ The OECD negotiations on a multilateral investment agreement collapsed in 1997 under the weight of fundamental disagreements as to the scope and coverage of an agreement between OECD members and because of the relative lack of interest on the part of international businesses (who appeared unwilling to publicly support the negotiations when they came under a belated attack by anti-globalization groups).

¹⁷ See Baez et al., *supra* note 4, at 319 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)). In *Filartiga*, multimillion dollar awards were made against the defendant for the infliction of torture upon the claimants but were never enforced by the courts of Honduras. See *id.*

ments would largely address such weaknesses. This is because awards made under such a mechanism could be made enforceable on the same basis that awards made against a state party for a successful investment claim are enforceable by a claimant. Through the introduction of only a few added provisions, such as those suggested in the Appendix, the adjudication of human rights claims brought by affected individuals could be undertaken by an ad hoc tribunal established and operated on a basis similar to that under which investment claims can be pursued under the relevant treaty.

Most bilateral investment treaties provide the investor with a choice of commercial arbitration rules under which to bring a claim. The appropriateness of these rules for investment disputes has been questioned over the past few years, particularly with regard to whether hearings should be held in camera. However, the drafters of future treaty texts need only make minor changes to ensure openness of future proceedings. The rules themselves are general in scope, leaving considerable leeway for a tribunal to adopt the practices and procedures that suit the circumstances of the claim to be heard. Accordingly, the addition of potential compensation claims for the violation of human rights by an investor/investment would not be difficult to accommodate.

Investment treaties also generally provide for the claimant's choice of at least one of the would-be arbitrators, as well as designation of an appointing authority. Whereas investment claimants might choose economic law scholars or lawyers, human rights claimants would probably choose human rights scholars or adjudicators (i.e., persons who have experience sitting on state-to-state human rights tribunals).

Moreover, whereas the integrity of domestic regulators and courts could be questioned with respect to the uniform and nondiscriminatory application of international human rights norms in any given country, tribunals established under a human rights protection mechanism—such as the one proposed herein—would not necessarily suffer from similar attacks on their credibility or impartiality. An international tribunal would hear prospective claims of ill-treatment at the hands of an investor/investment, with an international mandate and international law expertise rather than a local tribunal with no international law experience and potentially conflicting mandates.

The proposed claim mechanism would provide for the opportunity to receive compensation directly from the offending investor/investment. Such a mechanism would potentially represent a considerable improvement over the use of a trade-sanctions mechanism for alleged human rights violations. The proposed mechanism would

simply be more economically efficient than the establishment of any trade-sanctions mechanism, because trade-sanctions mechanisms contemplate one state punishing another through application of some form of duty, quota, or ban for failure to enforce human rights norms domestically. Claims for compensation that are targeted against an individual firm for specific conduct are far more economically efficient and do not raise the potential for conflicts with multilateral trade regimes.

More importantly, however, the inclusion of a mechanism such as the one proposed herein improves upon the existing trends in international law, which have been leading towards the protection of individual rights by individuals as against individuals. It is recognized that the international legal landscape contains far more actors and interests than those of nation-states. The possibility of compensation being awarded under the proposed mechanism also provides a possible incentive for effective monitoring and prosecution of individual claims by NGOs.¹⁸

The remedy of compensation for the breach of a human rights obligation has a long history in international treaty practice.¹⁹ While most treaties also provide for various forms of special or declarative relief, the prospect of receiving compensation not only provides the victims of human rights abuses with recognition and acknowledgement of the wrongs that have been committed, but it also provides them with a means of beginning to rebuild their lives. Accordingly, the principle of entitlement to compensation has been included in a draft Statement of Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.²⁰ In particular, the draft text provides: "In cases where the viola-

¹⁸ Under international investment agreements and mixed claims jurisprudence, the only remedy for a breach is the payment of compensation. Compensation would accordingly be the only remedy available under the proposed human rights protection mechanism.

