Articles

Corporate Human Rights Obligations under Stabilization Clauses

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Abstract

Lawyers, economists and social scientists alike have for a number of years agreed that foreign investment has the potential to act as a catalyst for the enjoyment of an individual's fundamental human rights, particularly in developing countries. This article discusses and critically analyses corporate human rights obligations and the lack thereof under stabilization clauses in foreign investment contracts. The balance of this article is devoted to exploring three main issues relating to corporate human rights obligations and stabilization clauses. First, stabilization clauses in foreign investment agreements are examined in relation to corporate obligations and responsibility for fundamental human rights. In doing so the substantive and procedural dimension of stabilization clauses is analysed. Second, using the concrete examples of the Mineral Development Agreement between Mittal Steel and the Government of Liberia Mittal Steel Agreement and of the Baku-Tblisi-Ceyhan Pipeline Project as case studies, this article considers an application of stabilization clauses in foreign investment contracts in relation to the fundamental human rights obligation of states and of corporations. Third, a proposal for reform in the form of a fundamental human rights clause is introduced. To be clear, the argument here is that the fundamental human rights obligations of investors, particularly of corporations, must be included in foreign investment agreements.

A. Introduction

Lawyers, economists and social scientists alike have for a number of years agreed that foreign investment has the potential to act as a catalyst for the enjoyment of an individual's fundamental human rights, particularly in developing countries. This article discusses and critically analyses corporate human rights obligations and the lack thereof under stabilization clauses in foreign investment contracts. In 2006, developing countries

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attracted 380 billion dollars of foreign direct investment.[1] Corporations, particularly transnational corporations, are increasingly operating most of their foreign direct investments in developing countries. They have assumed the role of the cardinal actors in foreign investment, even though states and individuals also often act as investors.[2] International investment standards are mainly aimed at greater investor and investment protection.[3] Whereas foreign direct investments can stimulate economic growth, development and employment, they can also contribute to improving the human rights situation in many developing countries – as a direct consequences of the investments, or, alternatively, indirectly due to the presence of investments. Despite this, there is little conclusive evidence that investments do promote growth, development and employment in developing countries.[4]

Corporate investments can have negative consequences for the individual's enjoyment of fundamental human rights, including an adverse effect on fundamental labour rights, fundamental human rights preserving the security of persons and those preserving non-discrimination.[5] Rather than presuming that the rules and practices of foreign investment contribute to the protection and promotion of human rights, this article concentrates on the lack of corporate human rights obligations under stabilization clauses in foreign investment agreements. It appears that the fundamental human rights under the most pressure due to foreign investment include labour rights and non-discrimination, whereas the category of preserving safety and security is likely to prove less problematic. This article does not attempt to offer an exhaustive or a limited list of rights, but it does offer three categories of fundamental human rights that corporations may be asked to observe as a point of departure for research in the field of human rights and business. It recognizes, however, that corporations can and do have obligations to monitor all human rights. All in all, it appears that developing states are less likely to regulate and monitor corporate investors that do not violate fundamental human rights.

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[1] THE WORLD INVESTMENT REPORT 2007, *TRANSNATIONAL CORPORATIONS, EXTRACTIVE INDUSTRIES AND DEVELOPMENT,* iii.

[2] U.N. Human Rights Council [HRC], Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: P*rotect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5, para. 12, 7 April 2008 available at: http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf.

[3] International Law Association, First Report of the Committee on International Law on Foreign Investment, 2006, 440 available at: http://www.ila-hq.org/en/committees/index.cfm/cid/1015.

[4] U.N. High Commissioner for Human Rights, Report on Human Rights, Trade, Investment, UN Doc. E/CN.4/Sub.2/2003/9, 2 July 2003, 6-8.

[5] HOWARD MANN, INTERNATIONAL INVESTMENT AGREEMENTS, BUSINESS AND HUMAN RIGHTS: KEY ISSUES AND OPPORTUNITIES (2008) 39. *See* also generally INTERNATIONAL LAW ASSOCIATION, COMMITTEE ON INTERNATIONAL LAW ON FOREIGN INVESTMENT, FINAL REPORT (2008) 15 available at: http://www.ila-hq.org/en/committees/index.cfm/cid/1015.

While states have the primary responsibility to respect, protect and fulfil human rights[6], the obligations and responsibilities of corporations may also be recognized in the sphere of foreign investment. Arguably, corporations are obliged to respect and protect fundamental human rights in the investment context.[7] To the extent that investment agreements concern and affect fundamental human rights, this article argues that corporations have to comply with tripartite obligations to observe fundamental human rights.[8] In his 2009

[6] United Nations Human Rights Committee General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, Human Rights Committee, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

For a detailed analysis see: J. G. Ruggie, State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties, Prepared for the mandate of the Special Representative of the United Nations Secretary-General (SRSG) on the issue of human rights and transnational corporations, A/HRC/4/35/Add.1, 13 February 2007 available at: http://daccessdds.un.org/doc/UNDOC/GEN/G07/108/52/PDF/G0710852.pdf?OpenElement.

See also: J. RUGGIE, STATE RESPONSIBILITIES TO REGULATE AND ADJUDICATE CORPORATE ACTIVITIES UNDER THE UNITED NATIONS' CORE HUMAN RIGHTS TREATIES, INDIVIDUAL REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS REPORT NO. III, (2007) para. 33 available at: http://198.170.85.29/Ruggie-ICCPR-Jun-2007.pdf,. In relation to States' duties regarding acts by *natural or legal persons* and *private individuals or bodies,* see United Nations Human Rights Committee General Comment 16, 'Article 17 (Right to privacy)', 8 April 1988 (32nd Session) at paras. 1 and 10, in relation to acts by *private persons or bodies* see General Comment 18, 'Non-discrimination', 10 November 1989 (37th Session) at para. 9, in relation to acts by *private agencies in all fields,* the *private sector* and *private practices* see HRC General Comment 28, at paras. 4, 20 and 31. J. Ruggie, Mapping State obligations for corporate acts: An examination of the UN Human Rights Treaty System Report No. 1: International Convention on the Elimination of All Forms of Racial Discrimination, Prepared for the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises With the support of The Office of the United Nations High Commissioner for Human Rights, 18 December 2006, available at: http://www.business-humanrights.org/Documents/State-Obligations-Corporate-Acts-CERD-18-Dec-2006.pdf.

