The Fate of International Human Rights Norms in the Realm of Bilateral Investment Treaties (BITs): Has Humanity Become a Collateral Damage?

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ABSTRACT

Since the end of 1950s, Bilateral Investment Treaties (BITs) have become the most important legal instrument in the orbit of international investment law. These treaties offer the highest legal protection to investors’ property rights. They do so by listing out standards, e.g., substantive rights of investment treatment, in foreign countries. While they are also used as a source of law in the process of Investor-State dispute settlement process, it has always been observed that the international human rights obligation of investment receiving states (“host-states”) gets no or little attention in this process. This is the direct reverberation of the asymmetrical nature of the BITs provisions and the negligence of arbitral tribunals, which fail to generate the human rights aspect of the business.

Owing to the astasia and unbalanced discourse between international investment laws and international human rights rules, the host-states have wrongly been interpreted by the arbitral tribunals to have used their regulatory power in breach of the BITs provisions even in legitimate cases where the states have a police power to protect the public health, the environment, and other implications of rights like labor standards. Pro-investors avowal is that BITs, as source of international investment law, should be conceived of as a “self-contained regime” of international law, and hence, stands separately out of the influence of international human rights law whatsoever. Human rights lawyers, on the other side, endorse a broader notion of regulatory power of host-state to allow them to insert the defense of human rights in the investment dispute settlement process. This essay is a review of how these two interests can be accommodated for a prolific integration and tenable cross-fertilization between both norms of international human rights and foreign investment protection.

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I. Introduction

The last half-century witnessed two major competing, at times pragmatically conflicting, regimes of international law that will continue to substantively define the general practices and behavior of states in the discourse of international law and policy. The first Bilateral Investment Treaty (“BIT”), signed over 50 years ago, in 1959, between Germany and Pakistan1 marked the transformation of transnational investment protection by becoming an essential instrument and source of international investment law in the existing world economic order. BIT, as a major legal instrument in the flow of Foreign Direct Investment (“FDI”), is an international legal document that guarantees the protection of the investors and their investments in a foreign country from the risks of a non-commercial nature such as nationalization and other regulatory measures interfering with the investors’ legitimate expectations.2

Highly ascribed to a potentially suspicious domestic law of investment-receiving country (the “host state”) in offering appropriate legal protection to the properties of the foreign investor, and because the customary international law standards on the protection of foreign investment3 were frequently marred by persistent disagreement between the global north and south, international treaties emerged as the principal source of norms in the foreign investment milieu.4 This newly designed concept of BIT unarguably leaves the protection of investors in a foreign country with little or no concern for the international principles and norms applicable to the protection of human rights and freedom of citizens of the host state. Undoubtedly, the private interest of the investor is the dominat-


2. RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 3-7 (2008).

3. The relevant customary international law that was specifically applicable to the international protection of investment, in addition to the theory of the minimum standard of treating aliens and foreign property, was best understood with respect to the practice of “Hull Formula.” See VAUGHAN LOWE, INTERNATIONAL LAW 197-99 (Clarendon Law Series 1st ed. 2007). This formula was based on the principle that the standard of compensation is characterized as “adequate, effective, and prompt compensation.” Developed in 1938 during the tension between the United States and the government of Mexico caused by the national plan of Mexico to nationalize all the foreign properties, this standard of compensation was named after the Secretary of State who was the author of note about the standard towards the government of Mexico. See IAN BROWNLIE, THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS 140-3 (1998). The United State Note was in response to Mexican nationalization programs in the 1930s. The Mexican Government did not reject the principle of compensation but maintained that the measure of compensation must depend upon the capacity to pay of the nationalizing state, because otherwise an obligation to pay “immediately the value of the property taken” would deny the State the right to restructure its economy and to introduce economic reforms. Based on this, the practice had been accepted as a customary rule of international law regarding expropriation of foreign investment. However, because of the formula’s high championship by the Westerns, the newly emerging states of Africa after decolonization process came to, later on, contest the practice of this rule. Immediately after the mounting disagreement between the developed and newly emerging countries, BITs therefore became a major instrument and replaced the same exact standard of customary practice, but in a treaty form, to continue to regulate the regime of international investment protection.