¹⁹ See, e.g., Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, art. 11, 1465 U.N.T.S. 112, 116; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 2, 999 U.N.T.S. 171, 173; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, art. 6, 660 U.N.T.S. 211, 222; G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 39, U.N. Doc. A/RES/44/25 (1989); G.A. Res. 217A(111), U.N. GAOR, 3d Sess., art. 8, U.N. Doc. A/810 (1948); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, U.N. ESCOR Commission on Human Rights, 56th Sess., Annex, Provisional Agenda Item 11(d), pmb., U.N. Doc. E/CN.4/2000/62 (2000) [hereinafter *Principles & Guidelines*].

²⁰ See generally *Principles & Guidelines*, *supra* note 19.

tion is not attributable to the State, the party responsible for the violation should provide reparation to the victim or to the State if the State has already provided reparation to the victim."²¹

IV. THE BASIS FOR LIABILITY UNDER THE PROPOSED MECHANISM

Under conventional international human rights law, states are obliged to ensure that each of their citizens enjoys basic rights and freedoms—not only insofar as states must not breach such rights or freedoms—but also by ensuring that the necessary legal and political conditions exist that will promote and protect the enjoyment of such rights and freedoms. This general obligation also includes the need to safeguard the rights of citizens as against the conduct of non-state actors. This line of reasoning was elaborated in the *Velásquez Rodríguez Case*, in which the Inter-American Court of Human Rights concluded that Honduras was responsible for the extrajudicial disappearance of Mr. Rodríguez at the hands of individuals acting as government agents.²²

The court further concluded that the failure of the state apparatus to provide any sort of protection or remedy for Mr. Rodríguez constituted a violation of his rights under the American Convention on Human Rights.²³ The existence of such a duty implies that at least some, if not many, forms of non-state activity must be relevant for the protection of individual human rights. It is interesting to note that most international investment agreements actually contain a customary international law exhortation to provide “full protection and security” to the investments of foreign investors. If such an obligation is to be imposed on states in respect of how they treat aliens and foreign investments, surely it must exist in respect of the kinds of treatment that must today be provided to individuals under modern international human rights law.²⁴

²¹ *Id.* para. 17. On January 23, 2002, the U.N. Commission on Human Rights affirmed a “deep” commitment to the finalization of this statement, although it would apparently go no further at that time. *Id.*

²² *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4, reprinted in 9 HUMAN RIGHTS, L.J. 212, 242–43 (1988).

²³ *Id.* para. 182., at 243.

²⁴ Historically, states were free to treat their own citizens as poorly as they desired so long as a “minimum standard of treatment” was provided to aliens (i.e., foreign investors). See, e.g., *The United States of America On Behalf of George W. Hopkins, Claimant, v. The United Mexican States* (Docket No. 39) (1926), reprinted in 21 AM. J. INTL. L. 160, 166–67 (1927) (“[I]t not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws. . . . The

But what kind of “activities” undertaken by the investor/investment should be the subject of a human rights claim? International law purists might argue that international human rights conventions impose little or no obligations on the activities of non-state actors and, to the extent that they do impose obligations, their breach is a matter of dispute between the states that are party to the applicable treaty. As discussed above, this is far too narrow a reading of the state of the international legal order today. Non-state actors have disparate and easily identifiable interests that do not necessarily conform to those of any particular state. These interests may themselves conflict among different types of non-state actors (here, the interests of transnational corporations, potential human rights claimants, and NGOs). In addition to possessing international legal interests, it would appear only prudent to conclude that non-state actors might also possess positive duties to act under such obligations.

