The Human Rights and Developmental Dimension of Investment Laws: From Investment Laws with Human Rights to Development-Oriented Investment Laws

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THE HUMAN RIGHTS AND DEVELOPMENTAL DIMENSION OF INVESTMENT LAWS: FROM INVESTMENT LAWS WITH HUMAN RIGHTS TO DEVELOPMENT-ORIENTED INVESTMENT LAWS

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Abstract

Domestic investment laws are classified in this Article as strong, moderate, and weak in terms of their relevance for the protection of human rights and the promotion of developmental goals. This Article suggests that if human rights and development are to find a stable place in the global investment architecture, a radical departure from the current Model Bilateral Investment Treaty (BIT) regime is required. It is suggested that BITs be replaced with domestic investment laws that contain precise developmental objectives for the host (developing) States. Each prospective investor, in consultation with the host state, will undertake a Development Impact Assessment (DIA), which will be directed towards identifying and contributing to the host's development. This system will eliminate the need for the negotiation of investment guarantees in BITs because where the investors satisfy their stated development-related duties and other obligations in the domestic investment law, they will not be subject to further limitations.

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INTRODUCTION

In the last decade, several BITs have included provisions on human rights and environmental protection.[1] Even so, BITs are generally geared towards protecting the interests of investors from industrialized States. Meanwhile, the developing host states are so eager to attract foreign direct investment (FDI) that they are willing to lower their human rights and environmental standards.[2] This process is aptly described as a race to the bottom. The persistent problem with investment-related human rights is not so much the indifferent or abusive behavior of foreign investors or their home States. It can generally be attributed to two factors: (1) host states' poor domestication and monitoring of their human rights obligations, which to some degree is predicated on the provision of investment guarantees that are detrimental to poor host states; and (2) the absence of a clear developmental plan and objectives in the pursuit of foreign direct investment.

One of the fundamental claims of this Article is that BITs do nothing to promote existing human rights or internationally established environmental standards as they were not designed for that purpose. In many cases, they are flatly opposed to these two objectives. However, given the artificial fragmentation between foreign investment law and

1. Examples include the Agreement between Canada and (...) for the Promotion and Reciprocal Protection of Investments, art. XV, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download; MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY art. 16.1, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download; Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and (...) art. XVI, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download.

2. *See* Kenneth J Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L. J. 469, 499 (2000), who argues that BITs "seriously restrict the ability of host states to regulates foreign investment." The U.S. Model BIT, prohibits performance obligations beyond what is established by international law, such as employability quotas of nationals of the host state. *See also* Tarcisio Gazzini, *Bilateral Investment Treaties and Sustainable Development*, 15 J. WORLD INV.& TRADE 936 (2014), who argues that the aim of sustainable growth is not directly measurable against the investor guarantees offered in BITs.

human rights law (both treaty-based and customary), States are forced to pursue these objectives through BITs, which, no doubt, seems absurd. The other existing avenues to promote and implement human rights and environmental standards are through domestic investment laws and possible agreements between host states and investors. However, the latter option is usually moot, particularly where there exists a BIT favoring the investor in question. It seems unrealistic that an investor would agree to commit itself to standards that are higher than a BIT or the host state's domestic law, particularly where there was a risk that the host would not accept the investment without such commitment on the part of the investor.[3] As a result, it falls to domestic investment laws to fill this void. Yet, with minor exceptions, this Article suggests that current investment laws in developing States are unable to meet human rights and environmental expectations because they have already been curtailed by a plethora of BITs and private investor–host state agreements. In any event, such discussions should not even be taking place because host states are under concrete obligations to implement duties arising from human rights treaties to which they are parties. By seeking to enforce human rights through BITs, which limit rather than augment their potency, BITs effectively replace the major human rights treaties and customary international law—an absurd and contradictory result.

This Article argues that rather than making a vague reference to human rights, a development-based reform of the global investment architecture is warranted. It is suggested that domestic investment laws should transform themselves into mechanisms that promote and implement concrete developmental objectives in the host state. To support this argument, this Article attempts a classification of investment laws based on the level of human rights protection offered therein. This classification is meant to show that even at the highest level, the synergy between human rights and investment is thin and is unconnected to the broader picture of development, which is the primary purpose of investment for developing countries. For the reader to understand the rationale for a transition from BITs and investment laws with human rights provisions to development-oriented investment laws, this Article sketches three levels of human rights protection in investment laws, namely: (a) *strong* investment laws, which refer directly to the country's human rights legislation and international human rights treaties and custom; (b) *moderate* investment laws, which include a reference to constitutional values, or which require that investments must meet a

3. Even the most robust domestic investment framework that is intended to promote human development is inclined to collapse if diffused by BITs that leave no room for meaningful compromises. *See* Jeswald W Salacuse and Nicholas P Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L. J. 67, 76 (2005).

certain developmental value; and (c) *weak* investment laws, namely those that refer to the host's domestic laws or the country's international obligations, but which fail in practice to suggest that investors are bound by the human rights provisions therein.

The remainder of this Article is structured as follows: Section 2 investigates the place of domestic human rights laws and their relevance for foreign investors. Section 3 discusses the role of domestic human rights laws in investment treaties and the principle of not relaxing domestic legal standards. Section 4 then goes on to examine the three variants identified by this author in the implementation of human rights in domestic foreign investment laws. These are identified as strong, moderate, and weak. It is based on this classification that Section 5 identifies the concept of development as the only viable and tangible target that should be central to the investment laws of host states. The analysis goes on to show how this may be achieved by a synergy between constitutional and statutory law, as well as based on a pre-investment Development Impact Assessment (DIA), which involves the active involvement of both investors and host states.

I. DOMESTIC HUMAN RIGHTS LAWS AND THEIR RELEVANCE FOR FOREIGN INVESTORS

Much has been written about the interplay between obligations originating from human rights treaties versus those arising from the international law of foreign investment.[4] Obligations in human rights treaties are addressed to States, and if one were to adapt these to the context of foreign investment, the addressee would remain the same. Strictly speaking, foreign investors do not possess human rights obligations under human rights treaties.[5] At the same time, BITs and other International Investment Agreements (IIAs) demand that foreign investors obey the laws of the host state, to the degree that such laws are not in conflict with the terms of the BIT and customary foreign investment law.[6] The State remains the sole addressee of the obligations contained in human rights treaties, and investors are bound to observe such obligations only to the extent that they have been incorporated in the

4. *See* Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L COMP. L. Q. 573 (2011); Edward Guntrip, *Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law*, 65 INT'L COMP. L. Q. 829 (2016); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 121 (12 May, 2005), where the tribunal stated that "there is no question of affecting fundamental human rights when considering the [application of the investment guarantees] contemplated by the parties."

