

## Note

# Human Rights Impact Litigation in ISDS: A Proposal for Enabling Private Parties to Bring Human Rights Claims Through Investor-State Dispute Settlement Mechanisms

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## INTRODUCTION

Can private parties use Investor-State Dispute Settlement (ISDS) mechanisms to systematically advance human rights? For at least two decades

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now, we have known the inverse is possible: private companies can use ISDS mechanisms to stymie human rights. That is the lesson of Ethyl Corporation's 1997 claim challenging a Canadian import ban on the gasoline additive methylcyclopentadienyl manganese tricarbonyl (MMT).<sup>1</sup> The chemical manufacturer's \$251 million claim was only the third filed through the North American Free Trade Agreement's ISDS provisions and the largest ever filed at the time.<sup>2</sup> In retrospect, however, what made the claim notable was not its historic size, but rather that it signaled corporations' willingness to use ISDS to challenge government policies that fulfill core human rights obligations.<sup>3</sup>

The Canadian government had instituted the ban because it believed MMT was a dangerous toxin that posed a significant public health risk.<sup>4</sup> The U.S. government, for example, had already banned MMT's use in formulated gasoline.<sup>5</sup> Yet Ethyl filed a claim arguing that the import ban's negative impact on its business constituted a form of indirect expropriation.<sup>6</sup> In so doing, it directly challenged the Canadian government's ability to regulate in the interest of its citizens' health. Ethyl's suit also proved devastatingly effective. Canada settled the suit with Ethyl and agreed to lift the MMT import ban entirely.<sup>7</sup>

In the two decades since Ethyl's successful fight against Canada, investors have used ISDS mechanisms to challenge environmental, health, and other social regulations regarding waste disposal, tobacco control, and similar social services.<sup>8</sup> Because arbitral awards are enforceable against the losing party, each individual ISDS claim is a potent tool for focusing the mind of the government.<sup>9</sup> Just like Canada did with Ethyl, governments may choose to abandon otherwise

1. Ethyl Corp. v. Government of Canada, Award on Jurisdiction, ¶ 5 (June 24, 1998), 38 I.L.M. 708-31 (1999) [hereinafter Ethyl Corp. Award].

2. Michelle Sforza & Mark Vallianatos, *NAFTA & Environmental Laws: Ethyl Corp. v. Government of Canada*, GLOBAL POL'Y F. (Apr. 1997), <http://www.globalpolicy.org/component/content/article/212/45381.html>.

3. Commentators Michelle Sforza and Mark Vallianatos wrote at the time that the suit "demonstrates how present and future international economic pacts could pose a danger to environmental regulations and other safeguards." Sforza & Villianatos, *supra* note 2; see also *The Right to Health*, OFF. U.N. HIGH COMMISSIONER HUM. RTS. & WORLD HEALTH ORG. (2008), <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf> (discussing the right to health).

4. Sforza & Villianatos, *supra* note 2.

5. *Id.*

6. Ethyl Corp. Award, *supra* note 1, ¶ 7.

7. Letter from Judith Resnik, Professor of Law, Yale Law Sch., et al., to Mitch McConnell, Senate Majority Leader, U.S. Congress (Apr. 30, 2015), <https://www.washingtonpost.com/t/2010-2019/WashingtonPost/2015/04/30/Editorial-Opinion/Graphics/oppose-ISDS-Letter.pdf> ("After the arbitration panel rejected Canada's argument that Ethyl lacked standing to bring the challenge, Canada settled the suit for \$13 million. Moreover, Canada lifted the ban on the toxic additive as part of the settlement."); see also Michelle Sforza & Mark Vallianatos, *Ethyl Corporation v.s. Government of Canada: Now Investors Can Use NAFTA to Challenge Environmental Safeguards*, PUB. CITIZEN, <https://www.citizen.org/our-work/globalization-and-trade/ethyl-briefing-paper> (last visited Apr. 18, 2018) (discussing this suit).

8. Alfred-Maurice de Zayas, Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order, ¶ 6, U.N. Doc. A/70/285 (Aug. 5, 2015).

9. See, e.g., Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 54(1), Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention] ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.").

pro-human rights policies rather than risk a costly loss if the matter goes to arbitration.<sup>10</sup> Beyond the individual impact of each claim, two decades of corporations using ISDS claims have cumulatively impressed upon governments the legal costs of regulating to advance human rights at odds with private interests. This unidirectional regulatory chill makes governments less likely even to attempt to pursue such policies in the first place.

The growing role of ISDS mechanisms in stymying pro-human rights policies has generated a rich literature on potential ways to reform the ISDS system, the need to eliminate it altogether, or the importance of saving it despite its shortcomings.<sup>11</sup> Lost in this otherwise valuable macro-level debate is the practical reality that the current ISDS regime is almost certain to remain in place for at least a few more decades to come. Not only is there momentum behind the existing system, but many Bilateral Investment Treaties (BITs) and International Investment Agreements (IIAs) contain clauses that effectively guarantee ISDS's continued existence for another ten to twenty years.<sup>12</sup> In the United States, ISDS provisions may survive unscathed, despite the radioactive rhetoric regarding America's existing trade deals. Even as President Donald Trump seeks to renegotiate the North American Free Trade Agreement (NAFTA), he has so far indicated that he intends to keep the NAFTA's ISDS provisions largely unchanged.<sup>13</sup> Campaigns to reform or eliminate the ISDS regime are therefore only likely to succeed in the long term. Recognizing this reality, this Note focuses on finding a short- to medium-term solution: enabling private actors to bring ISDS claims that intentionally and systematically advance a human rights agenda. To date, the potential for private parties to bring such claims in the ISDS system has largely gone ignored.

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10. As I discuss in Part I, this Note uses the term "pro-human rights" to refer to policies that advance socioeconomic rights. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, arts. IX-XV (Dec. 16 1966). I do not use the term "pro-human rights" to refer to State-driven policies that aim only to liberalize the economy or create a more business friendly environment. Some argue that such policies do advance political and economic freedom and, by extension, human rights. Such a debate is beyond the scope of this Note.

11. *See* discussion *infra* Section III.A.

12. *See, e.g.*, U.S. DEP'T OF STATE, U.S. MODEL BILATERAL INVESTMENT TREATY art. 22(3) (2012), <http://www.state.gov/documents/organization/188371.pdf> [hereinafter U.S. MODEL BIT]; FED. MINISTRY OF ECON. & TECH. (GER.), GERMAN MODEL TREATY-2008, art. 13(3), <http://www.italaw.com/sites/default/files/archive/ita1025.pdf> [hereinafter GERMAN MODEL TREATY-2008].

13. OFF. U.S. TRADE REPRESENTATIVE, SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION 17 (2017), <http://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf> (stating that ISDS provisions should remain, but should be improved through increased transparency and efficiency in adjudication); *see also* David Singh Grewal, *Investor Protection, National Sovereignty, and the Rule of Law*, 2 AM. AFF. J. 17, 18 (2018), <http://americanaffairsjournal.org/2018/02/investor-protection-national-sovereignty-rule-law> ("Strikingly, what appears to be missing from the administration's current trade priorities is a commitment to rethinking one of the most controversial provisions of NAFTA—its special procedures for resolving disputes between private foreign investors and member states."); David Dayen, *Trump's Renegotiation of NAFTA Is Starting To Look a Lot Like the TPP*, NATION (July 18, 2017), <http://www.thenation.com/article/trumps-renegotiation-of-nafta-is-starting-to-look-a-lot-like-the-tp> (noting that the United States Trade Representative's objectives for the NAFTA renegotiation would bar labor and environmental groups from suing foreign governments under the NAFTA directly, even though it would allow foreign investors to sue foreign governments under ISDS provisions directly).

This Note argues that investors and domestic communities can take advantage of a new asset class—social impact bonds—to purchase the right to use ISDS mechanisms to pressure States to maintain pro-human rights policies. While social impact bonds are a relatively new asset class, the market for them is rapidly growing.<sup>14</sup> Both public and private entities around the world have already issued social impact bonds in both the Global North and South,<sup>15</sup> and at least one estimate suggests that the commercial market for social impact bonds is anticipated to reach \$1 trillion within the next decade.<sup>16</sup> This means that social impact bonds provide a vehicle for investors to “purchase standing” to bring pro-human rights ISDS claims in a growing set of contexts around the world.

This Note provides a roadmap for how investors might execute this strategy. It provides an example of the type of social impact bond that investors might wish to purchase, and details how they might use the doctrines of indirect expropriation and fair and equitable treatment to raise their claims. The Note tracks the legal arguments that companies have used to advance their private interests, and shows how investors holding social impact bonds might deploy these same arguments on behalf of domestic constituencies. In order to do this effectively, investors should work in close coordination with the domestic movements and communities they are trying to help. While enabling these investors to pursue such a strategy in tandem with local movements would be a positive step, it would be ideal if domestic communities could advance their own human rights themselves. As such, this Note briefly suggests how the *Tokios Tokelés* doctrine might enable domestic communities to do so through ISDS mechanisms.

Investors and domestic communities should consider adopting these legal strategies because ISDS mechanisms offer unique advantages for human rights advocates. ISDS mechanisms can serve as rare international legal tools that provide a private, enforceable cause of action. To date, investors have used claims to convince governments to abandon otherwise pro-human rights policies. Investors and domestic communities can use the legal strategies advanced in this Note to encourage pro-human rights policies, too. Relatedly, if investors and domestic communities adopt these strategies en masse, this will have the cumulative effective of reversing the unidirectional regulatory chill ISDS mechanisms have so far engendered. This would create a more human-rights-friendly policymaking environment.

This Note proceeds in three Parts. First, it explains how companies coopted the ISDS regime to push it beyond its initial narrow focus on preventing expropriation to instead serve as a legal mechanism for fighting back against a

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14. Adriana Barajas et al., *Social Impact Bonds: A New Tool for Social Financing*, PRINCETON U. PUB. POL'Y & INT'L AFF. PROGRAM 8 (2014) (stating that social impact bonds first launched in 2010).

15. *Impact Bond Global Database*, SOC. FIN., <http://sibdatabase.socialfinance.org.uk> (last visited Apr. 20, 2018) (noting that a non-governmental foundation is issuing a social impact bond in Peru, and governmental entities are issuing social impact bonds in countries like the United States and Canada).