Professor Steven Ratner has developed a theory of legal responsibility for the activities of transnational corporations under international human rights law. His apparent goal was to formulate an objective standard through which the adjudication of human rights claims against transnational corporations could be pursued. Ratner notes first that “international law has already recognized human rights duties on entities other than states,” citing examples from the customary law of war, the customary international law minimum standard of treatment of aliens, and the customary and treaty law of human rights (such as “war crimes, genocide, crimes against humanity, torture, slavery, forced labor, apartheid, and forced disappearances”).²⁵ He suggests that the only reason that international human rights discourse has focused upon the responsibility of states for human rights abuses is that the potential for abuse has been traditionally found in the hands of those who control the apparatus of the state.²⁶ As non-state actors take on more significant powers and/or authority that has been (implicitly or explicitly) delegated from states, it is only logical to conclude that their potential for liability under international human rights law should be similarly expanded. It is not a matter of divining “new” human rights; it is simply a matter of noting that there may be

citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens.”).

²⁵ Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 466–67 (2001).

²⁶ *Id.* at 468–69.

multiple actors against whom existing rights can be exercised. Ratner accordingly concludes:

If human rights are aimed at the protection of human dignity, the law needs to respond to abuses that do not implicate the state directly this does not mean that everything that a corporation does that might deleteriously affect the welfare of those in the corporation's sphere of operations is a human rights abuse—just as, for example, a tax increase that makes some people worse off financially is not a human rights abuse. Nor does it require ignoring the nexus to state action, as such a linkage may well serve to help clarify certain duties of corporations. But it does suggest that the recognition of some duties of corporations, far from being at odds with the purpose of international human rights law, is wholly consonant with it.²⁷

Based upon Ratner's analysis, there appear to be three grounds for investor liability for human rights abuses under the proposed mechanism. First, there is responsibility for the ways in which an investor/investment abets, or can be seen as complicit in, human rights abuses perpetrated by state officials. Second, there is responsibility for acts of the investor/investment that constitute a *de facto* exercise of state power, whether delegated on an implicit or explicit basis. Finally, there is responsibility for acts of the investor/investment if its activities are clearly contemplated within the scope of the applicable norms in question.

The first of these categories is perhaps the easiest to independently establish. How can the breach of an international human right be absolved simply because one of the perpetrators does not hold public office, particularly if the right in question is regarded as fundamental (with individual liability likely attaching)? Ratner correctly notes that there should be certain lesser (or "secondary") treaty breaches that might only be amenable to activities of the state; however, insofar as such obligations can be perpetrated by a non-state actor, Ratner would hold them liable.²⁸ For example, if reports were accurate that Shell Oil's subsidiary in Nigeria provided the equipment used by state security forces to violently repress opposition to its investment and even paid their salaries, complicity in the violation of

²⁷ *Id.* at 472.

²⁸ *Id.* at 492–93.

relevant obligations, such as the right to life and security of the person, would rest with Shell and its investment.²⁹ The Ninth Circuit Court of Appeals has recently come to a similar conclusion, under the Alien Tort Claims Act, concerning allegations that Unocal Corporation was not only aware of serious human rights abuses being committed by military personnel in connection with the construction and protection of a natural gas project in Burma, but that it was also complicit in such abuses.³⁰

The second of these categories is based upon theories of attribution that have traditionally held states liable for the actions of their agents.³¹ Essentially, if the investor/investment is granted de facto dominion over a portion of territory or the provision of a particular service—which has happened within the context of various resource concession agreements between states and investors—it will be held responsible for its actions to the extent that a state would itself be held liable if it were exercising the same authority over its citizens or territory.³²

The third category of potential corporate responsibility applies to international obligations that would appear to directly address the activities of individual, non-government actors (such as foreign investors/investments). Such obligations need not necessarily be limited to traditional human rights obligations. For example, the Basel Convention on the Control of Transboundary Movements of Hazardous Waste imposes liability directly on individuals, including corporations, and requires signatory states to enact domestic regulatory measures to punish offenders.³³

Ratner even provides a better example of corporate liability from the field of international labor law, which appears to mirror the “indirect effect” analysis that has been formulated by a WTO Panel to ex-

²⁹ See *THE PRICE OF OIL*, *supra* note 7.

³⁰ *Doe I v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. 2002).

³¹ Ratner, *supra* note 25, at 490.