5. *See* ILIAS BANTEKAS AND LUTZ OETTE, INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE 339–98 (2d ed. 2016), on the obligations of non-state actors in the field of human rights.

6. *See* OFFICE OF THE US TRADE REP., 2004 US MODEL BILATERAL INVESTMENT TREATY, art. XII (2004).

laws of the host state. Otherwise, they exist only in the realm of inter-State relations. Crucially, if the host state has simply signed or ratified, but has not subsequently adopted implementing legislation, the investor's obligation to obey domestic law does not encompass the treaty in question.[7] Of course, a State may just as well adopt human rights legislation that goes far beyond the scope of existing human rights treaties without ratifying any such treaty. In this exceptional eventuality, the investor would be bound to observe (on the basis of pertinent BITs and/or Multilateral Investment Treaties) this extensive body of domestic human rights laws.

There is certainly much complexity as to what is encompassed within a host state's domestic laws for the narrow purposes of delineating the respective obligations of a foreign investor. In theory, what constitutes valid law should be ascertained by reference to the host state's constitutional requirements.[8] In practice, however, States may be forced to circumvent their constitutional arrangements for a variety of reasons.[9] Something becomes law (i.e., it is binding) when it is approved based on a special majority by a parliament-type of institution and is then published (for transparency purposes) in an official gazette or other publicly available outlet. States nowadays routinely contract through instruments that bypass this formula. This includes private contracts that include confidentiality clauses, executive agreements that are meant to be expeditious (and which in theory do not concern substantive issues), memoranda of understanding (MOU), and high-level decisions of informal institutions, such as the Paris and London Clubs.

7. Where states do not incorporate an investment treaty to which they are parties into domestic law, as is the case with Canada's relationship to NAFTA, the courts generally argue that they have no jurisdiction to determine the constitutionality of the treaty. *See* Hupacasath First Nation v. The Minister of Foreign Affairs of Canada and the Attorney-General of Canada, 2015 F.C.A. 4.

8. Petrobart Ltd. v. Kyrgyz Republic (Arb. Inst. of the Stockholm Chamber of Com. 2005) https://www.italaw.com/sites/default/files/case-documents/ita0627.pdf. The tribunal highlighted art. 9(4) of the Kyrgyz Constitution, which included 'universally recognized principles of international law' as part of the state's international obligations. The applicant investor relied on the Kyrgyz investment law (in the absence of a BIT) and requested the tribunal to interpret art. 9(4) as encompassing a broader range of activities constituting 'foreign investment,' contrary to the narrow list contained in the investment law. The tribunal declined to entertain the request.

9. *See, e.g.*, BCB Holdings Ltd and Belize Bank Ltd v. Attorney-General of Belize, [2013] CCJ 5 (AJ), http://www.caribbeancourtofjustice.org/wp-content/uploads/2013/11/2013-CCJ-5-AJ.pdf. The Caribbean Court of Justice held that a tax concession contracted in violation of the Belize Constitution was invalid because such actions violate fundamental principles of constitutional legal order and to "disregard these values is to attack the foundations upon which the rule of law and democracy are constructed." BCB and the Bank of Belize bypassed the CCJ by seeking to enforce the award in New York and ultimately succeeded in BCB Holdings Ltd. v. Gov't of Belize, 650 F. App'x 17 (D.C. Cir. 2016), *cert. denied* 137 S. Ct. 619 (2017).

A real-life illustration is instructive. According to Article 36(2) of the Greek Constitution, international agreements must be ratified by an implementing law that is adopted by the plenary of Parliament. International agreements require a qualified majority of three-fifths of the deputies per Article 28(2) of the Constitution.[10] Following the post-2008 financial crisis, Greece sought to secure liquidity from inter-State creditors and International Financial Institutions (IFIs) through a variety of agreements. The terms of one of these, the Loan Agreement of 8 May 2010 (as amended by a subsequent agreement of 12 December 2012), was discussed neither publicly nor in Parliament, including the severe austerity measures contained therein. In fact, in a document entitled *Statement on the Support to Greece by Euro Area Members States* of 11 April 2010,[11] it was announced that the Euro Area member states, together with the European Central Bank (ECB) and the IMF, were prepared to provide a loan to Greece and that the terms of the loan had "already been agreed."[12]

In addition to bypassing constitutional requirements to introduce an agreement as domestic law, States in transition, emergency, or other vulnerable circumstances, may conversely decide to be bound by an agreement against another party (a State, IFI, an inter-governmental organization or other), while precluding the agreement from taking effect at the domestic level. During the Greek financial crisis, Article 1(4) of Law 3845/2010 granted the Finance Minister authority to negotiate and sign the texts of all pertinent loan and financing agreements (including treaties, contracts, and MOUs). Although it was required under the Constitution that all such agreements must be subject to parliamentary ratification, this never happened. Five days after its adoption, Article 1(9) of Law 3847/2010 modified article 1(4) of Law 3845 by stipulating that the term "ratification" [by the Parliament] is replaced by "discussion and information."[13] Moreover, all pertinent agreements (irrespective of their legal nature) were declared as producing a legal effect upon their signature by the Finance Minister—although such legal effect extends only among the sovereign signatories; thus, it is not necessarily law. Hence, Articles 28 and 36 of the Constitution were effectively bypassed by a mere legislative amendment. What is more, Law 3845/2010 included two of the three MOUs as mere annexes, relegating them to the status of

10. *See* Council of State [Plenary Assembly] 668/2012, p. 29 (Greece) the majority of the Greek Council of State (ΣτΕ) members agreed with such an interpretation of art 28(2) of the Constitution.

11. EUROGROUP, STATEMENT OF THE SUPPORT TO GREECE BY EURO AREA MEMBERS STATES (Apr. 11, 2010), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/113686.pdf.

12. *Id.*

13. TRUTH COMMITTEE ON PUBLIC DEBT, PRELIMINARY REPORT 48 (2015), http://cadtm.org/IMG/pdf/Report.pdf.

"programme plans,"[14] despite that the obligations contained in these MOUs effectively circumvented domestic laws and Greece's obligations under human rights treaties.[15]

Hence, what constitutes law for BIT obligations incumbent on foreign investors may be as restrictive or expansive as a host state desires. A host state may further restrict the application of existing human rights and environmental laws to foreign investors by private agreement (including stabilization clauses), a subsequent law, or even by consistent conduct.