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The central principles embodied by BITs only take account of investment protection and encouragement. Despite the fact that the exact contents differ from one treaty to the other, all BITs nowadays address two main interests exclusive to foreign investors: substantive rights with reference to the treatment of foreign investment and dispute settlement procedures. Remarkably, not only do foreign investors usually have no enforceable obligations listed under BITs, but most investment treaties are silent as to the rights of non-investors, for the most part, when it comes to the local citizens.

In the other compartment of public international law is the regime of international human rights law with well-established jurisprudence and discourse that was developed subsequent to the adoption of the Universal Declaration of Human Rights in 1948 (“UDHR”) after World War II. International human rights commitments require states not only to simply refrain from interfering with the rights of citizens, but on occasions, requires that states regulate the activities of non-state actors, including business actors, in a fashion that ensures that citizens enjoy their rights enshrined under all international human rights conventions. However, in instances when the host state has entered into international commitments with foreign investors through bilateral investment treaties, this will open up the possible episode for foreign investors to challenge their treatment at the hands of the host state despite the host state’s motive to advert to its human rights obligations to protect, respect and fulfill-springing from UN treaty rights. Following these contradicting phenomena, in different words, the fundamental problem reveals itself when the monothematic commercial interest embedded in the international investment instrument collides with the host state’s subsequent activity in taking steps to implement human rights obligation it owes to its citizens based on other international human rights conventions and protocols.

International arbitration tribunals tasked with assessing the compliance of states with their obligations to foreign investors are occasionally confronted with human rights questions, including the relevance of human rights law to the resolution of disputes between foreign investors and states. It is, therefore, not surprising that investment arbitral tribunals regularly deplore the lack of appropriate middle and reconciling grounds and standards of protecting foreign investment and simultaneously making sure international human rights obligations of the host state remain intact.

The existing framework of international investment law and investor-state arbitration, in practical discourse, assumes a readiness to rebuff and reject the opportunity to confer on the host states the standing privilege to bring the argument of international human

rights obligations. In conjunction with this, a separate constitution of international investment arbitration for every dispute settlement is also considered one of the factors that pose constant threats of inconsistencies of decisions and fragmentation. As a result of this, it appears over time that the discourse is failing to reconcile human rights values with the protection of foreign investors.

Many other authors broadly identify this problem as a clash between investment treaty arbitration and general law approach, which means, contemplating the discourse of investment treaties as a "self-contained regime" of international law, more separate and exclusive from the general public international law norms. This is one of the crucial elements in understanding the practically contradicting discourse between international investment protection and international human rights enforcement mechanisms.

This essay seeks to address the conceptual inter-face between BITs and international human rights obligation of the host states. It dwells on whether the host state can raise international human rights obligation it owes under human rights treaties (e.g.: The Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Committee on the Elimination of Racial Discrimination, Convention to Eliminate All Forms of Discrimination Against Women, Convention Against Torture, and so forth) as a legal defense in the process of investor-state dispute settlement process.

The author believes that the world order of human dignity and "global good" of rule of law requires that one regime of international law cannot be understood in isolation, distinct and unconnected from the other. Therefore, arbitral venues shall allow both the commercial interest and human rights interest to prevail in solving investment disputes between a foreign investor and host state. In order to appropriately address the discussion, the essay first seeks to present a brief overview of BITs along with the typical standards of investment protection. The essay also tries to gauge and scrutinize whether the conservative understanding of investment protection as "a self-containing regime" holds water in the discourse. The essay also investigates the lateral, i.e., the leftist proposition of and heavy reliance on customary practice of "police power" of host states in the quandary at hand. The essay will also make some reconnaissance as to the current practice of investor-state investment dispute settlement and reflect on remarkable cases that present the predicament of human rights. Finally, the author gives the alternative and plausible policy solutions in settling the practical conflict between the legal regime of foreign investment protection and human international rights discourse.