³² Versions of the applicable types of international attribution theories can be found both in treaty law and international claims jurisprudence. See, e.g., North American Free Trade Agreement, Dec. 17, 1992, arts. 1502–03, 1992 WL 812398 (obliging states to be responsible for the actions of state enterprises and designated private monopolies acting under the delegated authority) [hereinafter NAFTA]. Similar theories of attribution can be found in the “colour of right” jurisprudence of local U.S. courts adjudicating claims under the Alien Tort Claims Act, 42 U.S.C. § 1983. See, e.g., *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

³³ See Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, arts. 2(14), 4(3), 9(5), 1673 U.N.T.S. 57, 130, 132, 137.

plain the primacy of private business interests in the protection to be afforded by states under WTO rules. In a report on the U.S. Trade Act of 1974, the WTO Panel mentions the "indirect effect" of various WTO trade obligations because of how important the relevant obligations were in terms of providing security for them to conduct their business.³⁴ Similarly, Ratner, in discussing International Labour Organization (ILO) conventions, remarks:

[B]oth the purpose of the [ILO] conventions and their wording make clear that they do recognize duties on enterprises regarding their employees. For instance, one of the ILO's so-called core conventions, the 1949 Convention Concerning the Application of the Principles of the Right To Organize and To Bargain Collectively, states simply, "Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment." While clearly an injunction to governments to enact legislation against certain behavior by industry, the obligation also entails, indeed presupposes, a duty on the corporation not to interfere with the ability of employees to form unions . . . the rights to form a union and to strike are rights as against the employer, even if the treaties themselves place duties on the state. States preparing other conventions have, in fact, recognized this truism in textual terms. For example, the 1981 Occupational Safety and Health Convention contains six articles specifically obligating employers to attain certain standards.³⁵

Accordingly, to the extent that international obligations appear to specifically contemplate regulating the conduct of individuals or transnational corporations, it would appear likely that a proposed remedy should also contemplate action on an individual scale.

V. THE CHOICE OF OBLIGATIONS

Selecting from among the available international obligations for which investors/investments could be held liable under the proposed mechanism is a delicate task. While the business community has been actively involved in the development of most corporate codes, that participation—and its acceptance of the norms developed in each

³⁴ WTO Panel Report, United States—Sections 301–310 of the Trade Act of 1974, WT/DS152/R, paras. 7.72–73, 76–78, 81–82 (Dec. 22, 1999).

³⁵ Ratner, *supra* note 25, at 476–79 (citations omitted).

case—rests fundamentally on the assumption that the codes will be applied on a strictly voluntary (i.e., not legally binding) basis.³⁶ Accordingly, as attractive as it may be to merely choose the norms already approved for use in any given corporate code, it would likely be necessary to involve the private and public sector in discussions about norm selection before proceeding. Another possible concern would be whether the potential parties to the investment treaty have actually ratified and adopted the treaty norms under consideration. If the host state has not adopted the obligation for application to its own enterprises, it may not be possible to expect a competing investor/investment operating in its territory to be obliged to honor the obligation either.³⁷ If the “home” state of the investor has not adopted the obligation, the investor may simply be discouraged from proceeding with what it might accordingly consider to be an unnecessarily onerous regulatory environment.

Keeping these issues in mind, a good starting point might be the international norms referred to in the SA 8000 Standard, which contains a detailed list of international obligations to which all participating firms must adhere in their daily operations, including a large number of international labor obligations.³⁸ Firms could adopt this auditable quality assurance standard in order to achieve compliance under the proposed mechanism, based upon a “due diligence” standard of liability. Adoption of a due diligence standard for all obligations that have not attained the status of *jus cogens* norms—for which a strict standard of liability would be more appropriate—would permit investors to

³⁶ See, e.g., Kristian Ehinger, *BLAC Statement, in OECD GUIDELINES, supra* note 5, at 31.