II. Domestic Human Rights Laws in Investment Treaties and the Principle of Not Relaxing Domestic Legal Standards

Naturally, investment treaties find a special place within domestic legal orders as a source of obligation for host states and foreign investors. Observance of domestic law is an essential ingredient for the preservation of legal certainty and the rule of law. However, powerful home States have demanded (through BITs and other agreements) that domestic host state laws, including human rights and environmental legislation, not be such as to effectively expropriate assets or strip foreign investors of legitimate investment guarantees.[16] Although this seems common sense, situations may well arise where a host state's generous BIT or contractual obligations towards a foreign investor are in violation of its treaty-based human rights obligations. Investment treaties deal with such issues by prioritizing anti-expropriatory measures and breaches of investor guarantees over and above other considerations.[17] Exceptionally, such

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14. *Id.* at 48–49.

15. *See generally* Ilias Bantekas and Renaud Vivien, *On the Odiousness of Greek Debt*, 22 EUROPEAN L. J. 539 (2016) (where the bypassing of constitutionally mandated processes is described in more detail).

16. JOHANNE COX, EXPROPRIATION IN INVESTMENT TREATY ARBITRATION (Loukas Mistelis ed., 2019).

17. Naturally, human rights treaty bodies and international human rights courts and tribunals take the exact opposite view. *E.g.*, Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece, (ECSR) No. 76/2012 Decision on the Merits, Eur. Comm'n. Of Soc. Rts. ¶ 66–81 (Dec. 7, 2012), https://hudoc.esc.coe.int/eng/#{%22sort%22:[%22ESCPublicationDate%20Descending%22],%22ESCDcIdentifier%22:[%22cc-76-2012-dmerits-en%22]; Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece, (ECSR) No. 75/2012 Complaint Eur. Comm'n. Of Soc. Rts. ¶ 48 (Jan. 16, 2012), http://rm.coe.int/no-76-2012-federation-of-employed-pensioners-of-greece-ika-etam-v-gree/16807423fa; Capital Bank AD v. Bulgaria App. no. 49429/99 Eur. Ct. H.R. ¶ 90 (2005); *see also* Eur. Comm. Of Soc. and Econ. Rts. (CESCR). *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, ¶ 13, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017), which states that:

> States parties should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist, as required under the principle of the binding character of treaties. The conclusion of such

preferential treatment may be sidelined (or carved out) through general exception clauses in investment treaties. Article 10 of the Canadian Foreign Investment Promotion and Protection Agreements (FIPA) stipulates that:

> 1. [Unless discriminatory and arbitrary], nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:
>
> (a) to protect human, animal or plant life or health;
>
> (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

Article 11 of the FIPA goes on to say that host states must not lower domestic standards when attracting foreign direct investment. This principle is accompanied by a consultation mechanism.

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

The last sentence of Article 11 is a wonderful display of international solidarity that places the international protection of human rights and the environment above the host state's endeavor to attract foreign investment.[18] However, this author is not aware of a single instance where

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> treaties should therefore be preceded by human rights impact assessments that take into account both the positive and negative human rights impacts of trade and investment treaties, including the contribution of such treaties to the realization of the right to development. . . . The interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with art 103 of the Charter of the United Nations and with the specific nature of human rights obligations. States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude.

18. *See* Agreement between the Kingdom of Norway and _____ for the Promotion and Protection of Investments, Draft version 130515, art. 11 (hereinafter Norwegian Model BIT) https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf; *see also* Draft Agreement between the Government of the French Republic and the Government of the Republic of (…) on the Reciprocal Promotion and Protection

such consultations have taken place.[19] Canadian federal law generally provides for a consultation with indigenous persons in respect to federal actions that may have an adverse or other similar impacts on them.[20] Despite the laudable objectives behind it, concerned investors have much incentive to preclude the activation of this mechanism. Moreover, Article 11 and the consultations envisaged do not make us wiser as to the alternatives for developing states when intense competition for FDI gives them no choice but to relax their domestic standards.

Even discriminatory tax cuts in favor of foreign investors may ultimately constitute a relaxation of domestic standards. By renouncing resources otherwise stemming from predictable taxes, the host state limits its capacity to invest in the national market.[21] Additionally, these tax cuts create an imbalance between nationals and investors. Moreover, tax cuts increase investors' profits while at the same time reduce the promotion of the development of the host state, especially where the investor does not use the tax reduction to increase its productivity or otherwise create new jobs.[22]

Although the subject matter of corporate social responsibility and the discussion on the human rights obligations of non-state actors is beyond the scope of this Article, it is worth mentioning that some recent human rights-friendly BITs approach the matter of lowering domestic standards from a more pragmatic perspective. While Article 11 of the Norwegian Model BIT uses the same language as Article 11 of the Canadian FIPA, Article 32 stipulates that: "the parties *agree to encourage* investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United

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of Investments, art. 1(5), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5874/download (stating "nothing in this agreement shall be construed to prevent any contracting party from taking any measure to regulate investment of foreign companies and the conditions of activities of these companies in the framework of policies designed to preserve and promote cultural and linguistic diversity).

19. Hupacasath First Nation v. The Minister of Foreign Affairs of Canada and the Attorney-General of Canada, 2015 F.C.A. (upholding the Court of Appeals 2013 judgment of the Federal Court, whereby the Canada/China BIT, which is similar to the FIPA, had not been proven to produce any appreciable and non-speculative effects on the rights and interests of the appellants.).

20. Federal Canadian case law clearly suggests that high level management decisions and structural changes generally give rise to a duty to consult First Nations (indigenous peoples) where such actions may have an adverse impact on their livelihood. *See* Huu-Ay-Aht First Nation v. The Minister of Forests, 2005 B.C.S.C. 697; Dene Tha' First Nation v. Canada (Minister of Environment), 2006 F.C. 1354; Rio Tinto Alcan Inc. v. Carrier Sekami Tribal Council, 2010 S.C.C. 43 (with the applicable test set out in paragraph 45); Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General), 2012 F.C. 517.

21. George K Foster, *Investors, States and Stakeholders: Power Asymmetries In International Investment and the Stabilizing Potential of Investment Treaties*, 17 LEWIS & CLARK L. R. 364 (2013).