9. See id.
10. It is important to note from the rule of investment dispute arbitration that parties to the dispute must agree as to who will be the arbitrators. In most cases, a panel consists of three arbitrators. G.A. Res. 65/22, at 6-8, A/RES/65/22 (Apr. 2011).
II. Evolution, Definition, and Major Contents of BITs

After the first half of 20th century, BITs have become the most important legal instruments effecting private foreign investment activities. BITs, according to Cornell University Legal Information Institute, “are international agreements creating the terms and conditions for private investment by nationals and companies of one state in another state.” The first generation of these treaties were Friendship, Commerce and Navigation Treaties (“FCN’s”), which put obligations on the investment receiving country, i.e., host state, to treat foreign investments on the same level as investments from any other state, including in some occasions treatment that was as favorable as the host nation treated its own national investors. FCNs also established the terms of trade and shipping between the parties, and the rights of foreigners to conduct business and own property in the host state.

The second generation of these treaties are BITs, which set forth actionable standards of conduct that applied to governments in their treatment of investors from other states, including fair and equitable treatment (also referred to as national treatment, which provides that a host state shall treat foreign and domestic enterprises equally), protection from expropriation; free transfer of means and full protection and security.

A BIT is an agreement between two states that protect and promote investments from one state to another state. A BIT is a treaty between two States that ensures that investors of a State-Party receive certain standards of treatment when investing in the territory.


17. The creation of BIT is believed by majority to replace the international protection of foreign investment activities that had been relied on by customary international law of the “Hull Formula”, the formula that required adequate, prompt, and effective compensation in case of expropriation. See M. H. Mendelson, Compensation for Expropriation: The Case Law, 79 AM. J. INT’L L. 414 (1985). The state of this customary law had been at issue between developed and developing countries particularly in Africa during the time of decolonization. By rejecting this formula, therefore, newly emerging countries claimed they could nationalize all the colonizing power’s assets and their national’s commercial enterprises according to their nation’s laws, in their nation’s courts, without necessarily paying compensation. International law standards of compensation and protection of foreign investment were thus becoming quite unclear, and as a result, it forced major investment source countries like Germany to engage in bilateral investment protection treaties with developing countries. It is much more like a reinventing of the customary rule except that this time the standards of investment protections are affirmatively sealed in a legal instrument; which means, BIT as an international legal instrument clearly reinstated the essence of the Hull formula in a detail and precise way. See generally Victor Mosoti, Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between, Nw. J. INT’L L. & BUS. 95 (2005) (discussing the evolution of the Hull Formula in modern BITs and the history of African nations and BITs).


of the other State-Party. The purpose is to encourage FDI between the two State-Parties, which hopefully leads to economic growth for both State-Parties. However, BITs grant foreign investors rights against sovereign States, and allow them to directly initiate arbitration against a State when the State has not fulfilled its obligations under a BIT. Investors have claimed millions of dollars in damages under BITs for State regulations, for example, addressing an emergency financial crisis, refusing to grant a license for a toxic waste facility, and enacting affirmative action legislation.

Most BITs have a dispute resolution clause that constitutes “a unilateral offer to settle disputes by arbitration, extended to the investor by the state, and which the investor accepts by initiating arbitration under the treaty.” Where a host-state has a BIT with a foreign investor’s home state and the host state breaches its obligations to the investor as enumerated in the BIT, the investor may bypass domestic court systems and bring a claim directly against the Host-State before an international arbitration tribunal. Thus, the arbitration is not between the two States that entered into the BIT, but rather, BITs allow the investor to directly sue nation-states for violating their treaty obligations to the corporate investor, i.e., private individual. Notably, to date, investors have initiated the vast majority of cases.

The distinctive feature of many BITs is that they allow for a dispute resolution mechanism whereby an investor whose rights have been violated under the BIT could have recourse to international arbitration, often under the auspices of the International Center for the Settlement of Investment Disputes (“ICSID”). ICSID is the leading international arbitration institution devoted to Investor-State dispute settlement. ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID or the Washington Convention, entered into force in 1966) with over one hundred and forty member States. The Convention sets forth ICSID’s mandate, organization and core functions. The primary purpose of ICSID is to provide facilities for conciliation and arbitration of international investment disputes. ICSID was created by the Convention as an