See also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997. *See* General Comment 12 of the UN Committee on Economic, Social and Cultural Rights, 12 May 1999, 15.

For a detailed discussion on tripartite human rights typology *see*: MAGDALENA SEPULVEDA, THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (2003). ASBJØRN EIDE, RIGHT TO ADEQUATE FOOD AS A HUMAN RIGHT, HUMAN RIGHTS STUDY SERIES NO 1, UNITED NATIONS PUBLICATION (1989);

For a critical analysis of tripartite framework see: Ida Elisabeth Koch, *Dichotomies, Trichotomies or Waves of Duties?*, 5(1) HUMAN RIGHTS LAW REVIEW 81-103 (2005). BRIGIT C.A TOEBES, THE RIGHT TO HEALTH AS A HUMAN RIGHT IN INTERNATIONAL LAW Chapter 4 (1999). G.J.H. van Hoof: *Legal nature of economic, social and cultural rights: a rebuttal of some traditional view*, *in* THE RIGHT TO FOOD, 106-108 (P. Alston and K. Tomaševski, eds., 1994). NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS (2002), Ernst-Ulrich Petersmann, *On 'Indivisibility' of Human Rights*, 14(2) EUROPEAN JOURNAL OF INTERNATIONAL LAW 381-385 (2003).

[7] NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS 79-85 (2002). Hakeem O. Yusuf, *Oil on Troubled Waters-Multinational Corporations and Realising Human Rights in the Developing World with Particular Reference to Nigeria*, 8.1 *AFRICAN HUMAN RIGHTS LAW JOURNAL* 79-107 (2008).,Arguing that corporations should be similarly obligated to respect, promote and protect human rights.

[8] International Law Association, Committee on International Law on Foreign Investment, Final Report, 2008, 15, available at: http://www.ila-hq.org/en/committees/index.cfm/cid/1015.

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report, John Ruggie, the Special Representative of the United Nations Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprise, notes that corporate responsibility to respect human rights 'has acquired near-universal recognition by all stakeholders'.[9] Going beyond the previous report, the 2009 Report recognizes that 'there may be situations in which companies have additional responsibilities. But the responsibility to respect human rights is the baseline norm for all companies in all situations.'[10] Similarly, Andrew Clapham suggests that corporations have a 'duty to ensure that the contractors with which they do business are complying with the Norms.'[11]

The balance of this article is devoted to exploring three main issues relating to corporate human rights obligations and stabilization clauses. First, stabilization clauses in foreign investment agreements are examined in relation to corporate obligations and responsibility for fundamental human rights. In doing so the substantive and procedural dimension of stabilization clauses is analysed. Second, the potential impact of investment agreements on the fundamental human rights of individuals is examined in relation to corporate activities. By doing so it is possible to evaluate which arguments are convincing and determine whether either approach is entirely satisfactory. Third, a proposal for reform in the form of a fundamental human rights clause is introduced. To be clear, the argument here is that the fundamental human rights obligations of investors, particularly of corporations, must be included in foreign investment agreements.

B. Stabilization clauses and the fundamental human rights obligations of corporations

Most international investment contracts include stabilization clauses. Stabilization clauses are those clauses in investment contracts between investors and host states that address changes of legislation in the host state throughout the period of investment. They have also been defined as 'contract language which freezes the provisions of a national system of law chosen as the law of the contract as of the date of the contract, in order to prevent the application to the contract of any future alterations of this system.'[12] Stabilization clauses protect investors, particularly corporations, from the application of unfavourable

[9] U.N. Human Rights Council [HRC], Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights, U.N. Doc. A/HRC/11/13/, 22 April 2009. para. 46.

[10] *Id.* para. 48.

[11] ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 231 (2006).

[12] *Amoco International Finance Corporations v. The Government of Islamic Republic of Iran*, et al., Partial Award No. 310-56-3, 14 July 1987, reprinted in 15 Iran-US CTR at para. 239.

legislation[13] or administrative measures subsequent to the conclusion of the contract.[14] The arbitral tribunal in *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, noted that 'it is widely accepted in international law and practice that an arbitration clause survives the unilateral termination by the state of the contract in which it is inserted and continues in force even after the termination.'[15] Stabilization clauses take many different forms, which include free clauses and, more recently, economic equilibrium formula.[16] They are mainly drafted to address change in laws or the risk of a change in government. In this light, three categories of stabilization clauses can be distinguished: freezing, economic equilibrium and hybrid clauses.[17]

First, economic equilibrium clauses include protection against all changes in legislation, 'by requiring compensation or adjustments to the deal to compensate the investor when any changes occur'.[18] Second, 'full freezing clauses freeze both fiscal and non-fiscal legislation in relation to investment for the duration of the project'.[19] Third, full hybrid clauses safeguard 'against all changes in legislation, by requiring compensation or adjustments to the deal, including exemptions from new laws, to compensate the investor when any changes occur'.[20] Stabilization in its insulating economic equilibrium includes a 'change in law' provision, whereas the managerial form includes such an interpretation and application of the clause which would be of benefit to the investor. 'Change in legislation' stabilization clauses usually require compensation if the newly introduced legislation negatively affects the value of the project.[21] Several international arbitrations orders held that, for example, nationalization violated contractual commitments in stabilization clauses and that investors (corporations) have a right to compensation.[22] In *Libyan American Oil*

[13] BEATA WŁODARCZAK, STABILIZATION CLAUSES (2006), unpublished LL.M. thesis, 14. Also see Stabilization Clauses and Human Rights, A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights, 11 March, 2008.