22. Vandevelde, *supra* note 2, at 477.

Nations Global Compact" [emphasis added]. Such provisions, however, reinforce the argument that investors have no human rights or environmental obligations from BITs, nor from the laws of the host state unless the latter says otherwise.

Overall, BITs demonstrate little reverence for domestic laws and, in any event, avoid any deference to developing States' domestic laws in the sphere of human rights and environmental regulation.

III. THE THREE LEVELS OF HUMAN RIGHTS PROTECTION IN FOREIGN INVESTMENT LAWS

In absolute terms, developing States, or States eager to attract foreign investment to boost their development, generally relax rather than augment their laws in favor of human rights, development, and environmental protection. This Article identifies three types of domestic investment laws based on their regulatory authority by which to enforce human rights and environmental norms (both of which are part of the general framework of development), namely strong, moderate, and weak. This classification does not seek to assess how these laws are implemented in practice, but rather how significant the synergy is between the host's legislative framework and the obligations of investors. An investment law that explicitly derives its authority from the constitution and the host's treaty obligations provides standing for class action constitutional suits, whereas this is not the case where investment laws are divorced from the constitution and the host's human rights legislation.[23]

However, the rationale underlying this classification is to show that even the best synergy paradigm (i.e., the human rights potential of domestic investment laws) is unable to fulfill the promise of human rights, let alone the promise of development. The link between human rights and investment in investment laws, even if the latter derive their authority from the host's constitution or its international human rights obligations, does not guarantee that the investment will have a developmental impact or will otherwise enhance socio-economic rights. In developing countries, the protection of human rights is generally weak

23. It should be noted from the outset that it is beyond the ambit of this Article to evaluate the impact of public participation, lobbying, and external pressure parameters on domestic investment laws. In developed economies, such parameters significantly influence policy and judicial activism. Hence, the potency of domestic laws (investment or other) is assessed by reference to the various actors and parameters that effectively influence and shape them. It is assumed that the impact of civil society is limited in developing economies and this can be assumed to also apply with respect to the strengthening of investment laws. *See* Scott L Greer and Maria Martín de Almagro Iniesta, *How Bureaucracies Listen to Courts: Bureaucratized Calculations and European Law*, 39 LAW & SOC. INQUIRY 361 (2013); Julie M Simmons, *The Role of Citizens in the 'Soft Law' of Select Social Policy Areas in Canada and the European Union*, 56 CAN. PUB. ADMIN. 270 (2013).

and is structurally inefficient. As a result, it is a fallacy to presume that such inefficiency will be remedied through the implementation of investment laws. If investment laws are to make a tangible impact on rights—other than the obligation of host states to adhere to their human rights obligations and investors to conform to domestic laws—this can only occur if they are directed towards developmental objectives and not towards human rights in the abstract. The classification of the three levels of human rights protection in existing investment laws in this Article, brief as it is, aims to show exactly this; namely, that the linkages between human rights in general and investment does not enhance socio-economic rights and does not contribute to the host's overall development. It is because of the failure of this human rights model in investment laws, as set out in the following classification that we then go on to lay out the contours of the developmental paradigm upon which investment laws should be predicated.

A. *Strong Domestic Investment Laws*

A 'strong' investment law may be defined as that which is expressly linked with the host state's human rights and environmental obligations, as these are found in its constitution, regular legislation, and its treaty- and customary-based commitments. It is clear, therefore, that a strong law must be subordinate to these sources and interpreted in conformity with these. Hence, justiciability and legal standing in respect of the investment law's human rights and environmental aspects follow those found in the constitution and the international obligations of the host state. It is no wonder that strong laws are exceptional, and even where they exist, there is insufficient data as to how they are applied and enforced against all foreign investments and investors. The prime example is Section 3 of the South African Protection of Investment Act 22 of 2015,[24] which is among the very few with explicit reference to human rights. It reads:

> This Act must be interpreted and applied in a manner that is consistent with:
>
> a. its purposes as contemplated by section 4;
>
> b. the Constitution, including:
>
> i. the interpretation of the Bill of Rights contemplated in section 39 of the Constitution;
>
> ii. customary international law contemplated in section 232 of the Constitution; and

24. The Protection of Investment Act 22 of 2015 § 3 (s. Afr.).

iii. international law contemplated in section 233 of the Constitution; and

c. any relevant convention or international agreement to which the Republic is or becomes a party.

The interpretative obligations contained in Section 3 ordinarily apply because of constitutional law, but few courts make the necessary connection.[25] It is important that human rights treaties and customary law be made an integral part of the host state's investment legislation to eliminate any doubt about the so-called fragmentation of international human rights and environmental law from foreign investment law.

B. *Moderate Domestic Investment Laws*

Domestic investment laws of a moderate strength are those that, although linked to the host's constitution, the obligations contained therein and the relationship between the two instruments is tenuous and hardly decisive. In many situations, the law's reference to the constitution is hortatory. In reality, there is no justiciability for entertaining suits before a constitutional or supreme court or the law is interpreted per existing obligations under BITs. There is no single standard of a moderate strength investment law. The various sub-categories may generally be clustered based on the following characteristics found in the host state's foreign investment legislation: (a) investment laws requiring (simply, but not effectively) adherence to the host's constitution; and (b) those requiring adherence to treaties adopted by the host, but again without reference to a tangible methodology and discernible legal standing.

1. Investment Laws Requiring Adherence to Local Constitutions

The first sub-category consists of statutes requiring the investor to obey the constitution of the host state. Examples are reflected in several South American investment laws. This is true of Article 1 of the Argentine Ley de Inversiones Extranjeras (1993); Article 3 of the Nicaraguan Ley de Inversiones Extranjeras 2000; Article 2 of the Peruvian Ley de Inversiones Extranjeras (1991). Beyond South America, one may equally point to Articles 5 and 19 of the Belarus Investment Law (2013). Given the superior nature of constitutional law above all other domestic laws, one would have expected such a requirement to require no explicit mention. Constitutional adherence in the host's investment or related laws is meaningful only where constitutional or other courts

25. The Republic of South Africa Constitutional Court is a unique paradigm of promoting human rights, having adopted seminal judgments, especially in the field of socio-economic rights. *E.g., Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC) (s. Afr.); *South African Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.). These judgments led to concrete and sweeping policy changes.

possess jurisdiction to assess the constitutionality of a BIT, the local investment law, and the contract between the host state and the investor. Such jurisdiction has been exercised in numerous cases by constitutional tribunals, and both the treaty in question and its application became the subject matter of judicial review.[26] A similar procedure has been exercised by the Court of Justice of the EU (CJEU) as concerns incompatibilities between the EU treaties and Member States' BITs. EU treaties possess a supra-constitutional value given that they supersede Member States' constitutions. In several cases, the CJEU has held that where a BIT conflicts with said treaties, it violates EU law, and the incumbent State incurs liability.[27]

This line of reasoning suggests that a review of the constitutionality of BITs, investment laws, and investment agreements is inherent in the constitutional tradition of States and is integral to sovereign regulatory powers.