22. See generally Alvarez, supra note 20.
23. See generally id.
26. See id. at 278-79.
29. See id.
30. See id.
impartial international forum providing facilities for the resolution of legal disputes between eligible parties.\textsuperscript{31} Until the beginning of 2008, over 2,600 such agreements exist.\textsuperscript{32} The majority of these BITs remain between developed and developing countries.\textsuperscript{33} As the main sources of international investment law, BITs provide investment security and investment neutrality to foreign investment.\textsuperscript{34} Most importantly, they include provisions that address the protection of foreign investors from unlawful expropriation or nationalization, discriminatory, unfair and inequitable treatment less favorable in comparison to that of the domestic investor, and protect against restriction of currency transfer. Most BITs contain similar provisions and preambles, investment and investor definitions, treatment of investment, expropriation, currency transfer, subrogation and dispute settlement provisions.\textsuperscript{35}

III. Can a State Raise International Human Rights Obligation in a ‘BIT’ Dispute Settlement Process?

Discussing the evolution and general contents of BITs above, one understands that the main concern of the investment treaty is to boom FDI by offering maximum legal protection to the investment and the investors. The concern in the international investment activities is not only limited to the private interest of the foreign investors but also the human rights interest of the local citizens of the host state has to carry as equal legal weight and as germane as that of the private investors. This, therefore calls for inclusion of international human rights values into the exit process of international investment dispute settlement. It must be noted that the investment protection could better respect and will not have to be a direct detriment towards the international human rights commitment of the host states. The thesis is that these two fields of international law are not hermetically separate disciplines that cannot interact in a meaningful way.\textsuperscript{36} 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.\textsuperscript{37}

International investment treaties today follow a fairly standard design, which mainly focuses on providing foreign investors with special international law rights and remedies to protect the investment. Through special dispute settlement processes of investor-state arbitration, individual foreign investors can initiate international arbitrations directly against the host state for alleged breaches of international investment agreements.\textsuperscript{38}

\textsuperscript{31} See article 1(2) of The convention on the Settlement of Investment Disputes between States and Nationals of other States: “The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.”

\textsuperscript{32} HOWARD MANN, INTERNATIONAL INVESTMENT AGREEMENTS, BUSINESS AND HUMAN RIGHTS: KEY ISSUES AND OPPORTUNITIES 3 (2008).

\textsuperscript{33} See id.

\textsuperscript{34} See M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 265 (1994).

\textsuperscript{35} See M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 217 (2d ed. 2004).

\textsuperscript{36} Surya P. 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”, 40 INT’L LAW. 121, 123 (2006).

\textsuperscript{37} See id. at 140.

\textsuperscript{38} See id. at 133.
There is a substantial fear among human rights lawyers that “arbitrators set up to resolve disputes under these bilateral investment treaties are trusted to protect the interest of investors over the interest of the public.” In a recent investment arbitration case, Toto v. Lebanon, the panel reduced the definition of “investment” into simply profit motivated economic activities. Following these new developments, it would be worrisome to imagine the practical tension between the protection of private interests of the investors and public interest of the citizen of the host-state, the consequence of which might soon evolve into a structural bicker between investment-sending and investment-receiving countries.

The investor-state battle is discernible particularly when the host state attempts to invoke its international human rights obligation on behalf of the interest of its public with reference to the protection of environmental rights, indigenous peoples’ right, public health, etc. What degree of attention should be given to the human rights obligation of the host-state in the settlement process of investor-state dispute, whose cause of action resulted from the regulatory activities of the state in response to the requirement of a separate international commitment, i.e., human rights commitment the state owes?

Indubitably, a great number of international human rights lawyers argue that states could legitimately raise human rights obligations in their pleadings before investment arbitral tribunals. Following this thesis, there are two fundamental parameters worth discussing. From the outset, BIT is not a self-governing regime of international law where investment arbitrators must cling only to the rules mentioned in the bilateral instrument by ignoring the customary international human rights norms. International Law is best understood as a comprehensively interconnected system of different laws governing different subjects. This may validate the host-state’s assumption of international human rights commitment whenever there is either theoretical or practical conflict in the process of investment dispute settlement.

Second, the traditional practice of “police power” would be presumed to allow the host-state to effectuate all necessary regulatory activities towards the investment, of which discharging the international human rights obligation is of the essence. The following paragraphs explore these two grounds just mentioned above and in so doing it interweaves and traverses the relevant cases of international investment dispute into the discussion for closer demonstration of the matter.