[14] Comments to the IFC: Baku-Tbilisi-Ceyhan Pipeline Project, Center for International Environment Law 6.

[15] *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic* 12 April 1977, YEARBOOK OF COMMERCIAL ARBITRATION VI 89 (1981). *See* also, R. DOAK BISHOP, INTERNATIONAL ARBITRATION OF PETROLEUM DISPUTES: THE DEVELOPMENT OF A LEX PETROLEA 1131 (1998).

[16] Comments to the IFC: Baku-Tbilisi-Ceyhan Pipeline Project, Center for International Environment Law 7.

[17] ANDREA SHEMBERG, STABILIZATION CLAUSES AND HUMAN RIGHTS 6 (2008). A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights

[18] *Id.*, 9.

[19] *Id.*

[20] *Id.*

[21] *Id.,* 5-8.

[22] *TOPCO v. Libya,* Award of 17 January 1977, 17 ILM (1978) 3 at 24.

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Company v. Government of the Libyan Arab Republic[23], for example, the stabilization clause was upheld and 'justified not only by the said Libyan petroleum legislation, but also by the general principle of the sanctity of contracts recognized also in municipal and international law'.[24] Foreign investment contributes to the economic development of developing countries and it relies on the promise of the predictability and protection of contractual relationships. However, it has yet to be properly explained why an investing corporation should be absolved from observing domestic law, if every person is expected to know and comply with the law of the host state. [25]

Recent decades have witnessed discussions on the *right* substance of stabilization clauses in foreign investment contracts, in which two opposing views are discernable. A central tenet of the first approach is that stabilization clauses contribute to the stability of contractual relations. This has been defined to include corporate interests, and, consequently to exclude the fundamental human rights obligations of corporations. The advocates of the second approach recognize the importance of stability, but they go further in their endeavour by arguing that such clauses should not interfere with the fundamental human rights obligations of corporations and of investors alike.[26] In so doing, they recognize the paramount importance of the fundamental human rights obligations of corporate investors. They claim that stabilization clauses should not take priority over the application of the fundamental human rights obligations of corporations, and *a fortiori* those of states.[27] It may be suggested that whenever a stabilization clause conflicts with fundamental human rights obligations it can be considered as null and void as fundamental human rights trump all the other corporate and state obligations.[28] To this end, the human

[23] The nationalization of *Libyan American Oil Company (LIAMCO)* by the Libyan government triggered arbitration proceedings.

[24] *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic,* 12 April 1977, Yearbook 89 (1981). 62 ILR 31 (1977)*See* also *Libyan American Oil Co. v. Socialist Peoples's Libyan Arab Jamahirya*, United States District Court, District of Columbia, 482 January 18, 1980. F.Supp. 1175 (1980). *See* also *Government of the State of Kuwait v. American Independent Oil Co. (*AMINOIL), Award of 24 May 1982, 21 International Legal Materials (ILM) 726 (1982); and *Texaco*, 53 ILR 471 (1979).

[25] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 331 (1994).

[26] U.N. High Commissioner for Human Rights, Report on Human Rights, Trade, Investment, E/CN.4/Sub.2/2003/9, 2 July 2003, para. 24. See also Andrea Shemberg, Stabilization Clauses and Human Rights, A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights, 11 March 2008, paras. 34-37 available at: http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf.

[27] BEATA WŁODARCZAK, STABILIZATION CLAUSES (2006), unpublished LL.M. thesis, 34.

[28] International Law Association, The Final report of the International Committee of International Law on Foreign Investment, 4 (2008), available at: http://www.ila-hq.org/en/committees/index.cfm/cid/1015. See generally N. SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES (2008), and BEATA WŁODARCZAK, STABILIZATION CLAUSES (2006), unpublished LL.M. thesis, 35.

rights of individuals, with which corporations and its officers are obliged to comply, derive from national legal orders, international law and voluntary corporate commitments.[29] In this way, it is questionable what practical value annulment of the stabilization clause, and even of the whole foreign investment contract, would have.

First, the violation of fundamental human rights norms would have to be considered on a case by case basis. Second, investment often represents a rare opportunity of development for less-developed countries and, possibly, in the long-term perspective, both investors and the local population of the contracting party would benefit from them. The stabilization clause thus protects the stability and predictability of contractual relations.

Neither of the two approaches to the substance of the stabilization clauses can stand in isolation.[30] It appears that the stability of contractual relations and the corporate investors' international fundamental human rights obligations concerns can be reconciled by including both dimensions in the contract. Such an approach would aptly address both concerns relating to investment contracts. It would allow for respect of fundamental human rights without arguing for the nullity of stabilization clauses. Despite the historic deprioritisation of human rights obligations of corporations in investment contracts, the negative effects of globalization have brought them to the forefront of the discourse. For this reason, the introduction of the human rights clause should be welcomed. Amendments to the contract, or a more adequate interpretation of the contractual provisions, appear thus to be a better alternative to deal with the potentially problematic stabilization clauses in foreign investment contract. This is particularly the case given that it is highly unlikely that a state will bring the case to an arbitration body in relation to allegations of fundamental human rights violations by corporate investors.

Using the concrete examples of the Mineral Development Agreement between Mittal Steel and the Government of Liberia Mittal Steel Agreement [hereinafter MDA] and of the Baku-Tblisi-Ceyhan (BTC) Pipeline Project as case studies, the next section considers an application of stabilization clauses in foreign investment contracts in relation to the fundamental human rights obligation of states and of corporations. In doing so it investigates whether the fundamental human rights obligations of corporations can play a role in investment agreements and investment arbitrations. The first section analyses the application of stabilization clauses in the MDA agreement, while the second section investigates the relevant provision in the BTC pipeline project. In this light, it explores the fact that foreign investment contracts often regulate investment projects and they often

[29] This may *inter alia* include the following norms: freedom from genocide, crimes against humanity and war crimes, prohibition of torture, inhumane and degrading treatment, prohibition of slavery, prohibition of forced labour and child labour, prohibition of racial discrimination and forced disappearances.