Thus, where constitutional assessment is available (whether under the constitution, investment law, or supra-national treaty), it is not open to host states to enter into treaties or adopt laws and agreements that are incompatible with their constitutions. Investors will undoubtedly argue that BITs generally supersede local constitutions as constitutions generally confer supremacy to international agreements. This is true, and States may not invoke a violation of their domestic law to evade treaty or customary obligations under international law.[28] The problem lies in situations of conflict between BITs and those constitutional provisions that expressly implement the host's international obligations stemming from human rights treaties and customary law. There is a long line of debate concerning the outcome of such conflict,[29] but at the very least,

26. *See* Bolivian Constitutional Court, 10/5/2006, "Wilson Beimar Magne Hinojosa, Diputado Nacional c. Eduardo Rodríguez Veltzé, Presidente Constitucional de la República de Bolivia, and Others" (concerning the constitutionality of BITs and their implementing legislation in Bolivia.) (Bol.); equally, in Council of Canadians et al. v. Attorney General of Canada, [2006] O.J. No 4751 (Can.) (where the Court of Appeal for Ontario held that NAFTA did not violate the Canadian Constitution because it had not been incorporated into Canadian law and that in any even its application did not infringe the rule of law nor the Charter of Fundamental Rights); Corte Constituucional [C.C.] [Constitutional Court], agosto 3, 2010, Dictamen No. 020-10-DTI-CC, Suplemento del Registro Oficial (No. 249, p. 12) (Ecuador); Corte Constituucional [C.C.] [Constitutional Court], agosto 17, 2010, Dictamen No. 026-10-DTI-CC, Registro Oficial (No. 258, p.1) (Ecuador).

27. *See* Case C-249/06, Comm'n. of the Eur. Cmty. v. Sweden, 2009 E.C.R. I-01335; Case C-205/06, Comm'n. of the Eur. Cmty. v. Austria, 2009 E.C.R. I-01301.

28. Int'l L. Comm'n., Rep. on the Work of Its Fifty-Third Session, art. 3, U.N. Doc. A/56/10 (2001), which states that: "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

29. *See* Marko Milanovic, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J COMP. & INT'L L. 69 (2009).

treaties must be construed in accordance and conformity with fundamental human rights.

2. Investment Laws Requiring Adherence to International Agreements

The second type of investment statute that may be considered as being of moderate strength is that which (at least in theory) subjects all laws in the territory of the host state to the country's international agreements, which includes human rights treaties. These investment laws are contrasted in this Article from their 'strong' counterparts because they refer to international agreements in general and not specific to human rights. Article 91 of the 2016 Myanmar Investment Law, which is of this nature, provides that:

> If there is any provision of this law contrary to any matter provided for in the international treaties and agreements adopted by the Union, the provisions contained in the international treaties and agreement shall be abided by for such contradictory provision.[30]

No doubt, this is consistent with customary international law and constitutional tradition (i.e., that international law supersedes conflicting domestic law). Still, the implications in the interplay between treaty-based human rights obligations and obligations arising from BITs are unresolved. Much of this complexity arises from the fact that some statutes refer specifically to BITs, but not to other international treaties, and even where a provision is general, it does not cater to the likelihood of conflicting rules of international law.[31] Moreover, such provisions apply between the investment law and treaties/custom, but not in the relationship between the law and private agreements with private investors, which may just as well disregard the host state's human rights obligations and developmental objectives. For States that are not serious about their human rights obligations, or which have no concrete developmental objectives, provisions requiring general adherence to their international obligations can constitute a wonderful excuse in favor of the

30. Other examples include, Republic of Guinea-Bissau Investment Code, Law no. 3/2011, 6 July, 2011, art. 19; Gambia Investment and Export Promotion Agency Act, Act no. 3 of 2010, 26 May, 2010, art. 41(1) (which however only refers to BITs and not to other treaties.); Law no. 004/2002, Feb. 21, 2002, The Democratic Republic of Congo Investment Code, art. 41; Angola Private Investment Law, Law no. 10/18, June 26, 2015, art. 20(4) (but only as concerns rights of investors under international law); Kazakhstan Law on Investments, Law no. 373-II, Jan. 8, 2003, art. 2(4).

31. Although this matter is addressed in a few BITs, the matter is not resolved. *See, e.g.*, Norwegian Model BIT, *supra* note 18, art. 29, https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf (stating that "The provisions of this Agreement shall be without prejudice to the rights and obligations of the Parties under other international agreements.").

fragmentation suggested by BITs and general foreign investment law. Moreover, it is not at all certain that even where a conflict exists between a treaty-based human rights norm and a conflicting provision in the investment law that the courts and administrative machinery of the host state will find the existence of a conflict.

3. Weak Investment Laws

Finally, this Article classifies investment laws requiring the investor simply to adhere to domestic laws (generally) as weak. This conclusion is drawn based on considerations already explained and applies only where domestic law is the sole source of obligation in the host state's investment law. Where a country's legal system is fragile, its laws may lack even the most rudimentary human rights protections and be devoid of developmental objectives. Moreover, there may be little or no enforcement against otherwise illegal actions of investors (e.g., relating to the environment, corruption, etc.). On the contrary, where a legal system is strong, and the rule of law is omnipresent, reference to domestic laws is certainly meaningful because the rule of law provides, among others, effective access to justice mechanisms.

4. Development-Oriented Investment Laws

Strong investment laws (with a human rights component) are present in a handful of nations, at best, and even there, it is not always clear how the host state can transform the human rights and environmental obligations therein into tangible developmental results. It is suggested that this can only be achieved if developmental objectives are imbedded in domestic investment laws rather than relying on vague human rights obligations without clear roles for the synergy between the host state and each foreign investor.