A. Is BIT a “Self-Contained Regime” of International Law?

The camp of thought that seeks to exclude international human rights norms from the investment dispute settlement process is based on nothing but the postulate that BIT is an

42. See Wiessner, supra note 39, at 58.
43. See id.
independent and self-governing regime that stays out of any other international law.44 Resolving whether the highly specialized field of international investment law, owing to its particular functional focus, constitutes a self-contained and independent international legal regime had produced scholarly battles; “unfortunately, there is little, if any, agreement among arbitral tribunals on how to deal with the competing non-investment obligations.”45

The notion of a self-contained regime was first used in the Permanent Court of International Justice’s S.S. Wimbledon case46 and was further developed by the International Court of Justice in the Tehran Hostages decision.47 In introducing the concept, the International law Commission (ILC) has referred to the concept as a “group of rules and principles concerned with a particular subject matter that may form a special regime (“Self-Contained regime”) and be applicable as lex specialis. Such special regimes often have their own institutions to administer the relevant rules.”48 Based on this notion, some commentators of international investment law have attempted to understand BIT as an autonomous part of international law that is a self-contained regime;49 and while others like Professor S. Wiessner express worries about the negative impact of introducing BITs as “a self-contained regime” because, he maintains, “the concept can’t help in accommodating different public interests (human rights, environment, public health, cultural concerns, etc.) in the realm of trade and investment.”50

Pursuant to this, it is strongly agreed with the expression of Professor Wiessner, and to further “dismise this radical notion of [BIT as] self-contained regimes since it is inconceivable for [a general international law] system to be made up of entirely autonomous subsystems.” The interconnectedness of different rules of international law only requires that international investment treaties cannot be functional and operational without bring-

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45. MARC JACOB, INSTITUTE FOR DEVELOPMENT AND PEACE, INTERNATIONAL INVESTMENT AGREEMENTS AND HUMAN RIGHTS, 30 (2010).
46. On the morning of March 2st, 1921, the British steamship “Wimbledon”, chartered by the French armament firm “Les Affreuteurs réunis”, proceeding to Danzig with a cargo of 4,000 tons of goods (military material), was refused access to, and free passage through the Kiel Canal by the German authorities. In reply to the protests made to the German Government on this subject on March 23rd, 1921, by the French Ambassador at Berlin, that Government reaffirmed its refusal to allow the passage of this vessel and, in justification of this refusal, alleged that the cargo of the steamship “Wimbledon” consisted of war material destined for Poland, that the Treaty of Peace between the latter country and Russia was not yet ratified, that there was therefore a state of war between those countries, and that German regulations regarding neutrality forbode the transit across German territory of war material destined for these two countries. S.S. “Wimbledon” Case, 1923 PCIJ, Ser. A., No. 1 (Aug. 17).
50. See Wiessner, supra note 39, at 58;
ing international human rights law into the equation.51 Claiming that BIT can really form a self-contained and autonomous regime of international law may not only turn out to result in the fragmentation of public international legal rules, but it can also become unrealistic to distinctively consider BIT to fully resolve the social problem that arises in the course of economic and investment interaction between foreign investors and host-states.

B. Is the Regulatory Power/Police Power of the Host-States Legitimate?

Investors have always challenged the host-State’s regulatory actions by alleging that they violate BIT protections against expropriation on the ground that BITs generally prohibit government expropriation of an investor’s investment unless it is for a non-discriminatory public purpose and the investor is compensated.52 The difficulty, however, lies in how one can find valid lines of intersection between the investment protection and the host state’s regulatory power because not all governmental deprivations of property constitute an expropriation.53 In what kinds of areas can the host-state’s regulatory powers be legitimately practiced? Regulatory issues that can be placed in the realm of international human rights can help the host-state to legitimately invoke its international human rights commitment as a force majeure in the investor-state dispute settlement process.54 In order to comprehend how this can be effective, let us just dissect how important of a practice the notion of ‘police power’ reveals.