[30] *See* next section for an example of how a stabilization clause results in some abnegation of fundamental human rights.

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have far-reaching implications for the quotidian lives of local communities. In the following section the question under examination is whether the fundamental human rights obligations of corporations could be included in investment contracts and agreements.

I. Application of Stabilization Clauses - MDA Agreement

On 17 August 2005, the National Transitional Government of Liberia (NTGL) concluded a Mineral Development Agreement (MDA) with the Mittal Steel Holdings AG[31], a Swiss based transnational corporation.[32] The agreement stipulates that Mittal Steel will exploit and process Liberia's vast resources of iron ore, and foresees investments of around US$900 million over the next 25 years.[33] The MDA can be described as a foreign investment contract. Such foreign investment can contribute to the development of Liberia's economy, including lower unemployment, higher revenue and an improved transport network and infrastructure. On the other hand, however, some of the contract provisions can collide with the fundamental human rights obligations not only of states but also of corporations and their employees.

The MDA includes for example in Article XIX, sections 7 and 9 a regulatory stabilization clause, which aims to ensure that Mittal 'invests in a stable regulatory environment'.[34] The stabilization clause under consideration places Liberian national law at the periphery of the project's regulatory framework, so that it applies only to a handful of situations. In doing so, the MDA itself assumes a higher legal value in the hierarchy of sources of law than domestic law and international law. In this way it undermines the obligations of both the Mittal corporation and the state of Liberia to observe fundamental human rights. The stabilization clause in Article XIX provides that, in particular:

[31] Global Witness notes that the MDA agreement identifies Mittal Steel (Liberia) Holdings Limited as 'the party to the MDA agreement where it is referred to as concessionaire' 'CONCESSIONAIRE'. The Mittal Steel Liberia Limited is identified as 'as the agent of the Concessionaire and operating company in Liberia.' Global Witness notes that Mittal Steel (Liberia) Holdings Limited is '70% owned by Mittal Steel Holdings AG and 30% by the Government of Liberia'. Mittal Steel Holdings AG is a wholly owned subsidiary of the Mittal Steel NV, which is incorporated in the Netherlands and is the parent company in the Mittal corporate group. Global Witness, *Heavy Mittal? A State within a State: The inequitable Mineral Development Agreement between the Government of Liberia and Mittal Steel Holdings NV*, Report, 15, October 2006, , available at: http://www.globalwitness.org/media_library_detail.php/156/en/heavy_mittal. Mittal Steel NV merged in 2006 with Arcelor and now operated under the name of Arcetal Mittal, available at: http://www.arcelormittal.com/.

[32] For the text of the MDA Agreement see Global Witness, *Heavy Mittal? A State within a State: The inequitable Mineral Development Agreement between the Government of Liberia and Mittal Steel Holdings NV*, Report, October 2006, available at: http://www.globalwitness.org/media_library_detail.php/156/en/heavy_mittal.

[33] *Id.*, 7.

[34] *Id.,* 30.

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> (…) any modifications that could be made in the future to the Law as in effect on the Effective Date shall not apply to the Concessionaire and its Associates without their prior written consent, but the Concessionaire and its Associates may at any time elect to be governed by the legal and regulatory provisions resulting from changes made at any time in the Law as in effect on the Effective Date. In the event of any conflict between this Agreement or the rights, obligations and duties of a Party under this Agreement, and any other Law, including administrative rules and procedures and matters relating to procedure, and applicable international law, then this Agreement shall govern the rights, obligations and duties of the Parties.[35]

It further includes a provision that:

> The government shall indemnify and hold harmless the concessionaire and its Affiliates from any and all claims, liabilities, costs, expenses, losses and damages … as a result of any failure of the government to honour any provision or undertaking expressed in this Agreement.[36]

What follows from the clause is that even though corporate investors commit themselves to respect the local law of the host state, the wording of the investment contract appears to allow them to influence its eventual interpretation and application. It may appear that such a provision favours the corporate investors in this project. The semantic analysis of the stabilization clause suggests that foreign investment contracts would have priority over Liberian domestic law and international law. Such a stabilization clause would have the potential to undermine Liberia's obligation to respect, protect and fulfil the fundamental human rights of its population, because of its far-reaching potential to freeze Liberia's ability to comply with its human rights obligations. This would be even more so if Liberia's law was defective with respect to fundamental human rights.

In a similar vein, the stabilization clause could undermine the obligation of the Mittal Corporation to comply with its tri-partite typology obligation to comply with fundamental human rights. The crux is that it appears implausible that such stabilization clauses would trump the fundamental human rights obligations of corporations and states. Similarly, the

[35] The Mineral Development Agreement (MDA) Agreement, 17 August 2005, Article XIX, section 9, 21.

[36] *Id.* Article XXI, section 3, 22.

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International Project Agreement (IPA) between Benin, Ghana, Nigeria and Togo, and the Western African Gas Pipeline for the construction and management of the West African Gas Pipeline includes an economic equilibrium clause in Article 36.[37] If the regulatory change in legislation, judicial decision or ratification of international agreements, results in 'a material adverse effect on the Company', then the state must, under the clause, provide 'prompt, adequate and effective compensation'.[38] It appears, however, that the stabilization clause may require payment of compensation even when regulation pursues a public purpose goal.[39] In this light, it appears that a stabilization clause agreed between the investor and home state cannot trump the fundamental human rights of individuals, and consequently the fundamental human rights obligations of corporations. Protection of investments should, arguably, never result in an adverse effect on human rights. In other words, stabilization clauses must be read as having explicit fundamental human rights exceptions.[40] It appears that introducing new regulations to promote human rights is an important aspect of a state's duty to fulfil human rights and also of corporate obligation to respect fundamental human rights. Eventually, the stabilization clause in the amended MDA of May 2007 was substantially restricted due to pressure from civil society and the amended stabilization clause does not include provisions for its superiority over Liberian Law.[41]

II. The Application of the Stabilization Clauses - The Baku-Tblisi-Ceyhan (BTC) Pipeline Project

This section explores the application of stabilization clauses in relation to fundamental human rights underlying the Baku-Tbilisi-Ceyhan (BTC) oil pipeline project.[42] The 1,768 km Baku-Tbilisi-Ceyhan (BTC) pipeline is a pipeline system to transport up to one million

[37] Lorenzo Cotula, Foreign investment contract, Briefing 4, International investment contracts, 10 June 2005.