16. *Social Impact Bonds Infographic*, ROCKEFELLER FOUND. (Sept. 21, 2014), <https://www.rockefellerfoundation.org/report/social-impact-bonds-infographic/> (last visited Apr. 16, 2018) (noting that social impact investing can bring “up to \$1 trillion in potential commercial capital over the next ten years” into social programs).

broad array of government policies that negatively affect their business interests. Second, this Note shows how social impact bonds could be used to purchase the right to advance human rights policies. It identifies two legal concepts—indirect expropriation and fair and equitable treatment—that bondholders could use to vindicate human rights within the ISDS regime. It also identifies a third legal concept, the *Tokios Tokelés* doctrine, which could allow domestic parties to file claims within the ISDS regime. Third, this Note details the advantages of these legal strategies—namely, that these strategies can work in the short term and that the ISDS regime is a potentially powerful, albeit presently under-utilized, tool for protecting human rights. Finally, this Note concludes by briefly addressing how the strategies proposed might assist long-term efforts to reform the ISDS regime.

#### I. THE ORIGINS OF ISDS AND ITS TRANSFORMATION INTO A DEREGULATORY TOOL

The following Part describes how companies broadened the reach of the ISDS regime beyond its initial narrow purpose of protecting against expropriation into the domain of challenging otherwise pro-human rights policies that companies feel threaten their private interests. As this Part explains, this evolution was made easier by the fact that the boundary between policies that expropriate property and policies that harm business interests is blurry. This Note argues that investors can advance human rights through the ISDS regime by deploying the same legal tactics that companies have already pioneered. As such, this Part provides important background for Part II, where I elaborate further on the legal claims investors can make to vindicate human rights.

Before proceeding, a brief gloss on how this Note uses the term “human rights.” U.S. scholarship typically assumes that “human rights” refers primarily to civil and political rights,<sup>17</sup> such as the right to be free from “arbitrary arrest, detention or exile.”<sup>18</sup> However, within international law, human rights refers to both civil and political rights as well as socioeconomic rights.<sup>19</sup> This Note uses the term to refer to socioeconomic rights, such as environmental rights<sup>20</sup> and the right to health, housing, and food.<sup>21</sup> This is for two reasons. First, as the examples

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17. Philip Alston, *Economic and Social Rights*, 26 *STUD. TRANSNAT'L LEGAL POL'Y* 137, 137 (1994) (“The phrase ‘economic and social rights’ is rarely used by commentators in the United States.”).

18. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. IX (Dec. 10, 1948).

19. See JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 40-54 (3d ed. 2013) (discussing the place of socioeconomic rights within human rights law); see also Samuel Moyn, *The Return of the Prodigal: The 1970s as a Turning Point in Human Rights History*, in *THE BREAKTHROUGH: HUMAN RIGHTS IN THE 1970S* 1, 1-15 (Jan Eckel & Samuel Moyn eds., 2014) (providing an alternate historical account of the origin of human rights).

20. For a discussion of the role of environmental rights in international human rights law, see Francesco Francioni, *International Human Rights in an Environmental Horizon*, 21 *EUR. J. INT'L L.* 41, 42-43 (2010) (“Recent practice shows that the protection of the natural environment in special socio-cultural contexts is a *sine qua non* for the enjoyment of human rights by members of the relevant group or community.”); and Alan Boyle, *Human Rights and the Environment: Where Next?*, 23 *EUR. J. INT'L L.* 3 (2012).

21. Alston, *supra* note 17, at 137-38 (referring to these rights as “economic, social and cultural rights” rooted in the International Covenant on Economic, Social and Cultural Rights).

below illustrate, companies' ISDS claims have primarily infringed on socioeconomic rights. As such, this is the set of rights that the ISDS regime most urgently needs to protect. Second, as will be discussed in Part II, social impact bonds typically fund projects that advance socioeconomic rights. Since the legal strategies proposed in this Note hinge on the existence of a social impact bond, these strategies are best suited to protecting socioeconomic rights.

*A. The Origin of ISDS as a Regime for Protecting Against Expropriation*

Most accounts of the current ISDS regime trace the regime's roots back to the 1959 Abs-Shawcross Draft Convention on Investments Abroad.<sup>22</sup> This Convention was primarily concerned with protecting foreign investors' property against State attempts to expropriate it. Hermann Abs and Lord Hartley Shawcross, the Convention's authors, said that the Convention's purpose was to provide "security of investment."<sup>23</sup> It did this by mandating that countries abide by two legal principles. First, countries had to ensure "fair and equitable treatment to the property of the nationals of other Parties."<sup>24</sup> Second, it mandated that countries not expropriate property, either directly or indirectly, except in return for "just and effective compensation."<sup>25</sup> To ensure that States abided by these principles, Article VII(2) of the Convention provided "[a] national of one of the Parties claiming that he has been injured by measures in breach of this Convention" with the right to "institute proceedings against the Party responsible for such measures."<sup>26</sup> This article granted investors a private right of action against States that breached their obligations towards investors' private property rights. Simon Lester identifies this article as the "precursor to the modern investor-state procedure."<sup>27</sup>

Critically, the text of the Convention as well as the historical circumstances surrounding its creation indicate that it was not crafted with the aim of providing

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22. Hermann Abs & Lord Hartley Shawcross, *Draft Convention on Investments Abroad*, 9 J. PUB. L. 116, 116-18 (1960) [hereinafter Abs-Shawcross Draft Convention]. Simon Lester's account of the genesis of the ISDS regime provides a helpful and comprehensive outline for the history in this Note. Simon Lester, *Liberalization or Litigation? Time To Rethink the International Investment Regime*, CATO INST. CTR. FOR TRADE POL'Y STUD. 3 (2013), [http://object.cato.org/sites/cato.org/files/pubs/pdf/pa730\\_web.pdf](http://object.cato.org/sites/cato.org/files/pubs/pdf/pa730_web.pdf) ("The Abs-Shawcross convention . . . marked the first tentative step towards the widely adopted, binding set of international investment rules we see today."); see also O. Thomas Johnson Jr. & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010-2011, at 649 (Karl P. Sauvant ed., 2011) (providing a historical account of foreign investment protections); Lise Johnson & Lisa Sachs, *The Outsized Costs of Investor-State Dispute Settlement*, 16 AIB INSIGHTS 10, 10-11 (2016) (suggesting that the ISDS system may not be all that different from "gunboat diplomacy").

23. Hermann Abs & Lord Hartley Shawcross, *Comment on the Draft Convention by its Authors*, 9 J. PUB. L. 119, 119 (1960).

24. Abs-Shawcross Draft Convention, *supra* note 22, art. 1.

25. *Id.* arts. II-III; see also Lester, *supra* note 22, at 3 ("Article II provided that any 'undertakings' (i.e., contracts) related to foreign investments must be observed. And Article III dealt with direct or indirect 'deprivation' of property and required 'just and effective compensation' when that occurred.").

26. Abs-Shawcross Draft Convention, *supra* note 22, art. VII(2).

27. Lester, *supra* note 22, at 3. In contrast to contemporary ISDS provisions, the Abs-Shawcross Draft Convention required investors to gain the consent of respondent States in order to institute proceedings. Abs-Shawcross Draft Convention, *supra* note 22, art. VII(2).

investors with a right to affect social policy in areas like health, education, and housing. The Convention's emphasis on protecting "security of investment" is best understood as a reaction to concerns about the orientation of newly decolonized regions of the globe towards the property rights of Western investors.<sup>28</sup> Lester notes that the 1950s and 1960s were "a time of increased assertiveness by less-developed countries (LDCs) over their natural resources, resulting in the nationalization of a number of foreign operations, along with various other kind of interference with, and bad treatment of, foreign companies."<sup>29</sup> Because the Convention aimed to ensure that States afforded investors fair and equitable treatment and just compensation in cases of expropriation, a commentator writing in 1959 noted that the Abs-Shawcross Draft Convention was intended to provide a "means of protecting the private foreign investments of Western capital-exporting nations."<sup>30</sup>

After the Abs-Shawcross Draft Convention, the modern ISDS regime continued to expand along the same model, focusing on protecting property against expropriation. The first big steps towards its expansion came through the spread of BITs and IIAs in the late 1970s and early 1980s.<sup>31</sup> However, ISDS only became a commonplace element of the international legal regime in the 1990s. The NAFTA, including its Chapter 11 ISDS provisions, was signed in December 1993.<sup>32</sup> The World Trade Organization came into existence at the beginning of 1995, and the number of international economic agreements proliferated.<sup>33</sup> The number of BITs and IIAs expanded dramatically during this time period. For example, during the eight-year period between 1994 and 2002, there were approximately 150 new BITs signed every year.<sup>34</sup> (From 1980-1991, the number of BITs signed every year never reached over 100; in 1992 and 1993, there were a little over 100 BITs signed each year.<sup>35</sup>) While the rate of new BITs and IIAs has tapered since then, there are about 3,300 active IIAs in the world today.<sup>36</sup> While BITs and IIAs spread rapidly in the 1990s, investors only began to regularly utilize the ISDS provisions within these treaties in the 2000s. Since

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28. Lester, *supra* note 22, at 6 (explaining that the investment principles in the Abs-Shawcross Draft Convention were a reaction to a "surge in expropriation" in the 1950s).

29. *Id.* at 2-3 ("[The Abs-Shawcross Draft Convention] marked the first tentative step toward the widely adopted, binding set of international investment rules we see today.").

30. Editors, *Introduction to the Proposed Convention to Protect Private Foreign Investment: A Round Table*, 9 J. PUB. L. 115, 115 (1960); see also Lester, *supra* note 22, at 3 (discussing the Draft Convention).

31. Jason W. Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 403 (2011).

32. See Bill Clinton, President, Remarks on Signing the North American Free Trade Agreement Implementation Act (Dec 8, 1993), 2 PUB. PAPERS 2193 (1993).

33. *The 128 Countries that Had Signed GATT by 1994*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/gattmem\\_e.htm](http://www.wto.org/english/thewto_e/gattmem_e.htm).

34. U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE 24, fig.10 (2015) [hereinafter WORLD INVESTMENT REPORT 2015], [http://unctad.org/en/PublicationsLibrary/wir2015\\_overview\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2015_overview_en.pdf).

35. *Id.*

36. U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2017: INVESTMENT AND THE DIGITAL ECONOMY xii, 111 (2017), [http://unctad.org/en/PublicationsLibrary/wir2017\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf) (noting that there are currently 3,324 IIAs in the world).