Some, but very few, States have introduced such a developmental dimension in their investment laws. By way of illustration, the Ethiopian Investment Law, in its preamble, qualifies an investment as something that has a developmental value. But it is not clear how this is to be assessed and whether it is a *sine qua non* condition. In an equal manner, Article 35 of the Venezuelan Ley Constitutional de Inversion Extranjera Productiva stipulates that:

> All foreign investment will meet the following conditions:
>
> 1. Contribute to the production of national goods and services in order to meet domestic demand, as well as the increase of non-traditional exports.
>
> 2. Contributing to the national economic development and research and innovation capacities of the country, in

> addition to promoting the incorporation of goods and services of national origin.[32]

Although human development is part of the international human rights architecture, as formulated under the right to development[33] and quantified in instruments such as the UNDP's Human Development Index (HDI) or the Sustainable Development Goals (SDGs), its enforcement, or at least its concretization as hard law, has been fiercely resisted by developed states.[34] For BITs and foreign investment, human development should be the key goal, rather than human rights, since the latter should, in any event, is (or should) be an integral part of all host states' obligations and investors should abide by it. The right to development (RTD), as articulated in the UN Declaration on RTD, reveals three fundamental building blocks that help demonstrate that the entitlement is hardly an arbitrary construction. It is the natural outcome of the enforcement of the International Bill of Human Rights. These are: "the constant *well-being*" of all people,[35] the inextricable nexus between well-being and civil, political and socio-economic rights,[36] and the responsibility of states internally and externally to promote such well-being through the pursuit of all human rights.[37] A structured and comprehensive definition that included all three elements was articulated, not without dissent, in 2010 by the UN Special Rapporteur on the RTD, which will serve as a working definition for this Article:

> The right to development is the right of peoples and individuals to the constant improvement of their well-being and to a national and global enabling environment conducive to just, equitable, participatory, and human-centered development respectful of all human rights.[38]

This type of development should be pursued as a requirement in BITs and host states' domestic laws on the basis that this is the only truly beneficial impact of foreign investment. Development is typically associated with the overall wealth of states and is often linked to

32. *See also* the longer set of developmental criteria, set out in Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and (...), *supra* note 1, preamble and art. 15.

33. *See generally* G.A. Res. 41/128, (Dec. 4, 1986).

34. Human Rights Council, Rep. of the Working Group on its Eleventh Session, ¶¶ 7–12, U.N. Doc. A/HRC/15/23 (June 10, 2010).

35. G.A. Res. 41/128, art. 2(3) (Dec. 4, 1986).

36. *Id.* art. 1(1) and 2(2).

37. *Id* art. 4–8.

38. Human Rights Council, Rep. of the High-level Task Force on its Sixth Session, U.N. Doc. A/HRC/15/WG.2/TF/2/Add.2 (Right to Development Criteria and Sub-criteria), Annex (Mar. 8, 2010).

indicators such as economic growth, per capita income, and balance of payments, among others. The particular indicators of this type of development are intended to measure the overall wealth of States, not the well-being of their citizens. By way of illustration, a country's gross domestic product (GDP), which represents the market value of its products and services, may be high, the standard of living of its people can remain relatively low. This is because GDP is not a measure of personal income,[39] nor does it take into account the disparity in the distribution of wealth or the enjoyment of essential services and goods such as healthcare, education, water, and food. The measurement of human well-being is a relatively new phenomenon in economics and human rights literature. In 1990 the UNDP published its first *Human Development Report* to demonstrate how economic growth translates into human development. From the outset, the report took the approach that:

> People are the real wealth of a nation. The basic objective of development is to create an enabling environment for people to enjoy long, healthy, and creative lives. This may appear to be a simple truth. But it is often forgotten in the immediate concern with the accumulation of commodities and financial wealth.[40]

Human development is thus defined as enlarging peoples' choices, chief among these being the ability to lead a long and healthy life, be educated, and to enjoy a decent standard of living. The report noted that although income helps formulate human choices, it is merely a *means* and not an *end*. It distinguished between two sides of human development: "the formation of human capabilities, such as improved health or knowledge . . . and the use that people make of their capabilities, for work or leisure."[41] It identified three key indicators that may be used to measure human development, namely, longevity, knowledge, and decent

39. The contemporary view rejects money-centric definitions of poverty. Instead, it emphasizes the link between development and freedom in which case poverty is 'understood as the deprivation of basic capabilities rather than merely as lack of income on its own.' Human Rights Council, Implementation of H.R.C. Res. 6/13, ¶ 12, U.N. Doc. A/HRC/SF/2008/2 (Aug. 6, 2008). Committee on Economic, Social, and Cultural Rights. (CESCR) has defined poverty as 'a human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.' Comm. on Econ., Soc., and Cultural Rts., Statement Adopted by the CESCR, ¶ 8, U.N. Doc. E/C.12/2001/10 (May 4, 2001). A non-money-centric definition is also offered by the EU's European Consensus on Development, 2006 O.J. (C46/1), ¶ 11. It notes, among other things, that poverty "includes all the areas in which people of either gender are deprived and perceived as incapacitated in different societies and local contexts."

40. UNDP, Human Dev. Rep. at 9 (1990).

41. *Id.* at 10.

living standards.[42] These three indicators, known as the Human Development Index (HDI), offer markedly different results from the numbers reflecting the GDP of nations. Of course, democratic governance, a solid income, the enjoyment of human rights, and similar factors are also relevant to the processes of human development.

It should be observed, however, that the notion of a developmental objective in BITs is not universally shared, and this may be at odds with investment laws requiring such objective. This is true even in respect of the more human rights-oriented BITs. Article 8(1)(ix) of the Model Norwegian BIT expressly clarifies that there shall be no performance requirement "to achieve a given level or value of research and development in its territory." Understandably, powerful developed States are suspicious of investment laws requiring that all investment possess a development value.[43] However, there is no reason why BITs cannot determine that this applies to some investments (e.g., not portfolio investment) and that clear guidelines are set out in an annex or the body of the BIT and that these guidelines are based on the right to development and the UNDP's Human Development Index.[44]

5. Reform of Investment Architecture: Replacing BITs with Development-Oriented Investment Laws

It is a key argument of this Article that if BITs are unable to bring about developmental objectives, then they can and should be replaced by investment laws that offer sound investment guarantees on the one hand and set out their developmental agenda on the other. The benefits for investors currently found in BITs may just as well be served by sufficient exhibition of credible commitments in domestic laws.[45] There is no conclusive qualitative or quantitative evidence in the existing literature concerning a binary effect between BITs and increased FDI flows.[46] It is

42. *Id.* at 11.