[38] *Id.,* see also Lorenzo Cotula, *Reconciling regulatory stability and evolution of environmental standards in investment contracts: Towards a rethink of stabilization clauses*, 1(2) THE JOURNAL OF WORLD ENERGY LAW & BUSINESS 158-179 (2008).

[39] Lorenzo Cotula, The regulatory taking doctrine, Briefing 3, International Institute for Environment and Development, August 2007.

[40] Sheldon Leader, *Human Rights, Risks, and New Strategies for Global Investment*, 9(3) JOURNAL OF INTERNATIONAL ECONOMIC LAW 657-705 (2006).

[41] Global Wittness, Update on the Renegotiation of the Mineral Development Agreement between Mittal Steel and the Government of Liberia, August 2007, available at: http://www.globalwitness.org/media_library_detail.php/156/en/heavy_mittal.

[42] Terre-Eve Lawson Remer, *A Role for the IFC in Integrating Environmental & Human Rights Standards into Core Project Covenants: Case Study of the Baku-Tbilisi-Ceyhan Oil Pipeline Project, in* GLOBAL LAW WORKING PAPER 01/05, SYMPOSIUM - 'TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS', NYU School of Law.

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barrels of crude oil per day, primarily from the Azeri-Chirag-Guneshli fields to Ceyhan on the Turkish Mediterranean coast. The BTC pipeline is being developed by an international consortium of eleven oil corporations, brought together in the Baku-Tbilisi-Ceyhan Pipeline Company (BTC Co).[43] The legal framework of the project is defined in an Intergovernmental Agreement (IGA) between Georgia, Azerbaijan and Turkey, and the Host Government Agreements (HGA) signed by the consortium of oil corporations and the individual governments of participating states in September 1999 and in October 2000.[44] These agreements stipulate the mutual rights and obligations of the Project States and BTC consortium.[45] The HGA introduces a stabilization clause, which is in two parts. First, it refers to the state's obligations to restore the economic equilibrium of the project if affected by a 'Change in Law' and second, it creates a right to compensation of investors if the newly introduced legal requirements negatively affect the value (economic equilibrium) of the project.[46] In other words, if the change in legislation interferes with the economic equilibrium of the Project, the investor has a right to compensation. The substantive part of the stabilization clause in the HGA reads as follows:

> 7.2 The Government hereby covenants and agrees (on its behalf and acting on behalf of and committing the State Authorities) that throughout the term of this Agreement
>
> vi. 'if any domestic or international agreement or treaty; any legislation, promulgation, enactment, decree, accession or allowance; any other form of commitment, policy or pronouncement or permission, has the effect of impairing, conflicting or interfering with the implementation of the Project, or limiting, abridging or adversely affecting the value of the Project or any of the rights, privileges, exemptions, waivers,

[43] Oil corporations include: BP (UK) SOCAR (the state oil company of Azerbaijan); TPAO (Turkey); Statoil (Norway); Unocal (USA); Itochu (Japan); Amerada Hess (USA); Eni (Italy); TotalFinaElf, now renamed Total (France); INPEX (Japan) and ConocoPhillips (USA).43 BP holds a 30% stake in the consortium running the pipeline. Other consortium members include Azerbaijan's state oil company SOCAR (25%), Amerada Hess (2.36%), ConocoPhillips (2.5%), Eni (5%), Inpex (2.5%), Itochu (3.4%), Statoil (8.71%), Total-FINA-ELF (5%), TPAO (6.53%) and Unocal (8.9%).

[44] The European Bank for Reconstruction and Development, Striking a balance: Intergovernmental and host government agreements in the context of the Baku-Tbilisi-Ceyhan pipeline project, European Bank for Reconstruction and Development, available at: http://www.ebrd.com/pubs/legal/lit042e.pdf.

[45] Host Governments Agreements, 1 August 2002.

[46] Turkey-BTC HGA, paragraphs 7.2 (vi) and (xi), 10.1. This goes along with the dual nature of the stabilization clause.

> indemnifications or protections granted or arising under this Agreement or any other Project Agreement it shall be deemed a Change in Law under Article 7.2(xi)'.

The HGA stabilization clause employs the *change of law* concept. It partially removes investors from the normative framework of the host states.[47] Investors are not, however, removed from the normative framework of the host state in any absolute sense. It is questionable whether the legislative or other instrument meets the conditions specified in the clause in order to be recognized as a 'change of law' and it is clear that not all such instruments would.

It appears from the wording of the stabilization clause that the concept of changes of law clearly contradicts the tri-partite obligations on the part of corporations to observe fundamental human rights, which they are obliged to implement under the national legal order of the host state, and indeed, under the national legal order of the home state. It affects the host-state's ability to comply with obligations to respect, protect and fulfil fundamental human rights and to regulate in the public interest, as any such regulation may give rise to an obligation to pay compensation.[48] What is more, it does not encompass only the legislative branch, but also the judicial and administrative part of the executive branch. In doing so, it undermines the rule of law and a separation of powers in a particular state. By giving priority to the provisions of foreign investment contracts, the stabilization clause consequently hinders the implementation of international human rights law treaties as well as compliance with fundamental human rights in the state of investment. With regard to the second provision, it includes the right to compensation of investors, which strengthens the economic equilibrium clause:

> the Government shall provide monetary compensation as provided in Article 10 for any Loss or Damage which is caused or arises from: . . .(iii) any failure by the State Authorities, whether as a result of action or inaction, to maintain Economic Equilibrium as provided in Section 7.2(xi).[49]

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[47] In this respect see also preambular paragraph 10 of HGA with Turkey: '[T]he intergovernmental Agreement shall become effective as law of the Republic of Turkey and (with respect to the subject matter thereof) prevailing over all other Turkish Law (other than the Constitution) and the terms of such agreement shall be the binding obligation of the Republic of Turkey under international law.'