2004, the number of ISDS claims per year has often exceeded forty.<sup>37</sup> As of January 2016, there had been a total number of 767 ISDS claims filed against 109 countries.<sup>38</sup>

As the ISDS regime has expanded its geographic reach, investors have grown increasingly adept at utilizing its provisions to challenge social policies that otherwise harm their business interests. Ethyl's success in 1997 in using an ISDS claim to convince Canada to abandon its MMT ban is just one notable example. This Section examines other examples of companies successfully using ISDS mechanisms to challenge social policies, and then explores the individual and cumulative effects of these challenges.

### B. ISDS Claims and Their Impact on Human Rights

As the ISDS regime expanded geographically, companies began to push the regime beyond its original narrow focus on expropriation towards a broader focus on protecting investors against policies that harm their business interests. To do this, companies have taken advantage of the blurry boundary between policies that formally expropriate property and those that harm business interests.<sup>39</sup> As such, companies have argued that certain government policies impermissibly threaten their property interests, even when those policies otherwise advance human rights. In this way, companies have used the ISDS regime to deter States from adopting policies that advance socioeconomic rights.

Perhaps the most famous recent example of a company using ISDS provisions to challenge social policies is *Vattenfall*.<sup>40</sup> In March 2009, Vattenfall, a Swedish energy company with a planned coal-power plant near the Elbe River, filed an ISDS claim alleging Germany had expropriated its property and seeking €1.4 billion in compensation.<sup>41</sup> The dispute started in 2007 when Germany's Green Party took control of key positions in Hamburg and decided to conduct an environmental review of Vattenfall's proposed power plant.<sup>42</sup> The review concluded that the amount of hot water that the proposed plant would pump into the Elbe River comprised a threat to the river's health.<sup>43</sup> As a result, Hamburg required Vattenfall to take precautionary environmental measures when operating the plant.<sup>44</sup> Vattenfall alleged that these new environmental measures "destroy[ed] the economic value of the plant."<sup>45</sup> In response to Vattenfall's ISDS

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37. *Id.* at 115.

38. *Id.* States won thirty-six percent of these claims and investors won twenty-seven percent, while the rest were settled or discontinued.

39. See Part II, *infra*, for a further discussion of the development of the ISDS doctrine.

40. *Vattenfall AB v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Request for Arbitration (Mar. 30, 2009) [hereinafter *Vattenfall Request for Arbitration*].

41. *Id.*

42. Sebastian Knauer, *Vattenfall vs. Germany: Power Plant Battle Goes to International Arbitration*, SPIEGEL ONLINE: INT'L (July 15, 2009 6:38 PM), <http://www.spiegel.de/international/germany/vattenfall-vs-germany-power-plant-battle-goes-to-international-arbitration-a-636334.html>; see also *Case Studies: Investor-State Attacks on Public Interest Policies*, PUB. CITIZEN 3 (2014), [http://www.citizen.org/sites/default/files/egregious-investor-state-attacks-case-studies\\_4.pdf](http://www.citizen.org/sites/default/files/egregious-investor-state-attacks-case-studies_4.pdf).

43. Knauer, *supra* note 42.

44. *Id.*

45. *Vattenfall Request for Arbitration*, *supra* note 40, ¶ 45.

claim, in 2011 Germany agreed to a settlement with the Swedish energy company that allowed the company to proceed without the original Elbe River environmental protections.<sup>46</sup> The environmental protections contained in the final agreement were so weak that the European Commission has referred Germany to the Court of Justice of the European Union for its failure to protect fish species in the Elbe.<sup>47</sup> Buoyed by its success against Hamburg, Vattenfall has already filed another ISDS claim against Germany relating to its decision to abandon nuclear energy over safety concerns in the wake of the Fukushima nuclear disaster.<sup>48</sup>

Private investors have also utilized ISDS provisions to challenge policies well outside the domain of environmental regulations, including in areas like health, financial policy, and affirmative action.<sup>49</sup> Piero Foresti, an Italian mining company, filed a claim in 2009 seeking \$350 million in compensation from the South African government for its attempts to implement its Black Economic Empowerment (BEE) program.<sup>50</sup> Under the BEE program, the South African government required that black South Africans hold a minimum twenty-six percent ownership stake in mining companies in the country.<sup>51</sup> This affirmative action program was meant to redress the historical wrong of apartheid.<sup>52</sup> Piero Foresti resisted this program, arguing that it would dilute the existing owners' stake in the company. Ultimately, South Africa signed a settlement agreement with Piero Foresti that required the company to transfer only a five percent ownership stake to black South Africans.<sup>53</sup> One of the lawyers for Piero Foresti said that a key reason the government agreed to settle was because it feared that an adverse decision from the arbitral panel would endanger the entire BEE program.<sup>54</sup>

Ethyl's, Vattenfall's, and Piero Foresti's respective victories highlight two key features of the ISDS regime that make it a particularly powerful tool for these corporations. First, the ISDS regime provides these corporations with a mechanism to act directly against countries pursuing policies counter to their

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46. Claire Provost & Matt Kennard, *The Obscure Legal System that Lets Corporations Sue Countries*, GUARDIAN (June 10, 2015), <http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid> (noting the settlement was also motivated by Vattenfall's victories in domestic courts).

47. Press Release, European Comm'n, Environment: Commission Refers Germany to Court over Coal Power Plant in Moorburg (Mar. 26, 2015), [http://europa.eu/rapid/press-release\\_IP-15-4669\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4669_en.htm).

48. NATHALIE BERNASCONI-OSTERWALDER & MARTIN DIETRICH BRAUCH, INT'L INST. FOR SUSTAINABLE DEV., *THE STATE OF PLAY IN VATTENFALL V. GERMANY II: LEAVING THE GERMAN PUBLIC IN THE DARK* (2014), <http://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf>.

49. See *Case Studies: Investor-State Attacks on Public Interest Policies*, *supra* note 42 (providing case studies from Canada, Ecuador, and the United States, among others).

50. Provost & Kennard, *supra* note 46; see also Piero Foresti, Laura di Carli v. Republic of South Africa, ICSID Case No. ARB(AF)/07/01, Award (Aug. 4 2010).

51. Provost & Kennard, *supra* note 46.

52. *Id.*

53. *Id.*

54. *Id.* (“‘If the merits of the case were decided against the government, they thought, ‘That’s it, we are going to go down.’ And I think that’s why they were happy to agree to that settlement,” Jonathan Veeran, another of the company’s lawyers said, in an interview at his office in Johannesburg.”).

own private interests. Second, ISDS arbitral awards are theoretically enforceable and, perhaps more importantly, are often enforced in practice.<sup>55</sup> This is so even in those instances in which governments try to avoid paying. For example, a German company convinced a German court to seize a Boeing 737 plane owned by the Thai government in order to collect on a \$43 million ISDS arbitral award.<sup>56</sup> In most cases, however, prevailing investors do not need to seek to enforce a judgment against a State because governments that refuse to honor awards may risk their access to international markets.<sup>57</sup> As a result, one 2008 study found that “81 percent of participating corporations did not enforce or seek to enforce arbitral awards against States, namely because of high rates of voluntary compliance and the negotiation of post-award settlements.”<sup>58</sup> This means that governments must, and typically do, take corporations’ ISDS claims seriously. If governments fail to do so, they risk legal losses that could easily translate into fiscal and economic pain.

Because investors’ individual ISDS claims pose real threats to countries, they serve to focus the minds of governments that are pursuing pro-human rights policies contrary to the companies’ private interests. The examples of Ethyl, Vattenfall, and Piero Foresti all show that companies have been able to convince governments in both the Global North and South to reverse policy choices without prevailing in front of an arbitral panel. Often, an ISDS claim alone will force the government to the negotiating table, providing a company with a critical leverage point to achieve its aims.

While each company’s ISDS claim can be powerful in its own right, cumulatively these claims have worked to create a policy environment that deters governments from even attempting to pursue pro-human rights policies in the first place. Gus van Harten and Dayna Nadine Scott argue that companies’ usage of ISDS procedures to challenge social policies is leading to “regulatory chill.”<sup>59</sup>

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55. See, e.g., ICSID Convention, *supra* note 9, art. 54(1) (“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”); Catherine M. Amirfar, *Dispute Settlement Clauses in Investor-State Arbitration: An Informed Approach to Empirical Studies About Law: A Response to Professor Yackee*, 12 SANTA CLARA J. INT’L L. 303, 310 (2014).

56. ORG. FOR ECON. COOPERATION & DEV., INVESTOR-STATE DISPUTE SETTLEMENT PUBLIC CONSULTATION: 16 MAY–9 JULY 2012, at 30 ¶¶ 67–68 (2012), <http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf> (noting various methods that investors can use to enforce awards); see also Amirfar, *supra* note 55, at 310 (detailing the international treaty regime that permits ISDS arbitral awards to be enforced in domestic courts).

57. See Amirfar, *supra* note 55, at 310 (noting that States comply with ISDS awards in order to maintain access to international markets); *Come and Get Me: Argentina is Putting International Arbitration to the Test*, ECONOMIST, (Feb. 18, 2012) <https://www.economist.com/node/21547836> (suggesting that Argentina may lose access to international markets if it does not honor international arbitral awards).

58. Amirfar, *supra* note 55, at 310

59. Gus van Harten & Dayna Nadine Scott, *Investment Treaties and Internal Vetting of Regulatory Proposals: A Case Study From Canada 1* (Osgoode Legal Studies Research Paper No. 26, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2700238](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2700238); see also Lise Johnson, Lisa Sachs & Jeffrey Sachs, *Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law*, COLUMBIA CTR. ON SUSTAINABLE INV. 2-3 (2015), <http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf> (arguing that ISDS leads to regulatory chill); Eckhard Janeba, *Regulatory Chill and the Effect of Investor State Dispute Settlements*

Van Harten and Scott note that “ISDS creates incentives for states to avoid or modify their regulatory decisions because of a risk of foreign investor claims and monetary awards.”<sup>60</sup> When deciding whether or not to regulate, governments must weigh the costs of regulating against the potential benefits of doing so. When governments consider the potential litigation costs from ISDS claims as a decisive thumb on the scale, they will systematically choose not to regulate. Van Harten and Scott describe this phenomenon as “regulatory chill.”