43. An exception may be Switzerland, whose BITs mention economic development of host states in the preamble. *See* Gazzini, *supra* note 2, at 941.

44. *See* Federico Ortino, *Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing*, 30 LEIDEN J. OF INT'L L. 76 (2017).

45. On 'credible commitments', *see* Jay Dixon and Paul A. Haslam, *Does the Quality of Investment Protection Affect FDI Flows to Developing Countries? Evidence from Latin America*, 39 WORLD ECONOMY 1080, 1083 (2016).

46. *See* Eric Neumayer and Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 3 WORLD DEV. 31 (2005); Emma Aisbett, *Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 395 (Karl P Sauvant and Lisa E Sachs eds., 2009); Umakrishnan Kollamparambil, *Bilateral Investment Treaties and Investor State Disputes* (Econ. Res. S. Afr., Working Paper 589/2016).

also natural and undoubted that BITs were neither designed to be nor are necessarily conducive to sustainable development. Kollamparambil cites Robert Keohane's interpretation of diffused reciprocity[47] and argues that there is an existence of "issues with diffused reciprocity imbibed in BITs leading to the unequal distribution of rights and obligations between countries."[48]

All the more reason for arguing in favor of replacing BITs with strong and development-oriented investment laws is the bitter experience of many developing countries with investment guarantees in BITs that effectively curtailed, if not wholly inhibited, their regulatory power as regards the environment and sustainable development.[49] India, for example, has argued that the necessary regulation of many aspects of sustainable development, such as drinking water, health care standards, and environmental law, was challenged by foreign investors as violations of its existing BITs.[50]

The claim outlined in this Article for reforming the existing BITs-based system of foreign investment with a development-oriented framework is not new to international law. The contribution of investments to the economic development of host states was one of the criteria set out in the *Salini* case by an ICSID tribunal,[51] even if it has since fallen from grace. If human development is to become the key performance criterion in the investment laws of developing host states, it must be clearly explained therein what the role of investors is and how such role is to be measured and quantified.[52] For purposes of consistency, the pursuit of human development should be predicated on the Right to Development Declaration and the HDI, but this still leaves much space for the precise requirements demanded of investors.[53] As far as this author

47. Robert Keohane, *Reciprocity in International Relations*, 40 INT'L ORG 1 (1986).

48. Kollamparambil, *supra* note 46, at 13.

49. Gazzini, *supra* note 2, at 923, 938; *see also* Rodrigo Polanco, Jolle De Sepibus and Kateryna Holzer, *TTIP and Climate Change: How Real Are Race to the Bottom Concerns?*, 3 CARBON & CLIMATE L. R. 206, 207 (2017) (referring to negative effects on sustainable development caused by compromises during discussion on the TTIP).

50. *See* Prabhash Ranjan and Pushkar Anad, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38 NORTHWESTERN J. INT'L L. & BUS. 1, 5 (2017).

51. Salini v. Morocco, ICSID Case No. Arb/00/04, Decision on Jurisdiction, ¶ 52 (July 23, 2001).

52. The precise formulation of entrenched human rights norms has become much easier with the introduction and extensive use of human rights indicators and benchmarks in respect of all human rights. *See* David McGrogan, *Human Rights Indicators and the Sovereignty of Technique*, 27 EUROPEAN J. OF INT'L L. 385 (2016). Of course, DIAs are generally un-explored in both the literature and practice, but existing indicators constitute a sound blueprint, albeit each DIA, as is the case with HRIAs need to be personalized.

53. The South American experience with BITs and investment arbitration, for good or bad, has been particularly negative. Countries like Ecuador have not only denounced most of their BITs and withdrew from ICSID, but moreover set up citizens' commissions to audit the BITs,

is aware, there is no blueprint for a Developmental Impact Assessment (DIA). However, human rights impact assessments are now commonplace in international development assistance agreements, as well as in the obligations of states operating through IFIs and inter-governmental organizations.

General Comments by treaty bodies emphasize the obligation of States to carry out Human Rights Impact Assessments (HRIAs) in the context of budgeting, business activities, trade and investment agreements, and the privatization of public services, including potential extraterritorial-human rights impacts.[54] Most inter-governmental organizations oblige their organs and sub-entities to undertake HRIAs through internalized guidelines. This is true, for example, in respect of the EU whenever its organs adopt legislation or enter into international agreements.[55] The CJEU has emphasized the importance of such HRIAs in the adoption of primary and secondary EU legislation.[56] In one case, a complaint was made to the EU Ombudsman, arguing that in the context of the EU-Vietnam Free Trade Agreement, the EU Commission refused to prepare an HRIA, even though such agreements produce a significant impact on populations emerging from non-market economies, as was the case with Vietnam.[57] The Ombudsman found such a failure to constitute an instance of mal-administration.[58]

The proliferation of HRIAs among states and inter-governmental organizations has given rise to several common criteria and indicators. A leading commentator and current UN Independent Expert on the impact of foreign debt on human rights has described these as follows:

> The purpose and steps for carrying out an HRIA based on classic impact assessment approaches are also well-established. These include: a) preparation and screening of possible human rights impacts in consultation with affected

finding these to have only benefited investors. This led to a new Model BIT initiative, which among others insists on a more precise definition of "investment" and "profit," safeguards the ability of host states to regulate in the public interest and gives increased weight to human rights and environmental protection. *See* CECILIA OLIVET, CTR. FOR RES. ON GLOBALIZATION, WHY DID ECUADOR TERMINATE ALL ITS BILATERAL INVESTMENT TREATIES? (2017).

54. Comm. on Econ., Soc., and Cultural Rts., Gen. Comment No. 24, ¶ 17, 21–22, U.N. Doc. E/C.12/GC/24, (Aug. 10, 2017); Comm. on the Rts. of the Child, Gen. Comment 19, ¶ 47, U.N. Doc. CRC/CG/19 (July 10, 2016).

55. *Operational Guidance on taking account of fundamental rights in Commission impact assessments* (Eur. Comm., Working Paper SEC (2011) 567 Final, May 6, 2011).

56. Joined cases C-92/09 and C-93/09, Volker und Markus Schecke and Eifert v. Land Hessen, 2010 E.C.R. I-11063.

57. *See generally* Council Decision 2019/1121 of 25 June 2019, EU-Vietnam Trade and Investment Agreement, 2019 O.J. (L 186) 3.