The idea of regulatory power of states has a deep conceptual interface with the theory of “police power,” the theory which has its roots in centuries old customary international law. Black’s Law Dictionary defines the theory in the following terms:

Police power is a theory that describes the basic right of governments to make laws and regulations for the benefit of their communities. It is “[t]he power of a state to replace restraints on personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity . . . . Police power is the exercise of the sovereign right of a government to promote order, safety, security, health, morals and general welfare within the constitutional limits and is an essential attribute of government.”55 It is the authority conferred upon the states or countries to enact measures to preserve and protect the safety, health, welfare, and morals of the community. It is the fundamental right of a government to make all necessary laws.56

International law authorities have regularly recognized the positive practice of “police power” regulation that might justify non-compensation where there is a deprivation in

51. See id.
52. See ANDREW NEMCOBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 325-26 (2009).
53. See id.
54. See id.
55. See BLACK’S LAW DICTIONARY 1156 (6th ed. 1990). This definition draws on US law in the area, but is consistent with international law; see also George Aldrich, What Constitutes A Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunals, 88 AJIL 585, 605 (1994).
56. See BLACK’S LAW DICTIONARY, at 1156.
favor of public order and morality, protection of human health and environment, and state taxation. 57 There are different views regarding the theory of police power in the discourse of international investment dispute: that, whether the “police powers” are a criterion which is weighed in the balance with other factors or it is a controlling element that exempts automatically the measure from any duty for compensation. 58 Exercise of police powers allows the state to protect essential public interests from certain types of harms. 59 Let us take a hypothetical demonstration of this predicament. For example, a state might ban the use of an insecticide that scientific studies have demonstrated as cancer-causing, even where applied in minute amounts. 60 Supposing this pesticide was an investor’s only investment, the ban could result in the complete destruction of the investment and no compensation would be due. 61 This requires the State to undertake a legislative measure to protect and ensure the right to adequate health of its own citizens.

In the milieu of the state’s duty to protect, promote, and fulfill human rights (states’ parameter of international human rights obligation), the most significant issue that comes into the equation gets bolder, in most cases, as a result of the ensuing duty of the state to take a legislative measures and enforcement actions as part of integrating international human rights obligations into domestic laws and policy. This directly communicates to what has been pronounced above as the “police power” of host states to regulate or ensure that the health of the public is in order. However, the predicament both theoretically and practically elucidates itself in the ambiances where bilateral investment agreements are purposefully designed to limit the right of states to regulate. This limit may as well be diffused to systematically minimize the states duty to protect and promote human rights.

In the eye of general international law and practice, one has to stand for the proposition that investment rules cannot operate in an isolated fashion far from the human rights spirit of the general public in the host state. This is why the host-state should be allowed to echo its international human rights obligation in the investment dispute settlement process. To help draw a clear picture of the issue, for example, one may assume another scenario where a state is forced to regulate the activities of a foreign investment as an attempt to halt the investor from engaging in actions or omissions that exacerbate or aggravate the severe shortage of drinking water the state already has (particularly owing to the fact that drinking water is a limited natural resource and that it is a fundamental conditions for survival). As a matter of fact, the 1966 International Convention for Economic, Social and Cultural Rights (ICESCR)—one of the influential international human rights instruments—stipulates that the state parties have immediate obligations in relation to the right to water to take steps towards the full realization of adequate living standards under articles 11 (1), and 12. 62 In view of the Committee on Economic, Social and Cultural

57. NEWCOMBE & PARADELL, supra note 52, at 358.
58. See id. at 361.
60. See generally Subedi, supra n. 36.
Rights General Comment No. 15 (2002), such steps must be deliberate, concrete and targeted towards the full realization of the right to water.63 States parties have a constant and continuing duty under the Covenant to move as expeditiously and effectively as possible towards the full realization of the right to water.64

Given the above scenario, one can argue that the regulatory effort of the host state, also considered as a legitimate action, is also a positive obligation imposed on states to realize socio-economic rights of citizens. Nonetheless, the degree to which a host-state engages in regulatory activity of foreign investment should be commensurable and proportional to the threat of abuse posed by the investor to the local resources.