³⁷ The combined effect of the most-favored nation (MFN) and national treatment rules contained within the agreement would essentially oblige the host state to compensate the investor for any compensation that the investor would be forced to pay to a successful claimant. This is because the effective duty imposed by these two economic nondiscrimination rules would be for the host state to provide the best regulatory treatment available to the investor or its competitors, which would be the ability to ignore the human right in question.

³⁸ The list includes: The Universal Declaration of Human Rights; The United Nations Convention on the Rights of the Child; The United Nations Convention to Eliminate All Forms of Discrimination Against Women; ILO Conventions 29 and 105 (forced & bonded labour); ILO Convention 87 (freedom of association); ILO Convention 98 (right to collective bargaining); ILO Conventions 100 and 111 (equal remuneration for male and female workers for work of equal value; discrimination); ILO Convention 135 (Workers' Representatives Convention); ILO Convention 138 & Recommendation 146 (Minimum Age Convention and Recommendation); ILO Convention 155 & Recommendation 164 (Occupational Safety & Health Convention and Recommendation); ILO Convention 159 (Vocational Rehabilitation & Employment (Disabled Persons)); ILO Convention 177 (Home Work); and ILO Convention 182 (Worst Forms of Child Labour).

be held accountable for serious abuses but would not unduly impair their ability to efficiently establish and maintain their investment activity in the territory of the host states.³⁹ Even if the investor were not participating in the SA 8000 Standard, the obligation to act in a diligent manner would require the establishment of a self-monitoring protocol that could significantly enhance overall compliance.

Ratner has developed a four-step methodology for deriving and applying norms in any given case.⁴⁰ The first two steps are particularly relevant for examination of the proposed mechanism. First, one must consider the relationship existing between the host state and the investor/investment. If the ties between an arm of the state and the investor/investment are close, such proximity may indicate either a level of complicity (such as the “aiding and abetting” theory adopted by the Ninth Circuit Court of Appeals in *Doe I v. Unocal*)⁴¹ or some form of agency relationship. Second, one must consider the nexus between the business of the investor/investment and the local population. Norms that directly regulate the relationship between an enterprise and its employees would be more likely to attract liability, as would geographical proximity of the business and local citizens. For example, the International Covenant on Civil and Political Rights⁴²—which is not included in the SA 8000 Standard but certainly could be added to a human rights claim mechanism—prohibits discrimination in a manner that well applies to its investment’s relationship with its employees. Moreover, Ratner suggests that it may be necessary to adopt some form of proportionality test in order to tailor the application of general human rights obligations (such as freedom of speech) to the particular circumstances of the commercial context in question.

Ratner’s methodology also touches upon the nature of the obligation in question and the corporate structure of the target firm. It is unnecessary to apply his methodology to the generation of norms, be-

³⁹ Another potential candidate for reference under the proposed mechanism would be the *Universal Human Rights Guidelines for Companies*, currently under consideration by a working party under the auspices of the U.N. Commission on Human Rights, once it passes through the drafting stages. As this body’s work is not devoted to the articulation of one particular set of human rights obligations, and will likely be subjected to the kind of wide-ranging consultation required to achieve sufficient legitimacy as to one day be accepted as legally binding, this document holds great promise as a universal reference point for all manifestations of the proposed mechanism.

⁴⁰ Ratner, *supra* note 25, at 497–99.

⁴¹ *Doe I v. Unocal Corp.*, 2002 WL 31063976, at *15 (9th Cir. 2002).

⁴² International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 2, 999 U.N.T.S. 171, 173.

cause we have already assessed the relative suitability of the norms covered under the SA 8000 Standard. It is also unnecessary to delve very deeply into the structure of the targeted firm, because the investment treaty onto which the proposed mechanism will be grafted already contains a delineation of exactly what kinds of investors/investments may qualify to bring a claim. International investment protection treaties permit investors to bring claims on their own behalf, or on behalf of their investment enterprises, in the territory of another state party. Investors cannot bring claims against their home states, and investors cannot bring claims if their home state is not a party to the treaty. Under the proposed mechanism, investors would be held liable for activities that they undertook in the territory of another state party whether on their own or through their investment. Potential claimants would not be permitted to bring claims against investors/investments that were not receiving the protection of the treaty. Accordingly, the question of where decisions have been made within the corporate structure will not be particularly relevant so long as the investment activity in question provides *prima facie* evidence that a breach may have occurred.