While there has not been quantitative work to analyze whether this phenomenon is actually occurring, van Harten and Scott provide compelling qualitative evidence to show that it is. In a 2016 study, van Harten and Scott reported their findings from fifty-one interviews with government officials in Ontario.<sup>61</sup> The study occurred after Canada had been sued thirty-six times under the NAFTA’s ISDS provisions.<sup>62</sup> Their study showed that after Ontario’s Trade Ministry became increasingly aware of the risks of ISDS litigation, the Ministry pushed to implement a “trade policy screen” for almost any policy proposal being submitted to the cabinet.<sup>63</sup> The Trade Ministry claims that the purpose of this trade policy screen is to ensure that the Cabinet is aware of ISDS-associated litigation risk stemming from any major policy decisions.<sup>64</sup> However, other government officials expressed skepticism about this screen, arguing that its true purpose is to allow Trade Ministry officials to gather input from industry special interests who might be affected by a specific policy.<sup>65</sup> This can be seen as two sides of the same coin: for the “trade policy screen” to be effective, officials may need to engage with industry interests in order to determine how they might react to a specific policy. Furthermore, van Harten shows that ISDS is seeping deeper into the government of Ontario’s decision-making process. For example, after an environment-related ministry in Ontario was itself the subject of an ISDS claim, that ministry started developing its own expertise in assessing ISDS-related litigation risk.<sup>66</sup> Although van Harten’s study does not show that ISDS-related litigation risk has become a decisive thumb on the scale, it shows that this factor is being consistently introduced into the decision-making process.

Because companies are the primary parties using ISDS mechanisms to challenge social policies, this creates a unidirectional regulatory chill. Governments only have to factor ISDS-related risks into their decision-making

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(Ctr. for Econ. Studies & Ifo Inst. Working Paper Series No. 6188, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2887952](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2887952) (providing a mathematical model for determining when regulatory chill is most likely to occur under different approaches to making ISDS available).

60. Van Harten & Scott, *supra* note 59, at 1 (“The fear is usually linked to the exclusive access of foreign investors to ISDS, the inability of states to bring claims against foreign investors, the breadth of foreign investor protections in ISDS, the weaknesses of exceptions to protect the right to regulate, the ability of foreign investors to receive uncapped amounts of compensation from the state, the international enforceability of ISDS awards, or the absence of conventional judicial safeguards in ISDS.”).

61. *Id.*

62. *Id.* at 3.

63. *Id.* at 14-15.

64. *Id.*

65. *Id.* at 18-19.

66. *Id.* at 19-23.

when they are considering a regulation that will negatively impact business interests. However, when governments are considering an action that will support business, they need not fear ISDS litigation. Since, as van Harten and Scott's research suggests, policymakers are becoming habituated to considering ISDS risk in decision-making, the absence of ISDS risk may make certain policies look relatively even more attractive. Thus, the ISDS regime creates an imbalance in the policy environment by raising the cost of pursuing policies that advance a human rights agenda but may hurt business interests.

This need not be the case. If parties were able to coopt the legal strategies that companies have previously used for the new purpose of advancing human rights instead, this would help push States to maintain pro-human rights policies. Part II further develops this argument.

## II. PURCHASING THE LEGAL RIGHT TO USE ISDS TO FURTHER SOCIAL RIGHTS

As the ISDS regime has expanded to adjudicate disputes touching on human rights, its legitimacy to do so has increasingly been called into question.<sup>67</sup> For example, the United Nations' independent expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, has said that "the international investment agreement regime poses grave dangers to the enjoyment of human rights."<sup>68</sup> As a result, States, practitioners, scholars, and civil society organizations have argued for reforms to the ISDS regime, or for the need to end it altogether.<sup>69</sup> This Note does not engage directly in this rich debate on the relative (de)merits of the ISDS regime.

Rather, this Note makes a novel intervention in an ongoing debate about how the ISDS regime might be utilized to advance human rights. To date, most of the attention on how to sensitize the ISDS regime to human rights has ignored the potential role of investors. Scholars like Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni have gathered suggestions about how host States or amici curiae can help make ISDS tribunals aware of the human rights

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67. See, e.g., Ernst-Ulrich Petersmann, *Introduction and Summary: "Administration of Justice" in International Investment Law and Adjudication?*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 3, 3 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds., 2009) (noting that ISDS's "output-legitimacy (for example, in terms of serving the general interests of all stakeholders rather than one-sidedly favoring investor interests) . . . remain[s] controversial among governments, lawyers, and civil society"); Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMP. L.Q. 573, 575 (2011) (noting that a number of Latin American countries' actions show that concerns about the ISDS regime's legitimacy are real).

68. De Zayas, *supra* note 8, ¶ 6; see also Johnson, Sachs & Sachs, *supra* note 59, at 1 ("Multinational companies are increasingly using ISDS to challenge the legal and regulatory systems and policy choices of the contracting states, posing a serious and growing risk to the ability of states to govern in the public interest.").

69. See, e.g., Daniel J. Ikenson, *A Compromise To Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement*, CATO INST. (Mar. 4, 2014), <http://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state> (arguing for "purging" ISDS from the trade agenda); Open Letter from Payam Akhavan, Associate Professor, McGill Univ. Faculty of Law, et al. to Mitch McConnell, Majority Leader, U.S. Senate, et al. (Apr. 20, 2015), <http://www.mcgill.ca/fortier-chair/isds-open-letter> (arguing in favor of the ISDS regime despite some problems with it); Resnik, *supra* note 7 (arguing for eliminating ISDS provisions from the Trans-Pacific Partnership).

at stake in a case.<sup>70</sup> International Court of Justice Judge Bruno Simma has also argued that tribunals could take advantage of existing jurisprudence to allow host States to assert human rights defenses, or to oblige investors to better understand the human rights obligations of host States before undertaking an investment.<sup>71</sup>

That is not to say that investors have been altogether ignored. For example, Filip Balcerzak recently published a collection of cases in which investors sought to root their claims against host States' as violations of their individual human rights, because investors were tortured or otherwise denied due process of law.<sup>72</sup> While Balcerzak's work shows that investors can successfully make human rights claims within the ISDS system, the cases he documents suggest that investors typically do so in reaction to egregious government actions against investors themselves.<sup>73</sup> Such cases do little to open up space for States to comply with their human rights obligations to their own population by counteracting the unidirectional regulatory chill ISDS has created.

To the best of my knowledge, this Note is the first attempt to show how investors might intentionally and systematically seek to utilize the ISDS regime in order to advance the human rights of others. As I discuss further in this Part, reforming or eliminating the ISDS regime is a long-term project. This Note nonetheless shows how private actors might begin repurposing the ISDS regime to compel States to uphold their human rights obligations on a large scale. This Part argues that social impact investors can do so by purchasing social impact bonds and gaining the right to use the ISDS regime to advance human rights. This Part then outlines two legal concepts—indirect expropriation and fair and equitable treatment—that bondholders can deploy to make claims within the ISDS regime. A third legal concept, the *Tokios Tokelés* doctrine, is then presented as another avenue that domestic parties might pursue within the ISDS regime.

#### A. *The Possibilities of Social Impact Bonds*

The types of investors that can use the ISDS regime to protect human rights must have three characteristics.<sup>74</sup> First, they must qualify as an investor with an investment covered by the terms of the relevant treaty. Second, they need to be

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70. See James Harrison, *Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION, *supra* note 67, at 396; Petersmann, *supra* note 67, at 3; Valentina Sara Vadi, *Reconciling Public Health and Investor Rights: The Case of Tobacco*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION, *supra* note 67, at 452.

71. Simma, *supra* note 67, at 575.

72. FILIP BALCERZAK, INVESTOR-STATE ARBITRATION AND HUMAN RIGHTS 73-96 (2017) (referring, for example, to the *Bozbey* case where an investor was tortured, and the *Tulip* case where an investor was denied due process in legal proceedings against him).

73. See, e.g., *id.* at 90-95 (discussing investors' successes in convincing tribunals to consider the investors' human rights in the *Tulip* and *Al-Warraq* cases).

74. There have been instances where corporations have, seemingly by happenstance, filed claims that would likely have a pro-human rights outcome. One recent example is Al Jazeera's claim against Egypt for suppressing free speech. *The First ICSID Case of 2016: Al Jazeera v. Egypt*, STOCKHOLM CHAMBER COM.: ISDS BLOG (Feb. 1, 2016), <http://isdsblog.com/2016/02/01/the-first-icsid-case-of-2016-al-jazeera-v-egypt>. This Note seeks to identify investors and domestic communities that could *intentionally* pursue such claims on a systematic basis.

relatively substantial investors or else they will not have the leverage necessary to influence public policies. Because ISDS tribunals rarely provide specific performance remedies,<sup>75</sup> investors' influence is most likely tied to the size of their claim. (The size of Ethyl's \$251 million claim likely helped focus the mind of the Canadian government, for example.) Investors pursuing this strategy will also need to be able to fund the legal costs of a claim, which are typically \$1.5 to \$2.5 million.<sup>76</sup> Third, the investors' claims must be tied to a particular shift in public policy. An investor affected by a shift in environmental regulation cannot bring a claim related to healthcare regulations, for example. But she could bring a claim based on a shift in environmental regulations. Would it be possible to find a party who is (1) an investor with a (2) substantial investment that is (3) tied to particular social policy?

Companies and large pension funds are two categories of investors that meet the three criteria outlined above. One obvious way to convince such bodies to pursue a pro-human rights claim would be through more "traditional" shareholder activism of the sort that has helped pressure companies to become more environmentally and socially aware. This strategy, however, is limited in two respects. First, companies and pension funds would need to have an investment that is threatened by the end of an important policy or regulation in order to bring a claim. Yet, as recent trends in ISDS claims show, their commercial interests often run counter to a pro-human rights agenda. Second, such traditional shareholder activism is unlikely to be politically feasible.<sup>77</sup> This is because, even if a company were to successfully pursue a claim through ISDS mechanisms, countries might punish investors for their perceived hostility in doing so.<sup>78</sup> The risks to companies and pension funds of pursuing pro-human rights claims are high, and therefore resistance from within these organizations will be strong.

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75. See CHRISTOPHER F. DUGAN ET AL., *INVESTOR-STATE ARBITRATION* 570 (2008) ("Most arbitral rules do not restrain the power of tribunals [with regard to enforcing specific performance]. However, Article 54(1) of the ICSID Convention, which obliges the state parties to recognize as binding awards rendered under the Convention, limits this obligation to the enforcement of 'pecuniary obligations.'" (citation omitted)). Dugan also notes that Aaron "Ronnie" Broches, largely recognized as the creator of ICSID, intended only for monetary remedies to be enforceable.