[48] Comment to the IFC Baku-Tbilisi-Ceyhan Pipeline Project, Center for International Environmental Law, 7.

[49] The Host Government Agreement between Turkey and the BTC Consortium, Article 10, para. 10.1. *See* The European Bank for Reconstruction and Development, Striking a balance: Intergovernmental and host government agreements in the context of the Baku-Tbilisi-Ceyhan pipeline project, European Bank for Reconstruction and Development, available at: http://www.ebrd.com/pubs/legal/lit042e.pdf.

The present stabilization clause is formulated very broadly. The asymmetry in balance of power stems from the negotiation of foreign investment agreements. To the degree possible, the asymmetry should be removed from the investment contracts and replaced by equality in contractual relations. If persons are ever to enjoy dignity and fundamental human rights, corporations must be asked to agree with the objective and impartial use of standards in foreign investment contracts.

III. Changes in BTC project - the Human Rights Undertaking

Amnesty International published an extensive critique of the HGA-IGA framework in May 2003.[50] In this light, the BTC consortium thereafter declared unilaterally the 2003 BTC Human Rights Undertaking in relation to the contracts for construction and the operation of the BTC oil pipeline. A. Shemberg notes that 'the Human Rights Undertaking explicitly recognizes the state's international human rights legal obligations and the implications these might have on the investment'.[51] To this end, stabilization clauses do not apply now in relation to host state international human rights, labour, and health, safety, and environmental treaty obligations.[52]

The undertaking applies to corporations participating in the BTC Consortium as well as states. In this sense, the consortium of oil corporations has accepted a legally binding obligation to incorporate 'human rights considerations into their use of the investment agreements regulating construction and operation of the pipeline in all three countries'.[53] The Human Rights Undertaking did not challenge the HDA Economic Equilibrium clause as it was only attached to the previous two agreements. The BTC Human Rights Undertaking consists of four parts in relation to incorporation of the human rights obligations of investors. Broadly, the two main elements include:

> 1. Undertaking indirectly places obligations on investors not [to] assert, even informally, that the stabilization clause applies to human rights, social and environmental laws. It provides for such exemptions

[50] Amnesty International UK, 2003, Human Rights on the Line: The Baku-Tbilisi-Ceyhan Pipeline Project, London: Amnesty International UK.

[51] ANDREA SHEMBERG, STABILIZATION CLAUSES AND HUMAN RIGHTS, A RESEARCH PROJECT CONDUCTED FOR IFC AND THE UNITED NATIONS SPECIAL REPRESENTATIVE TO THE SECRETARY GENERAL ON BUSINESS AND HUMAN RIGHTS, available at: http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf, 11 March 2008, para. 91.

[52] *Id.*

[53] LEADER (note 40), 700.

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> from stabilization clauses, which are 'reasonably required' in order for the host state to fulfil its human rights obligations.
>
> 2. It also obliges investors '…not to seek compensation under the "economic equilibrium" clause or other similar provisions … solely in connection with…any action or inaction by the relevant Host Government that is reasonably required to fulfil the obligations of that Host Government under any international treaty on human rights (including the European Convention on Human Rights), labour or HSE in force in the relevant Project State from time to time to which such Project State is then a party.'[54]

The Undertaking introduces an obligation upon the consortium under which it 'shall not assert or advance, in any claim against, demand to, or dispute with a Host government or another party, …, and interpretation … that is inconsistent with regulation by the relevant Host Government of human rights…aspects of Project in its territory reasonably required by international labour and human rights treaties'.[55] In other words, the Undertaking stipulates that the consortium will not refer to a stabilization clause in the BTC contracts when it would undermine the host state's human rights obligations under international labour and human rights treaties, and provided that this requirement prevents potential human rights violations. It also includes a commitment not to exclude the jurisdiction of domestic courts and an obligation to provide an effective domestic remedy. The participating corporations in the Consortium are obliged not to limit the jurisdiction of domestic courts to seek remedies for human rights violations. This obligation includes also the right to an effective remedy.

Nonetheless, the Undertaking has a number of shortcomings. The most important is that it only applies if domestic law is no more stringent than applicable project standards.

[54] Relevant part reads as follows: 'not assert or advance, in any claim against, demand to, or dispute with another party, or in any legal action or proceeding an interpretation of any Project Agreement that is inconsistent with Articles 7 and 8 of the Joint Statement, which confirm that the HSE [health, safety and environmental] and human rights standards for the Project are dynamic, will evolve when and as standards under domestic law in the relevant State, EU Standards, and applicable international treaty standards evolve, and thus require conduct of the Project's human rights and HSE activities in accordance with such evolving domestic law from time to time provided it is no more stringent than the highest of EU Standards, those World Bank Group standards referred to in the Project Agreements, and standards under applicable international labour and human rights treaties…' See The BTC Human Rights Undertaking, available at: http://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf. Article 2 (d).

[55] The BTC Human Rights Undertaking, 22 September 2003, 2 (a).

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Therefore, if a state adopts higher fundamental human rights standards than the applicable project standards, only the relevant project standards would apply.[56] Moreover, it is questionable how international arbitration would interpret such a provision where investment disputes arise. Notwithstanding technical difficulties in implementation, corporations must not be allowed to impose a subjective and selective application of such provisions. All in all, the BTC Undertaking proves that it is possible to achieve a better balance between protection of investors and their obligations in order for a host state to pursue sustainable development goals.