Under the proposed mechanism, investors/investments will attract liability for conduct that breaches a series of human rights and labor obligations (specifically delineated in the SA 8000 Standard). Such liability will extend whenever the investor/investment acts on behalf of, or in complicity with, state agents or officials or fails to adhere to basic international labor and human rights obligations that are owed directly and specifically in relation to their treatment of their employees. Most claims brought under this proposed mechanism would be brought by, or on behalf of, aggrieved individuals who would be entitled to receive damages in an amount that effectively “wipes out all the consequences of the illegal act.”⁴³

The proposed measure is artful in its simplicity—establishing a new *quid pro quo* exchange for foreign investors. There remain, however, potential objections to its adoption and use. First, there must be a means of preventing frivolous and vexatious claims, as well an incentive towards the development and application of domestic regulatory structures, that satisfies at least the minimum standards established in human rights treaties. The means of satisfying these two requirements is quite simple. The treaty parties need only insert a provision requiring

⁴³ Case Concerning the Factory at Chorzów (Merits), 1928 P.C.I.J. (ser. A) No. 7, at 47 (Sept. 13).

that an exhaustion of local remedies requirement be satisfied before an alleged victim can proceed with his or her claim. If such a provision is interpreted using a remedial and purposive approach, the exhaustion rule would not present an insurmountable obstacle in cases where the local legal system simply is not amenable to the efficacious processing of a claim.

A second potential problem that will emerge following this approach to human rights enforcement is that a period of “patchwork” coverage will exist until such time as the proposed mechanism becomes more commonplace in the adoption or renewal of investment protection treaties. However, if the alternative being presented is the complete absence of any effective means of seeking compensation for human rights abuses, a patchwork of highly effective enforcement should doubtlessly be the preferred choice.

It should also be recalled that the proposed mechanism does address business transactions of an investment (rather than trade) character. In other words, the proposed mechanism will be of no use in cases where a firm is merely importing goods from an arm’s length supplier that is violating human rights in another part of the world—it only covers investment abroad.

A third concern exists in the possibility that competitors of an investor/investment covered by the proposed mechanism will enjoy an unfair advantage because they cannot be made the subject of a claim. This concern is addressed fairly quickly because the enjoyment of a more favorable regulatory climate by noncovered investors/investments could well be the subject of a discrimination claim by the covered investor/investment (arguing that the host state’s failure to honor its obligation to provide a human-rights friendly regulatory environment constitutes better treatment being accorded to noncovered competitors). Accordingly, by virtue of an MFN or national treatment claim, the covered investor could be entitled to receive compensation from the host government equivalent to the competitive advantage that would otherwise be enjoyed by its noncovered competitors.

Fourth, it may also be necessary for the parties who include a human rights claim mechanism in their investment protection agreement to take steps domestically to ensure that an award made against one of their investors can actually be enforced in their courts. In the absence of such statutory authority, an investor could challenge the award on the basis that it was not a party to the “contract” under which the award was rendered (i.e., the treaty in question). It may also be useful to consider imposing vicarious liability upon the host state for any awards made against an investor of another party—both to

ensure effective enforcement and to respect the host state's obligations to ensure that its citizens' human rights are not violated within its territory.