76. Rachel Thorn & Jennifer Doucleff, *Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of "Investor,"* in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 3, 5 n.4 (Michael Waibel et al. eds., 2010) ("A recent survey of awards suggests that states incur between US\$1.5 and US\$2.5 million defending investment claims . . . . [T]he average amount claimed was approximately US\$323.4 million, although the average amount award was substantially less (US\$10.4 million).").

77. In some instances, companies have joined together to call on governments to take action on a matter of common concern, such as the environment. See Michael Hutchinson & Georgina Seward, *Shareholder Activism: The New Face of Environmental Lobbying*, MAYER BROWN LLP (Jan. 2010), <http://m.mayerbrown.com/publications/shareholder-activism-the-new-face-of-environmental-lobbying-01-22-2010>. Such corporate activism arguably creates reputational benefits and adds to overall profit. However, this is a far cry from convincing a corporation to expend resources in directly challenging a foreign government in court.

78. See Malcolm Langford, Daniel Behn & Ole Kristian Fauchald, *Tempest in a Teapot? The International Investment Regime and State Backlash* (PluriCourts Research Paper No. 15-22, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2704344](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2704344) (citing examples of the governments of Zimbabwe, Indonesia, Kazakhstan, and Bolivia initiating criminal proceedings against companies that have filed ISDS claims).

Given that more traditional investors are unlikely to pursue pro-human rights ISDS claims, this Note seeks to identify other classes of investors that could. This Section argues that the jurisprudence of the ISDS regime has expanded so broadly that social impact investors already exist who could file claims to pressure governments to maintain pro-human rights policies. By buying social impact bonds, investors can purchase the right to file claims against governments seeking to eliminate or degrade social programs. The legal strategies for advancing these claims, and the potential causes of action, are detailed in Sections II.C and II.D.

In recent years, investors have paid increasing attention to the market potential of low-income consumers. A new class of so-called social impact investors has grown in pursuit of opportunities with mixed social and financial profit.<sup>79</sup> While such opportunities sometimes provide market rates of return, more typically they only provide sub-market rates of return in exchange for the opportunity to provide a social benefit.<sup>80</sup> The global appetite for such social impact investments is increasing. For example, the Investors' Council of the Global Impact Investing Network has reported that social impact funds now manage \$60 billion in assets.<sup>81</sup>

These investors often have a strong financial and social interest in the policies of the States in which they invest. Their assets serve sectors like affordable housing, agriculture, education, energy, and the environment.<sup>82</sup> Their investments often go into businesses in low-income communities or enterprises serving the bottom of the pyramid.<sup>83</sup> This means their investments are linked to the successes of low-income communities. In many cases, therefore, impact investors have taken a financial bet that depends on a government protecting or expanding its social policies for poor and marginalized groups.

Social impact bonds, also known as development impact bonds, represent such a class. The first social impact bond was the 2010 Peterborough Social Impact Bond to reduce prisoner recidivism at H.M. Prison Peterborough in the United Kingdom ("HMP Peterborough").<sup>84</sup> For that bond, the U.K. Ministry of Justice recognized that it could save money if it were able to reduce prisoner recidivism, or the rate at which prisoners reoffend and return to prison. As a result, the Ministry of Justice, in conjunction with the Big Lottery Fund, issued

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79. *What You Need To Know About Impact Investing: What Is Impact Investing?*, GLOBAL IMPACT INVESTING NETWORK, <http://thegiin.org/impact-investing/need-to-know> (last visited Apr. 20, 2018) ("Impact investments are investments made into companies, organizations, and funds with the intention to generate social and environmental impact alongside a financial return."); see also Tina Rosenberg, *Issuing Bonds To Invest in People*, N.Y. TIMES (Mar. 6, 2018), <http://www.nytimes.com/2018/03/06/opinion/social-projects-investing-bonds.html>.

80. See GLOBAL IMPACT INVESTING NETWORK, *supra* note 79.

81. J.P. MORGAN & GLOBAL IMPACT INVESTING NETWORK, EYES ON THE HORIZON: THE IMPACT INVESTOR SURVEY 5 (2015), <http://thegiin.org/assets/documents/pub/2015.04%20Eyes%20on%20the%20Horizon.pdf>.

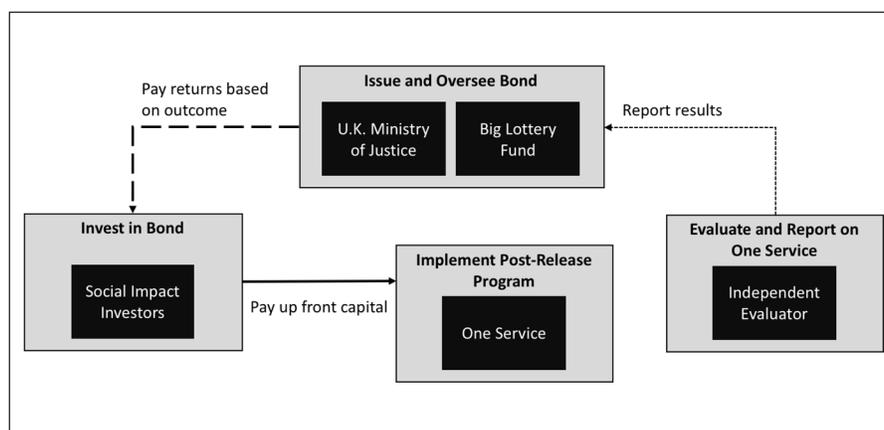
82. *Id.* at 6.

83. *Id.*

84. EMMA DISLEY, CHRIS GIACOMANTONIO, KRISY KRUTHOF & MEGAN SIM, THE PAYMENT BY RESULTS SOCIAL IMPACT BOND PILOT AT HMP PETERBOROUGH (2015), [http://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/486512/social-impact-bond-pilot-peterborough-report.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486512/social-impact-bond-pilot-peterborough-report.pdf).

a social impact bond to fund the work of One Service, a post-release prisoner support program.<sup>85</sup> The bond was tied to One Service's performance. One Service worked with different providers and local partners to support offenders as they exited HMP Peterborough. If One Service reduced recidivism by ten percent by 2014, bondholders would receive an interest payment.<sup>86</sup> An independent evaluator was responsible for measuring whether One Service had reached its targets.<sup>87</sup> The interest payment was made out of the money that the Ministry of Justice saved when fewer ex-convicts returned to prison, along with some assistance from the Big Lottery Fund. By contrast, if One Service did not hit this target, then investors did not receive any interest.<sup>88</sup>

**Figure 1: Illustration of Peterborough Social Impact Bond<sup>89</sup>**



Since the HMP Peterborough Bond, the social impact bond industry has grown dramatically. Both public and private entities in the Global North and South have issued social impact bonds to fund social programs.<sup>90</sup> And, while the following Sections address a potential bond issued by private parties to fund malaria prevention in Mozambique, the arguments advanced in the Note apply equally to social impact bonds issued by governments or private parties from the Global North or South. As a result of the broad geographic reach of social impact bonds, the Rockefeller Foundation estimates that there may be a trillion-dollar *commercial* market for social impact bonds in the next decade.<sup>91</sup> Investors are actively investigating the possible application of the social impact bond model

85. *Id.* at 11-14.

86. *Id.*

87. *Id.* at 3.

88. *Id.*

89. Figure based on *id.* at 12.

90. *Impact Bond Global Database*, *supra* note 15 (noting that a nongovernmental foundation is issuing a social impact bond in Peru and governmental entities are issuing social impact bonds in countries like the United States and Canada).

91. *Social Impact Bonds Infographic*, *supra* note 16.

to challenges in sectors like health,<sup>92</sup> education,<sup>93</sup> and enterprise development.<sup>94</sup> The basic finances of these bonds are all based on the core components of the HMP Peterborough example: (i) investors pay up front to support a service provider; (ii) the service provider uses the funds to provide a service measured against certain targets; and (iii) if the targets are met, a private or public entity that reaps savings shares some of those savings with investors as a return on their initial investment.

The growing asset class of social impact bonds is a ready-made vehicle for purchasing the right to pursue a human rights agenda through ISDS claims. Consider the holder of a bond to fund anti-malaria spraying in Mozambique.<sup>95</sup> This bond aims to reach eight million people in Mozambique over ten years.<sup>96</sup> The bond funds “an integrated malaria control program that addresses all aspects of prevention, diagnosis, treatment, and monitoring and evaluation.”<sup>97</sup> Private corporations working in Mozambique bear a cost for fighting and treating malaria when their employees fall sick. These costs come in the form of lost work hours as well as healthcare payments. Therefore, if the integrated malaria control program succeeds in achieving malaria reduction targets, these private actors save money. As in the HMP Peterborough example, these savings can be used to pay back investors their principal plus interest.<sup>98</sup> However, if the program fails to meet its targets, investors lose: “[i]f the malaria interventions are ineffective, investors are repaid only 50% of their principal, with no interest, the program terminates, and funders are absolved of further commitments.”<sup>99</sup>

These bondholders are likely to qualify as “investors” with “investments” as defined under most treaties. An “investor” is generally defined to include juridical and natural persons who are nationals of one of the parties to the treaty.<sup>100</sup> *Salini*—a dispute concerning whether or not the efforts of two Italian construction companies to build a fifty kilometer highway in Morocco would qualify as an investment—is one of the key cases defining “investment” under

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92. *See id.*

93. CTR. FOR GLOBAL DEV. & SOC. FIN. LTD., INVESTING IN SOCIAL OUTCOMES: DEVELOPMENT IMPACT BONDS 52-61 (2013), <https://www.cgdev.org/sites/default/files/investing-in-social-outcomes-development-impact-bonds.pdf>.

94. *Id.* at 62-71.

95. The author performed work to support the development of this bond while working for D. Capital Partners in 2011.

96. Lily Han, *Malaria in Mozambique: Trialing Payment by Results*, GUARDIAN (Mar. 31, 2014), <http://www.theguardian.com/global-development-professionals-network/2014/mar/31/malaria-control-payment-by-results>.