58. EUR. OMBUDSMAN, DRAFT RECOMMENDATION OF THE EUR. OMBUDSMAN IN THE INQUIRY INTO COMPLAINT 1409/2014/JN AGAINST THE EUR. COMM'N (Mar. 26, 2015).

groups; b) scoping; c) evidence gathering and data collection using qualitative and quantitative methods; d) analyzing impacts; e) development of recommendations aimed at preventing adverse human rights impacts or to ensure that they are mitigated; f) reporting and presentation of the findings; and g) ongoing evaluation and monitoring of actual impacts.[59]

It is based on HRIAs that DIAs can be elaborated and developed as annexes to host states' domestic laws. Although it is beyond the scope of this article to explain in any detail the exact contents of a DIA, they should, in general, set out a balanced quantitative and qualitative account as to what may be expected of investors, but equally how the host state is to capitalize from the investor's presence.

Developmental needs differ as does the capacity and expertise of each investor. Still, one may cite the need for enhanced technology transfer, training of the local workforce, emphasis on educational opportunities, environmental and energy efficiency capacity building, emphasis on the hiring of women, or disadvantaged populations and many others.[60] A crude example, and one not predicated on a structured and well-thought-out investment law, was the Volkswagen Group's investment in Rwanda in the form of a plant for compact cars. This investment was part of a joint scheme between the company and the two governments (i.e., Rwanda as the host state and Germany as the home State) to implement a system of modern infrastructure, especially involving the introduction of e-mobility and car-sharing to the African market.[61] Although it is too early to tell how this project will fare, it is important to highlight the introduction of modern technology in the country, infrastructure development, and cost-effective transport permeating all levels of society through a single investment. This investment will provide meaningful employment opportunities for a good part of Rwanda's educated generation, which will, in turn, stem the country's brain drain, in addition to reinforcing the secondary economy.

59. Juan P Bohoslavsky, *Guiding Principles to Assess the Human Rights Impact of Economic Reforms? Yes, in* SOVEREIGN DEBT AND HUMAN RIGHTS 402, 414 (Ilias Bantekas and Cephas Lumina eds., 2018).

60. *See* Rui Moura and Rosa Forte, *The Effects of Foreign Direct Investment on the Host Country Economic Growth: Theory and Empirical Evidence*, 58 SINGAPORE ECON. REV. 1 (2013).

61. Christian Hetzner, *VW Invests $20 Milllion in Rwanda's First Car Plant*, AUTOMOTIVE NEWS EUROPE (June 27, 2008), https://europe.autonews.com/article/20180627/ANE/180629816/vw-invests-20-million-in-rwanda-s-first-car-plant.

CONCLUSION

While mapping the potency of domestic investment laws and classifying them into strong, moderate, and weak, this Article attempts to break the mold of the existing foreign investment regulatory framework. It suggests that the pursuit of human rights in foreign investment law, while important, is, to a large degree, misleading. States already have an obligation under treaty and customary law to enforce human rights on their territory, and even extraterritorially under certain circumstances. That they have to rely on BITs and investment tribunals to make this happen marginally is absurd. States should be implementing their human rights obligations irrespective of BITs, and no other treaty obligation should curtail, directly or indirectly, human rights. In this light, BITs and general foreign investment law should be construed in a manner that is consistent with customary human rights obligations.

If, as the existing literature argues, BITs inhibit development (and hence the whole range of human rights) in developing countries, then such a developmental role can and should be played by domestic regulation, perhaps through a new generation of development-oriented investment laws that replace existing BITs. This argument is all the more poignant in the wake of BIT denunciations in South America (and ICSID withdrawal), as well as the rise of new Model BITs from Brazil, India, and other BRICS.[62] At present, the investment laws of developing nations are inadequately drafted, let alone equipped to drive through robust developmental objectives. They are subordinate to BITs, have been designed neither under a human rights-based approach (HRBA) nor in a manner that promotes development or in a structured manner that curbs one or more investment guarantees inhibiting development.

The broader framework that should be pursued is that of development, in the manner set out by the UN Declaration on the Right to Development and as quantified by UNDP's Human Development Index. Development is an altogether different proposition from just observing existing human rights obligations. It requires that a developmental plan be adopted, and that inward foreign investment be made an integral part of that plan. Each investor should know what is expected of its investment and what his or her developmental obligations are. There may well need to be an agreement with each investor to specify each party's roles and functions, and this will encompass agreement on applicable investment guarantees; based on such agreements, the investor will be able to make an informed judgment as to whether the investment is worthwhile in the medium and long term. It may also be the case that the investor or the host state will have to undertake a DIA upon application from each investor to identify the impact and ascertainable actions and goals. All of this information

62. *See* Ranjan and Anad, *supra* note 50.

will be contained in the host's investment law, which by necessity, will be a living instrument that is to be supplemented by the DIA and other specialized agreements between the host and the investor.

Based on the aforementioned, BITs will ultimately have to be replaced by development-oriented investment laws. This is a radical departure from the existing foreign investment architecture.[63] Yet, this paradigm resolves many of the woes of several scattered fields of international law and policy. For one thing, it resolves the fragmentation between environmental and human rights law with foreign investment law. Secondly, it serves to bridge international development law and finance with foreign investment and, in the process, decrease reliance on foreign aid or development assistance. Thirdly, it may effectively undo the complex web of investment guarantees. Were the host state to agree on a specific developmental role for each investment—and assuming the investor abides with the host's human rights and environmental laws—it is assumed that no further limitations bind the investor/investment. By way of illustration, if it were agreed that the developmental objective of a particular agricultural investment is to transfer know-how to local farmers while simultaneously introducing cheap and efficient seeds to the local market and increasing access of local products to international markets, there is no need to impose any other investment restrictions on said investor/investment. This suggests that it is in the interests of investors to contribute to the preparation and implementation of DIAs and their enforcement because this significantly reduces their responsibility and obligations towards the host state. Investment laws are the best and most efficient vehicles for such an endeavor.[64]

63. But no less radical than the proposal for bilateral arbitration agreements (BATs), propounded by one of the leading arbitration practitioners of his generation. *See* Gary Born, Chair, International Arbitration Practice Group, WilmerHale, BITs, BATs, and Buts: Reflections on International Arbitration (Apr. 16, 2014), *available at* https://www.youtube.com/watch?reload=9&v=ZdRjWcPQB_s.

64. This author is currently engaged with other stakeholders in setting out the contours of a prototype DIA, with the aim of presenting it to governments for possible future adoption.