Finally, in the event that there is simply too much resistance to embarking on a project in such untested waters, it may be useful to consider the ways in which a human rights claim mechanism could be introduced on a more limited basis. It may be possible, for example, for human rights claims to be limited to cases in which an investor has itself brought a claim for a breach of the treaty that has resulted in a loss to its investment. In such instances, the treaty could authorize a counterclaim to be brought by the host state on behalf of its citizens who may have suffered losses arising out of illegal conduct by the investment enterprise.⁴⁴

In fact, it could be argued that, under most investment protection treaties, host states already possess the ability to bring a counterclaim against the investor for a breach of international law in relation to the activities of the investment in its territory. It would be better, nonetheless, if future investment protection treaties specifically delineated that, just as states are obligated to treat foreign investments "in accordance with international law," so too must corporations treat the host state and its citizens in accordance with international law. It would also be prudent to clarify that the opportunity to launch a counterclaim (or perhaps an independent claim) for the breach of such a right by an investor/investment exists under the applicable investment protection treaty.

Of course, limiting the prosecution of human rights breaches by transnational corporations to counterclaims, or only to claims that must be subrogated to the discretionary prosecution of the host state, does not answer the problem of where an investor and the host government are working in complicity to violate human rights norms. Moreover, the problem of selective or vexatious prosecution might also arise if the state, rather than the claimant herself, is left in command of the right to bring a claim.⁴⁵

⁴⁴ The state practice of subrogating the claims of citizens is, after all, exactly the same place from which investment protection regimes originally grew.

⁴⁵ Cases of discriminatory or inequitable prosecution of a human rights claim against a transnational corporation by a state could well be construed as a breach of the underlying investment protection treaty provisions (requiring "fair and equitable" treatment, national treatment, and MFN treatment), but the immediate effect of such conduct would be to damage the investor/investment—forcing it to spend precious resources in its own defense.

CONCLUSION

The international legal landscape has undergone a sea of change over the past five decades, and two of the most prominent areas that have affected, and been affected by, this change are international economic law and international human rights. Both systems of law have moved towards the articulation of non-state rights and interests in both norm development and in prosecution of norms. By grafting a human rights claim mechanism onto the existing structure of international investment protection treaties, one can both recognize the growing place of the transnational corporation in human rights law and practice and improve upon the Achilles heel of human rights—effective enforcement. Through the establishment of an effective enforcement mechanism (perhaps based upon the draft provisions appended below), voluntary codes of corporate conduct can move from the realm of a public relations exercise to the role of an educative compliance mechanism. Without effective enforcement, human rights law will remain the weak sibling of international economic law. The citizens of this world deserve better.

Appendix: Draft Treaty Provisions

Article 1—International Law

1. Whenever making, or operating, an investment in the territory of another Party, the investors of a Party must act in accordance with international law, as set out in the obligations listed by the Parties in Schedule A to this Section.

Article 2—Claim by the National of a Party

1. The nationals of a Party may submit to arbitration under this Section a claim that an investor of another Party has breached an obligation listed in Schedule A of this Section and that the national has suffered loss or damage by reason of, or arising out of, that breach.
2. For greater certainty, the nationals of a Party may only submit a claim under this provision in respect of the actions of an Investor of a Party, or its failure to act, in relation to any investment that it owns or controls directly or indirectly in the territory of the Party of that national.

Article 3—Settlement of Disputes Between a National of a Party and an Investor of Another Party

1. Except as otherwise provided in this Section, the provisions for the settlement of disputes between a Party and an investor of another Party shall govern the settlement of disputes under this Section, where “disputing national” should be substituted for “disputing investor” as required.

Article 4—Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Section.

Article 5—Enforcement of Awards Against an Investor

1. Each Party agrees to amend its statutes or regulations to ensure that any awards made by a Tribunal under this Section may be enforced against the Investors of a Party within its territory.

Article 6—Enforcement of Awards Against a Party

1. Final awards granted against the investor of a Party under this Section shall be considered to be a final award made against the Party in whose territory the investor made or operated the investment that was the subject of the claim for which the final award was rendered.

Article 7—Constitution of a Tribunal When a Party Fails to Appoint an Arbitrator or the Disputing Parties Are Unable to Agree on a Presiding Arbitrator

1. The President of the Permanent Court of Arbitration in the Hague shall serve as the appointing authority for an arbitration under this Section.