97. *Id.*

98. *Id.*

99. *Id.*

100. Vasyi Chornyj, Marianna Nerushay & Jo-Ann Crawford, *A Survey of Investment Provisions in Regional Trade Agreements* 13 (World Trade Org. Staff Working Paper No. ERSD-2016-07, 2016), <http://www.econstor.eu/bitstream/10419/144182/1/863319661.pdf> (“Natural persons that have the nationality of one of the parties to the agreement under domestic law are typically considered investors in the other party.” (citations omitted)). The U.S. Model BIT helps explain the definition of “investor” further. An investor is only able to bring claims related to a “covered investment,” defined as an investment by a “foreign” investor in the territory of another party that is a signatory to the treaty that was “established, acquired or expanded” after the treaty was signed. *See* U.S. MODEL BIT, *supra* note 12, art. 1. The concept of the “foreign” investor is highly malleable. *See infra* Section II.E.

the ICSID Convention, and as such *Salini* remains a key decision in international investment jurisprudence.<sup>101</sup> Under *Salini*, an investment must typically (i) include “contributions” of money, assets, or know-how, (ii) have a “certain duration of performance,” (iii) involve “participation in the risks of the transaction,” and, in some instances, (iv) add “to the economic development of the host State of the investment.”<sup>102</sup> Later tribunals have understood the *Salini* test to include a fifth element, “generation of regular profits and returns.”<sup>103</sup> *Salini* suggests any investment that lasts at least two years is likely to pass the “duration” prong of this test.<sup>104</sup> While shorter-term investments like contracts for sale of equipment or contingent liabilities have failed this test, tribunals have ruled that investments like loans, shares in companies, and promissory notes qualify under *Salini*.<sup>105</sup>

There is a straightforward case that social impact bonds meet *Salini*’s five-part test for determining if an investment is covered because they (i) are a contribution of money, (ii) can, and often do, endure for more than two years, (iii) are intended to help share risk, (iv) are intended to assist with the economic development of the host country,<sup>106</sup> and (v) are made with the expectation of a financial return. Furthermore, many treaties, such as the U.S. Model BIT<sup>107</sup> and the NAFTA,<sup>108</sup> explicitly define an investment to include bonds or debt securities.<sup>109</sup> As discussed further below, bondholders’ direct financial stake in the incidence of malaria in Mozambique provides them with the right to use ISDS mechanisms to challenge government policies that increase malaria rates.

### B. *The Potential of Social Impact Investors*

Even though social impact investors are likely to be covered under most treaties, one possible concern is that these investors will not bring ISDS claims to challenge government policies that have negative social consequences. This might be because investors have both commercial and social impact investments in a certain country and do not wish to antagonize the host government. Alternately, this may be because social impact investors simply do not know about the legal mechanisms at their disposal.

Notwithstanding these concerns, there is good reason to suspect that social

101. *Salini Costruttori S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (Jul. 23, 2001), 42 I.L.M. 609 (2003) [hereinafter *Salini Decision on Jurisdiction*]; see also Alex Gabrowski, *The Definition of Investment Under the ICSID Convention: A Defense of Salini*, 15 CHI. J. INT’L L. 287, 298-99 (2014) (suggesting that the fourth prong of the *Salini* test has come under attack).

102. *Salini Decision on Jurisdiction*, *supra* note 101, ¶ 52.

103. DUGAN ET AL., *supra* note 75, at 260, 269 (listing cases).

104. *Salini Decision on Jurisdiction*, *supra* note 101, ¶ 54 (“The transaction, therefore, complies with the minimal length of time upheld by the doctrine, which is from 2 to 5 years.”).

105. See DUGAN ET AL., *supra* note 75, at 250-65.

106. *Id.* at 272-74 (noting that even projects that are “largely commercial, contractual, or trade-related in nature” have been considered to meet this prong of the test) (emphasis omitted).

107. See U.S. MODEL BIT, *supra* note 12, art 1.

108. North American Free Trade Agreement, Can.-Mex.-U.S., art. 1139, Dec. 17, 1992, 32 I.L.M. 289 (1993) (defining an investment to include a debt security of an enterprise that has a maturity of at least three years).

109. See Chorny, Nerushay & Crawford, *supra* note 100, at 12.

impact investors are precisely the type of investors who would use ISDS mechanisms to vindicate human rights claims. Social impact investors, by virtue of seeking out an investment with a below-market rate of return, have already demonstrated that they have strong social motivations for their actions. Furthermore, given that social impact investing is relatively new, many social impact investors have also proven themselves to enjoy being a first-mover. Thus, the idea of utilizing their investment for social gain through innovative legal claims might be appealing.

Moreover, social impact investors are well-positioned to adopt the legal strategies laid out in this Note. An ISDS claim will be most potent when a government not only believes that the claim might succeed, but when a government is also concerned about the size of any award upon victory. For example, Ethyl's ISDS claim against Canada was for \$251 million. In this respect, because bonds are sold to multiple investors, the structure of the bond itself groups multiple investors into a single class with a similar interest in advancing a social policy. Linking bondholders together through a single financial instrument will help them reach the necessary scale to file a sizeable ISDS claim. Also, forecasts that the social impact investment sector will reach a \$1 trillion commercial market in the next decade indicate that the financial size and power of impact investors will grow.<sup>110</sup>

Finally, it is worth noting that the impact investing industry is well-organized through a small number of associations and councils. The aforementioned Global Impact Investing Network, which manages \$60 billion in assets, is one notable example. Lawyers could work with these associations to quickly inform impact investors of their legal rights. This would help facilitate collaboration between investors and lawyers to act strategically to purchase the right to advance human rights through ISDS mechanisms.

Not only can bondholders therefore coordinate to bring a sizeable enough ISDS claim to focus the mind of the government, but they also have practical legal arguments at their disposal in order to do so. The next two Sections describe two alternative legal theories that have opened up because companies have expanded the ISDS jurisprudence to accommodate their own claims. Section II.C argues that bondholders can use the doctrine of indirect expropriation in order to prevent governments from eliminating needed social programs. Section II.D argues that bondholders can use the doctrine of fair and equitable treatment to stop governments from degrading existing programs. While both of these Sections provide legal paths for bondholders to champion the human rights concerns of local communities, there are two reasons bondholders should only do so in close coordination with domestic constituencies. First, bondholders' legal strategies are more likely to bring about the desired political change if paired with domestic political pressure. Second, bondholders who fail to coordinate with domestic movements risk foisting their own vision of human rights on the very communities they are trying to assist. However, even if bondholders do work closely with local communities, it would be best if

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110. *Social Impact Bonds Infographic*, *supra* note 16.

domestic communities could act for themselves within the ISDS system. To this end, Section II.E argues that the *Tokios Tokelès* doctrine could be used to provide an onramp for domestic parties to file ISDS claims themselves.

C. *Legal Strategy One: Drawing on the Doctrine of Indirect Expropriation to Stop Governments from Eliminating Programs*

To return to the context of the Mozambican social impact bonds, imagine if Mozambique tried to undertake efforts to eliminate key anti-malaria resources or regulations relied upon by the malaria bond-funded program. For example, the government of Mozambique might decide that it did not want to provide anti-malarial treatment in the country's restive north.<sup>111</sup> This would cause a spike in the national rate of malaria and have a negative effect on the ability of the anti-malaria control program to reach its targets. Alternatively, Mozambique might elect a leader who does not believe mosquitos cause malaria and wants to ban all anti-malarial pesticides from the country. Such a policy would mean that the anti-malaria control program would need to shut down.<sup>112</sup> What then? This Section explains how bondholders could use the concept of indirect expropriation to challenge such a policy reversal.

BITs and trade agreements typically allow governments to expropriate property (i) for a public purpose, (ii) in a non-discriminatory manner, and (iii) in return for "prompt, adequate and effective compensation."<sup>113</sup> These provisions relate to both "direct" and "indirect" expropriation.<sup>114</sup> Direct expropriation refers to the classic scenario in which the government declares it is taking property for a public purpose.<sup>115</sup> According to the Restatement (Third) of Foreign Relations Law of the United States, indirect expropriation includes situations in which the State "subjects alien property to taxation, regulation or other action that is confiscatory or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory."<sup>116</sup>

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111. Elsa Buchanan, *Mozambique: Towards a New War Between the Frelimo Government and Renamo Rebels*, INT'L BUS. TIMES (Mar. 1, 2016), <http://www.ibtimes.co.uk/mozambique-towards-new-war-between-frelimo-government-renamo-rebels-1546714> (noting tensions between northern and southern Mozambique).

112. An analogous scenario in a country in the Global North might be if a country had previously funded a criminal justice reform project—like efforts to prevent re-incarceration through the HMP Peterborough Bond—and then a subsequent government wanted to halt such programs. This could happen because of political shifts, such as was evident in the shift between the Obama and Trump Administrations' approaches to criminal justice issues.

113. See, e.g., U.S. MODEL BIT, *supra* note 12, art 6(1).

114. See, e.g., *id.*

115. E.g., *id.*, annex B, art. 3 (explaining that "direct expropriation[] [is] where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure").

116. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. g (AM. LAW. INST. 1987). "Indirect expropriation" and "fair and equitable treatment" are generally understood as overlapping but distinguishable concepts. Rudolf Dolzer & Felix Bloch, *Indirect Expropriation: Conceptual Realignments?*, 5 INT'L L.F. DU DROIT INT'L 155, 155. While claims under "fair and equitable treatment" are often premised on a violation of investor expectations, it may be reasonable to expect investors to foresee the possibility of direct and indirect expropriation. After all, expropriation is explicitly permitted under certain circumstances in many BITs. See, e.g., U.S. MODEL BIT, *supra* note 12, art 6(1). Violating fair and equitable treatment principles is not. As such, the clauses

Arbitral jurisprudence regarding the concept of *indirect expropriation* has bifurcated, with one line of cases standing for a more investor-friendly principle and the other line standing for a purportedly more State-friendly one.<sup>117</sup> The more investor-friendly line of cases instructs the arbitral panel to look solely at the effect of the government action on the investor.<sup>118</sup> The more State-friendly line of cases allows the arbitral panel to balance the government's purpose for the alleged indirect expropriation against the effect on the investor.<sup>119</sup> Since a survey of the existing jurisprudence suggests neither test is dominant, I consider how investors might bring a claim under both.<sup>120</sup>

The more investor-friendly set of cases is typified by *Tippets*, which establishes an “effects-test” for determining whether indirect expropriation has occurred. In *Tippets*, the Iranian government installed its own manager within a U.S. company. The tribunal held that “[t]he intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.”<sup>121</sup> *Metalclad*, a case filed under the NAFTA concerning actions by the Mexican government that limited a U.S. company's ability to exercise its permit to operate a hazardous waste landfill, adopts a similar logic.<sup>122</sup> *Metalclad* notes that “expropriation under NAFTA includes . . . covert or incidental interference with the use of property which *has the effect* of depriving the owner . . . of the . . . economic benefit of property even if not necessarily to the obvious benefit of the host State.”<sup>123</sup>

In defining the “effects test,” Rudolf Dolzer and Felix Bloch pose the following question:

Is it of any relevance, for instance, whether a government restricts the right of an owner with a view to limiting the earning potential of property in general, or whether the government acts to counter a certain environmental threat and for this purpose deems itself compelled to limit rights of property owners?<sup>124</sup>

The “effects” test answers this question in the negative. It does not examine whether the State had a pro-human rights purpose for its action. As such, investors seeking to challenge a pro-human rights policy can do so much more forcefully under the line of cases embodying the *Tippets-Metalclad* “effects”

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regarding expropriation merely seek to ensure that any such State action is (i) in the public interest and (ii) coupled with “prompt, adequate and effective compensation.”