C. Survey of Practical Challenges: The ICSID

The International Center for Settlement of Investment Dispute (ICSID) is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID or the Washington Convention) with over 140 (one hundred and forty) member States with the primary purpose to provide facilities for conciliation and arbitration of international investment disputes.65 Jurisdiction of the Center, according to article 25 Article 25 (1) of its establishment Convention, extends to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.66 It is considered to be the leading international arbitration institution devoted to resolving disputes between States and foreign investors, also known as BIT arbitrations. The ICSID is an impartial international forum providing facilities for arbitration of international investment disputes.67 The ICSID does not itself arbitrate disputes, but provides the rules and procedures for independent arbitration tribunals to resolve disputes.68

63. Id.
65. See INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, www.internationalarbitrationlaw.com/arbitral-institutions/icsid/ (last visited Jan. 14, 2015). “Generally, ICSID proceedings are held at the Centre’s headquarters in Washington, D.C. However, parties may agree to hold their proceeding in another location where ICSID has a pre-established arrangement. These locations include: Permanent Court of Arbitration at The Hague; Regional Arbitration Centers of the Asian-African Legal Consultative Committee at Cairo, at Kuala Lumpur and at Lagos; Australian Commercial Disputes Centre at Sydney; Australian Centre for International Commercial Arbitration at Melbourne; Singapore International Arbitration Centre; Gulf Cooperation Council Commercial Arbitration Centre at Bahrain; German Institution of Arbitration; and Maxwell Chambers, Singapore.”
66. See id.
67. See id.
The use of ICSID arbitration has increased rapidly over the past twenty years, as the number of bilateral investment treaties (BITs) has risen.

The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development.68 The BITs that are concluded between states (there are approximately over 2,600 BITs in effect according to the data of ICSID) are the major source of substantive law in settling the disputes, while the ICSID Convention is used as a source of procedural laws in the process of the dispute settlement.69

BITs create an international legal right of standing for individuals to bring claims against the host country. ICSID arbitration is the preferred method for investor-state dispute resolution. According to the U.N. Conference on Trade and Development (UNCTAD) data, almost two-thirds of the 219 known investment treaty claims were filed against developing countries.70 Thirty-seven (37) developing countries are defendants in investor-state arbitration claims, with several countries facing multiple claims.71 Against this backdrop, there is growing criticism of ICSID by the developing world and the perception that ICSID tends to decide disputes in favor of the foreign investor.72

At the heart of this criticism is whether the interests of the private investor override the regulatory power of the State. The foreign investor will always try to protect their foreign investment and the State often acts in a regulatory manner to protect the public interest. Not surprisingly, these interests usually collide when the government’s regulatory action is in areas of public services, such as the provision of water, electricity, waste disposal and sanitation services and other social and environmental impacts more generally. The human rights issues arising out of this small but powerful world of private investment arbitration and the ICSID system as a whole present complex questions around the success of the system to meet its purported goal to spur sustainable and fair economic growth in developing countries.73 With over 300 arbitrations known to have been initiated, the range of matters covers all types of regulatory measure, including environmental, human health, taxation, urban planning, and many more.74

Given the uncertainties, one may rightly ask whether international human rights law can be brought into the decision-making mix in the investor-state arbitrations in order to tilt the balance in favor of a state’s right to regulate. Investor-state arbitrations always begin from the allegation by the investor that its rights under the BIT have been breached. The final decision will be on whether a state has violated the rights of an investor. So, for this purpose, if the underlying issues in the dispute also raise international human rights law questions, they can be raised in the course of the legal arguments, even though the existing jurisprudence witnesses that little or no attention is given to human rights issues in ICSID arbitration.

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69. See id.
71. See id. at 3.
72. See id. at 7-8.
73. See id.
rights to affect the outcome of the judgment more than the interest of the investors does.\textsuperscript{75}