It appears though that the BTC Undertaking is only a temporary solution and that the fully-fledged integration of fundamental human rights in investment contracts would need to be a much more comprehensive one. Beyond any normative approach, it remains to be seen how such provisions are applied in practice. Stabilization clauses can impede the ability of host states to place fundamental human rights obligations on corporations and to monitor those obligations. Additionally, it also prevents the state from compliance with its own obligations under international law. It appears that for newly enacted non-discriminatory legislation that is aimed at the greater public good and benefits, corporate investors would not be able to claim compensation. This was nicely put by the NAFTA tribunal in *Methanex Corp v the United States*: '... as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alia*, a foreign investor or investment is not deemed expropriatory and compensable ...'.[57] However, it may nevertheless turn out that domestic courts would be sceptical in upholding challenges towards validity of stabilization clauses. The aim of this part of the article has been to examine the stabilization clause from the point of view of human rights considerations. This article has attempted to argue that the fundamental human rights obligations of corporations should be included in the investment contract alongside stabilization clauses. The next section analyses the procedural dimension of the investment contract in relation to human rights.

C. Right to effective remedy for the victims

This section analyses the procedural dimension of the dual nature of investment contracts. More specifically, it investigates whether the victims of violations have effective domestic remedies in case of fundamental human rights violations. If it is accepted that corporations are obligated under the investment framework to respect, protect and fulfil fundamental human rights, the question is how this legal obligation could be enforced. In this sense, a

[56] Center for International Environmental Law, Comment to the IFC Baku-Tbilisi-Ceyhan Pipeline Project, October 2003, available at http://www.ciel.org/Publications/BTC_Comments_10Oct03.pdf, 8.

[57] *1 Methanex Corp. v. United States*, Jurisdiction and Merits (NAFTA Ch. 11 Arb. Trib. Aug. 3, 2005), available at http:// www.state.gov/s/l/c5818.htm; Part IV, chapter D, para 7.

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victim of a human rights violation by or involving a corporation has a right to a remedy in the home state, especially if the host state's national legal order is unable or inefficient in providing access to the courts.[58] Investors have, under international investment agreements, a right to bring claims against host states, whereas no international mechanism exists where individuals could bring complaints against investors. This tilts the balance in favour of investors. Indeed, 'there have been no known investment treaty arbitrations where host states have adverted to…human rights obligations'.[59] In this context, the UN report encourages states to 'include human rights arguments in investment treaty resolution in an attempt to secure interpretations of investment agreements and tribunal decisions that take into account the wider legal and social context.'[60] Certainly, investment arbitration tribunals do not appear to be an appropriate forum for adjudicating investment-related human rights claims against investors, and human rights adjudication mechanisms in national legal orders should be strongly preferred. As concerns the applicable law in investment disputes, it would be the law specified in the investment agreement, or if none is specified, the law chosen by the parties before the arbitration tribunal.

In view of the above, stabilization clauses in investment contracts can be hence seen as a core element of the relationship between rights and obligations of corporate investors. Stabilization clauses can have a double function. They guarantee a continuous stability of the contractual relationship but they also ensure that contractual stability is not exercised in a way that would trump the fundamental human rights obligations of corporate investors and consequently prevent the effective realization of the fundamental human rights of individuals. The essence of the protection and promotion of fundamental human rights would be undermined, if every single corporation would derogate from a minimum obligation to respect, protect and fulfil fundamental human rights.

Clearly, the international investment normative framework is not working as well as it should. Fundamental human rights cannot be disregarded for the benefit of investment and investors' protection. However, as international investment also represents a certain value, the main and utterly complex question that arises is what kind of model investment agreement should be adopted that would not conflict with the fundamental human rights

[58] M. Sornarajah, *Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States, in* TORTURE AS TORT, COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig Scott, ed., 2001). It must be noted there that is debatable to what extent this might require foreign investors to do more than domestic investors if domestic protection of human rights is defective.

[59] L. E. PETERSON AND K. R GRAY, INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND INVESTMENT TREATY ARBITRATION 24 (2003). Available at: http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf.

[60] UN Commission on Human Rights, Human Rights, Trade and Investment, Report of the High Commissioner for Human Rights, U.N. Economic and Social Council, U.N. Doc. E/CN.4/Sub.2/2003/9, 55, 2 July 2003.

of individuals, and the corollary obligations of corporations and states, or, alternatively what type of other legal instruments and regulatory measures can be taken?

D. Integrating fundamental human rights obligations of corporate investors in foreign investment agreements

This section argues that there are, arguably, two different ways of answering what is an appropriate approach to integrating fundamental human rights in the obligations of corporate investors: first by amending foreign investment agreements already in place and introducing a new fundamental human rights provision into foreign investment agreements, or second, by appending, for example, the OECD Guidelines on Multinational Enterprises to the text of the contract or agreement as a binding appendix.[61] The first model has been explained briefly above in two case studies, while this section further analyses the first and second model by conceptualising and developing a model based on the fundamental human rights obligations of corporate investors and related actors.

In order for investors to comply with their fundamental human rights obligations, the investment agreements and contracts would have to place explicit obligations to respect, protect and fulfil fundamental human rights at the heart of their provisions. In contrast, the ILA Committee on the International Law on Foreign Investment notes in its Final Report that 'at present there are few signs that host country responsibilities will be balanced out by the introduction of corporate responsibilities in such agreements.'[62] Corporate investors enjoy a plethora of rights under international law on foreign investment, but are not formally required to comply with fundamental human rights. To this end, the UN report notes that 'there is a need to balance the strengthening of investors' rights in investment liberalization agreements with the clarification and enforcement of investors' obligations towards individuals and communities.'[63] In a similar way, the UN Commission on Trade and Development noted that what is needed is a balancing exercise 'between the legitimate commercial expectations of the investor party and the right of the host country party to oversee the evolution of the resulting relationship in a manner that is consistent with national development policies.'[64] For corporations to comply with their obligations to

[61] International Law Association, First report of the Committee of International Law on Foreign Investment, 2006, 441, available at: http://www.ila-hq.org/en/committees/index.cfm/cid/1015.

[62] International Law Association, the Committee on the International Law on Foreign Investment., The Final Report, 2008, available at: http://www.ila-hq.org/en/committees/index.cfm/cid/1015.