117. See generally Dolzer & Bloch, *supra* note 116 (providing a detailed exposition of each line of cases); see also Peter D. Isakoff, *Defining the Scope of Indirect Expropriation for International Investments*, 3 GLOBAL BUS. L. REV. 189, 197-200 (2013) (discussing these two lines of cases).

118. Isakoff, *supra* note 117, at 197-200.

119. *Id.*

120. Dolzer & Bloch, *supra* note 116, at 163 (“[I]t does not seem possible to characterize either of the two approaches as dominant or as representing the mainstream of international thinking.”).

121. *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA et al.*, 6 Iran-U.S. C.T.R. 219, 225-26 (Jun. 22, 1984); see also Dolzer & Bloch, *supra* note 116, at 161-62 (quoting *Tippets*).

122. Dolzer & Bloch, *supra* note 116, at 162.

123. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 103 (Aug. 30, 2000) (emphasis added); see also *Pope & Talbot Inc. v. Government of Canada*, Interim Award, 7 ICSID Rep. 69 (June 26, 2000) (further discussing the concept of indirect expropriation); Dolzer & Bloch, *supra* note 116, at 162-63 (discussing *Metalclad*).

124. Dolzer & Bloch, *supra* note 116, at 158.

test.

In the context of the Mozambican social impact bond, bondholders might wish to respond to certain government actions by filing a claim under the definition of indirect expropriation laid out in one of the core cases in the *Tippets-Metalclad* line: *Biloune v. Ghana*.<sup>125</sup> *Biloune* defines indirect expropriation as government action that “ha[s] the effect of causing the irreparable cessation of work on the project.”<sup>126</sup> If the Mozambican government decided to end anti-malaria efforts, this could cause the “irreparable cessation of work” for the anti-malaria control program, reducing the value of the bond to zero. This would likely constitute indirect expropriation.<sup>127</sup> While the government may seek to invoke a public interest exception to claims of indirect expropriation, it is unlikely that such an argument would succeed since the challenged government action—undermining malaria treatment—is directly contrary to the public interest. After all, if Ethyl could push Canada to change course even though Canada *did* have public interest motivations for its ban on MMT,<sup>128</sup> bondholders should certainly be able to successfully pursue a claim when the government does *not* have a public interest motivation for its action.

For similar reasons, bondholders may have a strong argument under the seemingly more State-friendly line of indirect expropriation cases, which look to the State’s purpose for the challenged action. Peter Isakoff notes that this test can look for a number of factors, such as whether the State enriched itself or whether it was targeting a specific investor. Nevertheless, “[m]ore often, tribunals examine whether a state action promotes the general welfare.”<sup>129</sup> The government’s purpose in promoting the general welfare is sometimes balanced against the harm to the investor.<sup>130</sup> In the Mozambican context, investors would be well positioned to argue that government action extinguishing an anti-malaria

125. *Biloune & Marine Drive Complex Ltd. v. Ghana Inv. Ctr. & Gov’t of Ghana*, UNCITRAL, Ad Hoc Award on Jurisdiction and Liability (Oct. 27, 1989), 95 I.L.R. 187 (1994) [hereinafter *Biloune Award on Jurisdiction and Liability*]; *Biloune & Marine Drive Complex Ltd. v. Ghana Inv. Ctr. & Gov’t of Ghana*, UNCITRAL, Ad Hoc Award on Damages and Costs (June 30, 1990), 95 I.L.R. 211 (1994).

126. *Biloune Award on Jurisdiction and Liability*, *supra* note 125, at 209; *see also* Dolzer & Bloch, *supra* note 116, at 162 (discussing *Biloune*).

127. If the government moved to end the program itself, investors would have a strong argument that such a sudden shift in government policy violates fair and equitable treatment. A government shift towards banning materials necessary for anti-malaria work or banning anti-malaria work in relevant part of the country would likely violate this standard. The fair and equitable treatment standard is present in the BIT between Mozambique and the United States. *See* Treaty Between the Government of the United States of America and the Government of Mozambique Concerning the Encouragement and Reciprocal Protection of Investment, Mozam.-U.S., art. II, Dec. 1, 1998, 80 Stat. 271. Such a sudden shift in policy would *prima facie* appear to violate the idea of consistency inherent in fair and equitable treatment principles.

128. Although the merits of that case were never adjudicated, Canada’s quick settlement with Ethyl Corporation was a signal that Canada believed the corporation had a reasonable likelihood of winning on the merits.

129. Isakoff, *supra* note 117, at 200; *see also* L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 19 ICSID REV. 293, 322 (2004) (emphasizing that the tribunal in *Feldman v. Mexico* stated that, in examining the purpose of State action, “governments must be free to act in the broader public interest”) (quoting Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, ¶ 103 (Dec. 16, 2002)).

130. *See* Fortier & Drymer, *supra* note 129, at 324-25 (discussing the proportionality principle in expropriation cases).

program is counter to the general welfare. This would complicate the government's ability to argue that its actions were indeed for the general welfare, and therefore justified.

Even if bondholders' claims against government efforts to eliminate social programs were never adjudicated in court, the claims would likely serve as a powerful political tool to focus the minds of governments on the need to change course. Were Mozambique to stop an essential medical service, it would almost certainly face dramatic domestic and international pressure.<sup>131</sup> The investors' ISDS claims could help this effort by forcing the government to justify its policies in arbitral courts and by raising the financial cost to the government for its anti-health policy choices. If coordinated with domestic constituencies, the claims might help protect human rights at a critical moment in the country's history.

#### D. *Legal Strategy Two: Litigating Human Rights Claims Using the Doctrine of Fair and Equitable Treatment*

What if a government decides that rather than eliminating a needed social program, as described in the hypothetical above, it will merely seek to defund a social program or degrade it? This Section provides a theory of how the doctrine of fair and equitable treatment could be used to press claims against such government policies.

The 2003 case of *Tecmed v. Mexico* is foundational for understanding how the principle of fair and equitable treatment came to provide a basis for investor complaints against a broad set of government actions.<sup>132</sup> *Tecmed* stems from a disagreement between Tecmed and the Mexican government over the government's decision not to renew the company's operating license. Rudolf Dolzer notes that *Tecmed* is famous for helping to make "investor expectations" into a "central pillar" of the concept of fair and equitable treatment.<sup>133</sup> *Tecmed* states:

The Arbitral Tribunal considers that this [fair and equitable treatment] provision of the Agreement . . . requires the Contracting Parties to provide to international investments treatment that does not affect the *basic expectations that were taken into account by the foreign investor to make the investment*. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relation with the foreign investor, *so that it may know beforehand*

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131. See, e.g., TREATMENT ACTION CAMPAIGN, <http://tac.org.za> (last visited Apr. 20, 2018) (providing an example of a mass-social movement in response to the efforts of the South African government to prevent people with HIV/AIDS from receiving needed treatment).

132. *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003) [hereinafter *Tecmed Award*]. Rudolf Dolzer's analysis of *Tecmed* and related cases was critical to this Section. See Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 17-18 (2014).

133. Rudolf Dolzer has tracked the evolution of fair and equitable treatment since *Tecmed* and identified seven broad concepts that it encompasses: "good faith in the conduct of a party, consistency of conduct, transparency of rules, recognition of the scope and purpose of laws, due process, prohibition of harassment, a reasonable degree of stability and predictability of the legal system, and, in particular, recognition of the legitimate expectation on the part of the investor." Dolzer, *supra* note 132, at 15. He notes that "legitimate expectation on the part of the investor"—referred to in this Note as "investor expectations"—is the "central pillar." *Id.* at 17.

*any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. . . .* The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.<sup>134</sup>

As defined by *Tecmed*, any claimant seeking to prove a violation of investor expectations will need to prove (i) that the investor relied on her expectations about the State's future actions in planning or launching her business; (ii) that the State changed its action contrary to investor expectations; and (iii) that this change was "arbitrary." "Arbitrary" is subsequently defined as "presenting insufficiencies that would be recognized . . . 'by any reasonable and impartial man,' . . . as being contrary to the law because[] ' . . . (it) shocks, or at least surprises, a sense of juridical propriety.'"<sup>135</sup>

*Tecmed's* expansive definition of "investor expectations" is important in the development of ISDS jurisprudence for two reasons. First, to the extent policymakers are aware of ISDS's underlying doctrine, *Tecmed* tilts the arbitral scales against any change in public policy. This is because States can comply with the *Tecmed* rule and act "consistently" simply by maintaining the status quo at the moment they receive a foreign investment. It is only when a State deviates from the status quo that an investor could have a potential claim. In this way, the *Tecmed* principle can be seen as fostering regulatory freeze<sup>136</sup> and ensuring the stable, unchanging regulatory environment that business tends to prefer.<sup>137</sup>

A second reason *Tecmed* is significant is that it spurred a line of cases that have further interpreted the threshold for establishing "investor expectations."<sup>138</sup> Marc Jacob and Stephan Schill have noted that some tribunals have only been willing to examine a fair and equitable treatment claim if a "quasi-contractual relationship between the State and the investor" exists.<sup>139</sup> However, other tribunals have been willing to adopt a much more relaxed standard, and have been willing to consider the general regulatory environment that existed at the time of the investment as relevant to establishing a violation of fair and equitable treatment principles.<sup>140</sup>

134. *Tecmed Award*, *supra* note 132, ¶ 154 (emphasis added).

135. *Id.* (footnotes omitted).

136. See Grewal, *supra* note 13 (stating that ISDS's indirect expropriation and fair and equitable treatment jurisprudence has led to "regulatory chill").