There is the lack of clear and consistent rules that authorize or help these tribunals consider the arguments of necessity submitted by host-countries, as part of complying with their separate obligations under the international human rights regime.\textsuperscript{76} The arbitrators that resolve BIT disputes can also present a problem for the promotion and protection of human rights.\textsuperscript{77} Generally, in investor-state arbitration tribunals, as provided in the Washington Convention, the parties choose the arbitrators. Each party has the right to appoint one arbitrator and the third arbitrator is chosen through agreement of the two party-nominated arbitrators.\textsuperscript{78} However, arbitrators present two distinct problems. First, human rights norms may be outside the scope of the arbitrator’s expertise.\textsuperscript{79} There are no significant restrictions on who can serve as arbitrators and ICSID requires that arbitrators must have “recognized competence in the fields of law, commerce, industry or finance.”\textsuperscript{80} Most BIT arbitrators have commercial backgrounds and are not familiar with matters pertaining to human rights-related laws.\textsuperscript{81} Even if a tribunal found it appropriate to address a human rights-related matter, the arbitrators may not be fully versed in how to proceed.\textsuperscript{82} Conversely, many human rights experts would similarly lack the necessary expertise in international investment law to serve as an arbitrator in BIT arbitration.\textsuperscript{83}

The realm of international investment arbitrators is a relatively small, close community, and understandably, these specialized arbitrators are concerned with “the securing of their next appointment to a tribunal”—consequently, it is safe to assume that their actions must ensure that corporations and investors will want them to serve as arbitrators in the future.\textsuperscript{84} In this small community, to obtain future employment, arbitrators must make a “display of commercial probity and their loyalty to the values of multinational business.”\textsuperscript{85} This will have a substantial drawback on the advocacy of international human rights standards into the sphere of bilateral investment dispute settlement process.


\textsuperscript{77} Id. at 11.

\textsuperscript{78} Id.


\textsuperscript{82} Id.

\textsuperscript{83} Id.


\textsuperscript{85} See id.
IV. Conclusion and Alternatives for Policy Consideration

Bilateral Investment Treaty (BIT), as the major source of international investment law, exhibits a controversy: whether or not it is an autonomous and self-governing/self-contained regime of international law with the exclusion of other rules of international law, e.g., rules of international human rights. The design of these treaties, in their present form, is asymmetrical precisely because foreign investors are being accorded substantive rights under these treaties without being subject to any specific obligations. BITs grant investors valuable rights but do not provide any reciprocal obligations. Besides the asymmetrical nature of the treaties in defining substantive rights, the procedural matters through which the investment dispute is settled, as the situation stands now, gives a little or no room for consideration of international human rights in the process. Whether there is a need for a greater degree of balance in BITs between the legitimate interests of investors and host countries’ regulatory power has always displayed the significance of introducing and embracing human rights norms in the settlement of the investment disputes.

Remodeling of the current nature of BITs to encompass clear provisions of human rights, and most importantly referencing specific international human rights treaties in a BIT, is a possible step to be considered when seeking to improve the protection of human rights in the sphere of bilateral investment. The investor-state dispute resolution clause of the treaty must also contain a provision indicating specifically how human rights obligations can actually be enforced before an arbitral tribunal. Language that recognizes and supports the host-state’s duty to protect and promote human rights, as well as language that supports and clarifies the responsibility of foreign investors to respect human rights must be clearly spelled out during the negotiations of future BITs.

Capital-exporting states need to respond to the grievances of violations of internationally accepted rights by moving towards adopting a new generation of BITs that imposes human rights obligations upon corporations. As part of that, it has to be required that investors comply with a “due diligence” standard and be subject to the doctrine of “clean hand” as an opportunity to generate a legal responsibility of the investor towards human rights. States should reform BITs to remove, or at least limit, hindrances on a host-State’s regulatory power to protect human rights, and they should re-engineer the normative framework of BITs to reflect a broader and sustainable development policy with substantive language that acknowledges broader jurisdiction regarding human rights-related matters in arbitral processes. International human rights norms and rules have arguably achieved the status of “jus cogens,” much more than the rules and norms of international investment, and therefore, can conclusively generate an obligation erga omnes towards any actor of international law.

From the perspective of the practice of the arbitral tribunals, it is recommended that the balancing role that it plays to compromise the private interests and public interest can be more grounded in the general international law rules given that there is a willingness to accept the cross-fertilization of precedents and practices of international human rights forums in interpreting different rights. Understanding the goal of international investment as narrowly as pushing the human rights norms out of the commercial realm would only make humanity and human dignity a collateral damage, not to mention the consequence of uncertainty and unsustainability of international development itself!