[63] UN Commission on Human Rights, Human Rights, Trade and Investment, Report of the High Commissioner for Human Rights, U.N. Economic and Social Council, U.N. Doc. E/CN.4/Sub.2/2003/9, 4, 2 July 2003.

[64] United Nations Conference on Trade and Development, State Contracts, UNCTAD Series in international investment agreements, United Nations, 2004, 45.

respect, protect and fulfil fundamental human rights, a special human rights clause could be included in the agreements and foreign investment contracts, which would advance protection and promotion of fundamental human rights in the investment context. This would also ensure that the rights of investors in investment contracts and agreements are balanced with their obligations to observe the fundamental human rights of individuals. One would in this way tackle the decrease in the rights and abilities of people faced with the consequences of such an investment. To this end, the inclusion of explicit reference to the fundamental human rights obligations, of both states and corporations, in investment contract and agreements seems justified.

A second approach would be to include the OECD Guidelines on Multinational Enterprises in the text of investment contracts or attach them as a binding appendix. It must be noted that the OECD Guidelines are one of the four parts of the OECD Declaration on International Investment and Multinational Enterprises.[65] For instance, the Norway 2007 Model BIT in Article 32 includes a provision on Corporate Social Responsibility, which provides '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 Nations Global Compact'[66]. This approach would suggest that rather than to go for a big dramatic solution in the form of inclusion of the OECD Guidelines in the investment contracts, policy makers should concern themselves with a provisional solution to the problem.

Stabilization clauses may impede corporations and states in taking appropriate legislative, administrative, and judicial measures to prevent fundamental human rights violations. The UNHCHR report noted that states should ensure that investment agreements include 'the flexibility to use certain policy options to promote and protect human rights' and 'to implement special measures to protect vulnerable, marginalized, disadvantaged or poor people.'[67] In this light, the UN Principles for responsible investment acknowledge that investors are obliged to act in the best long-term interests of their beneficiaries.[68] In Principle 1 investors unilaterally committed themselves to 'incorporate environmental, social, and corporate governance (ESG) issues into [their] ownership policies and practices'[69] and 'to incorporate ESG issues into investment analysis and decision-making

[65] OECD, Declaration on International Investment and Multinational Enterprises, 21 June 1976.

[66] The Norway 2007 Model BIT, Investment Treaty Arbitration, available at: http://ita.law.uvic.ca/documents/NorwayModel2007.doc.

[67] E/CN.4/Sub.2/2003/9, 30.

[68] The UN Principles for Responsible Investment, An investor initiative in partnership with UNEP Finance Initiative and the UN Global Compact, available at: http://www.unpri.org/.

[69] *Id*, Principle 1.

processes'.[70] As noted above, the declaration of nullity of the stabilization clauses does not appear as an appropriate solution. Instead, stabilization clauses should be narrowly formulated. In this respect, the UN Report notes that the right to compensation of investors must be also 'clearly and precisely defined'.[71]

E. Conclusion

The preceding sections have attempted to shed light on corporate responsibility for fundamental human rights under the selected aspects of the international investment framework. It is undoubted that foreign investment and corporate investors can have a negative impact on the enjoyment of the fundamental human rights of individuals. Such developments represent a challenge to the current normative framework. The rights of an investing corporation are often strengthened through investment agreements without taking into account their tripartite obligations to respect, protect and fulfil fundamental human rights, and consequently the rights of local populations. In this light, the obligations of corporations should also be strengthened in relation to the fundamental human rights of individuals and local communities. The promotion and protection of fundamental human rights should be included among the objectives of the investment contracts and, generally, investment agreements.[72] This could then resolve in interpretation of investment contracts or agreements in the light of a corporation's human rights obligations.[73]

The international community can, and should, ensure that corporate investors do not exploit the deficiencies in investment agreements to the detriment of individuals' enjoyment of fundamental human rights. Yet that is exactly what often happens when corporations invest in developing countries. From developments in two case scenarios it appears that there are possibilities for change. The full-fledged reform of the investment framework is necessary, but whether the international community has the will to create it remains to be seen. The uniform regulatory framework may encourage foreign investment in developing states by levelling the business playing field for ethical corporations.[74] On a

[70] *Id*, Principle 2.

[71] Multilateral Centre for Private Sector Development Istanbul, Basic Elements of a Law on Concession Agreements, OECD and Federation of Euro-Asian Exchanges, available at: www.oecd.org/dataoecd/41/20/33959802.pdf.

[72] UN Commission on Human Rights, Human Rights, Trade and Investment, Report of the High Commissioner for Human Rights, U.N. Economic and Social Council, U.N. Doc. E/CN.4/Sub.2/2003/9, 57, 2 July 2003.

[73] *Id.*

[74] JEFFREY SACHS, THE END OF POVERTY: ECONOMIC POSSIBILITIES OF OUR TIME 356 (2005).

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general level, it could be argued that the fundamental human rights of individuals and the fundamental human rights obligations of corporations should be explicitly mentioned in foreign investment contracts. Alternatively, the stabilization clauses should be interpreted in the light of fundamental human rights obligations of corporate investors. The case at the moment is that some clauses include reference to fundamental human rights and others do not. Some commentators rightly pinpoint that less-developed countries are placed in an inferior position when negotiating investment contracts. Corporate investors from developed countries should, however, find it in their own interest to promote fundamental human rights and operate in stable environments. And some already do. All in all, it appears that investment values must be better balanced with non-investment values. In the future, balance will need to be ensured between corporate rights and corporate responsibilities.[75] Mindful of this balance, it may be argued that corporations, and developed and developing states should include explicit references to fundamental human rights in investment agreements and investment contracts in order to ensure that corporations do not contribute to fundamental human rights violations and developing states do not violate fundamental human rights. One thing is clear: investment should not trump the fundamental human rights of individuals.

[75] International Law Association First report of the International Committee of International Law on Foreign Investment, 2006, 441, available at: http://www.ila-hq.org/en/committees/index.cfm/cid/1015.

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