137. See, e.g., *Infrastructure Investment: Bridging the Gap Between Public and Investor Needs* BLACKROCK I (Nov. 2015), <http://www.blackrock.com/corporate/en-za/literature/whitepaper/viewpoint-infrastructure-investment-november-2015.pdf> (stating that "develop[ing] a stable and consistent regulatory environment for infrastructure investment" will help strengthen "private capital markets[]" investment in infrastructure").

138. Dolzer, *supra* note 132, at 18 (noting that, after *Tecmed*, "in a series of decisions, arbitral jurisprudence has unfolded the essence of fair and equitable treatment and has identified the significance of legitimate expectations for understanding the standard") (citations omitted).

139. Marc Jacob & Stephan W. Schill, *Fair and Equitable Treatment: Content, Practice, Method* 26 (Amsterdam Ctr. for Int'l Law, Research Paper No. 2017-20, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2933425](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2933425).

140. *Id.* at 26-27 (citing relevant cases); see Grewal, *supra* note 13 ("Regulations that diminish the value of foreign investors' private property are frequently the subject of regulatory disputes alleging

For example, *Suez v. Argentina*, a dispute over Argentina's decision to alter the tariff rates affecting the Suez company, notes that arbitrators considering the concept of investor expectations must ask themselves, "What would have been the legitimate and reasonable expectations of a reasonable investor in the position of the Claimants, at the time they made their investment . . . ?"<sup>141</sup> *National Grid* provides guidance to arbitrators considering this question by indicating that the reasonable investor can build his or her expectations based on the "context in which the investment was made."<sup>142</sup> Subsequent panel decisions have read this criterion to include a broad set of contextual factors; *National Grid* itself shows that relevant contextual factors can include presidential statements about the government's purpose in allowing investments generally.<sup>143</sup> In the case of TransCanada's recent claim regarding the Keystone XL pipeline, Cory Adkins and David Singh Grewal note that TransCanada had argued that its interpretation of the U.S. Constitution could serve as the basis for its own investor expectations.<sup>144</sup> Given the expansiveness of the investor expectations test and its centrality to fair and equitable treatment, it is unsurprising that Dolzer refers to the concept of fair and equitable treatment as the "broadest of all" the substantive standards contained in most BITs and IIAs.<sup>145</sup>

Despite the investor-friendly nature of *Tecmed* and its progeny, arbitral tribunals have noted a public interest defense to claims that a State has violated the fair and equitable treatment standard.<sup>146</sup> For example, *National Grid* notes that investors' expectations must "rise to the level of legitimacy and reasonableness" in that "the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well."<sup>147</sup> This public interest defense is theoretically powerful when investors' claims are in tension with a public policy goal—as with Phillip Morris' argument

'indirect expropriation' as well as a failure of fair and equitable treatment.").

141. *Suez v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 228 (July 30, 2010); see also Dolzer, *supra* note 132, at 19 (discussing *Suez*).

142. *National Grid P.L.C. v. Argentine Republic*, Award, ¶ 175 (Nov. 3, 2008) [hereinafter *National Grid Award*].

143. *Id.* ¶ 176.

144. Cory Adkins & David Singh Grewal, *Democracy and Legitimacy in Investor-State Arbitration*, 126 *YALE L.J.F.* 65, 75 (2016) ("To those readers unfamiliar with the operation of investor-state dispute resolution, it may seem strange to charge an ad hoc investment tribunal with deciding the legality of the State Department's actions under the U.S. Constitution or an Executive Order. But TransCanada can point to a growing body of investment arbitration awards that base violations of investor's legitimate expectations on interpretations of domestic law."). TransCanada subsequently withdrew its ISDS claim after the Trump Administration signaled its willingness to approve the Keystone XL pipeline. See *TransCanada Suspends \$15-Billion NAFTA Suit on Keystone XL Pipeline*, STAR (Feb. 28, 2017) <https://www.thestar.com/business/2017/02/28/transcanada-suspends-15-billion-nafta-suit-on-keystone-xl-pipeline.html>.

145. Dolzer, *supra* note 132, at 10.

146. There are two other limits on the concept. First, to make a claim that the State violated "investor expectations," the investor must have relied upon its (now violated) expectations when making its investment. See *Tecmed Award*, *supra* note 132, ¶ 154. Second, there is a presumption against using "investor expectations" to "[shield investors] from the ordinary business risk of the investment." *National Grid Award*, *supra* note 142, ¶ 175.

147. *National Grid Award*, *supra* note 142, ¶ 175 (quoting *Saluka Investments B.V. v. Czech Republic*, Partial Award, ¶¶ 304-05 (Mar. 17, 2006)).

against tobacco regulations in Uruguay, for example.<sup>148</sup> However, as Canada's behavior with regards to Ethyl shows, States may not trust that an arbitral panel will uphold a public interest defense.<sup>149</sup> Like Canada, States may prefer to settle out of court and reverse the policy rather than take their chances before the panel. Thus, the public interest defense may be practically impotent as a protection against attacks on States' pro-human rights policies.

Social impact investors could use the expansive *Tecmed* doctrine to advance human rights. The example of the Mozambique malaria bond illustrates how this might work in practice. In the context of Mozambique, the government may have influence over the supply of anti-malaria medications to clinics. It may also be responsible for controlling the quality of medications entering its market and for preventing theft or diversion of medications along its supply chain. There is a strong social interest in ensuring the government maintains these health systems. A failure to maintain medical supply chains could have implications beyond malaria. For example, a breakdown in anti-fraud measures could allow fake anti-retroviral medications to enter the market. Alternately, theft along the supply chain may create shortages for multiple classes of drugs.

It is possible to imagine two scenarios by which the government might degrade the national medical supply chain. First, it might fail to ensure that a sufficient quantity of anti-malaria medications moves through the country. Second, it might fail to provide quality control, such that many fraudulent or faulty anti-malaria medications enter the supply chain. Degraded medical supply chains would deprive the anti-malaria control program funded by the bond of needed medications. This might lead to a spike in the rate of malaria in the country, meaning the program would not hit its malaria control targets. Depending on the severity of the problem, this could reduce the value of the bondholders' assets to zero.

In such a situation, bondholders could invoke *Tecmed* to argue that the government's actions constitute a violation of fair and equitable treatment. Under *Tecmed*, States have an obligation to act "consistently" and with regard to the "basic expectations that were taken into account by the foreign investor" when making the investment.<sup>150</sup> Even if investors cannot argue that they expected the medical supply chain to strengthen after they made their investment, they could plausibly argue that they could not have reasonably expected it would weaken. Thus, weakening the supply chain could constitute a violation of investors' reasonable expectations at the time of investment. For example, to support their claim, the investors could point to *National Grid's* instruction that investment expectations are rooted in the "context in which the investment was made." As noted earlier, *National Grid* indicates that presidential statements can serve as

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148. See *Philip Morris Sues Uruguay Over Graphic Cigarette Packaging*, NPR (Sept. 15, 2014), <https://www.npr.org/sections/goatsandsoda/2014/09/15/345540221/philip-morris-sues-uruguay-over-graphic-cigarette-packaging>.

149. In this case, Ethyl filed under a theory of indirect expropriation. See *Ethyl Corp. Award*, *supra* note 1, ¶ 7. As explained in the Section immediately below, there is a public interest defense against a claim of indirect expropriation.

150. *Tecmed Award*, *supra* note 132, ¶ 154.

the basis for investor expectations.<sup>151</sup> Even if many social impact bonds are not tied to government financing, they are often issued pursuant to a government's political commitment to provide funding to a needed social program.<sup>152</sup> Government statements expressing this sentiment may strengthen investors' arguments that they reasonably expected the country to maintain the quality of social services within a particular area, such as anti-malaria work. Any government deviation from this commitment could constitute a violation of investors' reasonable expectations and, by extension, a violation of fair and equitable treatment.

Investors' arguments that worsening social services constitutes a violation of fair and equitable treatment would find support in *TCW v. Dominican Republic*.<sup>153</sup> This case stems from a concession agreement that TCW had received from the Dominican Republic to provide electricity on the island. TCW brought a series of claims under the Dominican Republic-Central American Free Trade Agreement (CAFTA-DR) relating to the Dominican Republic's behavior regarding this concession. It claimed that the Dominican Republic had failed to "use its sovereign power to effective[ly] enforce existing laws criminalizing the theft of electricity and to provide [TCW] the legal protection necessary to collect its bills for electricity."<sup>154</sup> TCW argued that the Dominican Republic had violated the fair and equitable treatment protections afforded to investors in the CAFTA-DR treaty because it had repeatedly represented it would curb electricity theft in the sector but failed to take action to do so.<sup>155</sup> Though the arbitral panel never reached the merits of this argument, the Dominican Republic settled with TCW and a group of other, similar claimants for \$26 million.<sup>156</sup>

This case is significant in two ways. First, it suggests that if bondholders are able to secure representations from the government to maintain strong health systems—and the government later deviates from this promise—then the bondholders may have a colorable claim that the government violated fair and equitable treatment principles.<sup>157</sup> Second, it shows that even the threat of a

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151. National Grid Award, *supra* note 142, ¶¶ 176-77.

152. With the Peterborough Social Impact Bond in the U.K., for example, the Justice Secretary indicated that reducing the recidivism rate was a political priority. Nicholas Timmins, *Bond Project Aims To Cut Rate of Reoffending*, FIN. TIMES (Sept. 9, 2010), <http://www.ft.com/content/35123f02-bc5c-11df-a42b-00144feab49a>.

153. TCW Group, Inc. & Dominican Energy Holdings, L.P. v. Dominican Republic, Amended Notice of Arbitration & Statement of Claim (June 17, 2008).

154. *Id.* ¶ 9(f).

155. These standards included an "obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings" as well as "full protection and security." *Id.* ¶¶ 133-35 (thereby finding that the Dominican Republic had violated the fair and equitable treatment obligation under CAFTA-DR).

156. Luke Eric Peterson, *Dominican Republic Settles Trio of Electricity Arbitrations*, INV. ARB. REP. (Sept. 19, 2009), <http://www.iareporter.com/articles/dominican-republic-settles-trio-of-electricity-arbitrations>.

157. Even if private corporations issue the social impact bonds, they may do so conditional on such government statements. The government may be induced to make such a statement so as to secure additional funding for malaria treatment. Of course, successive governments might deviate from the promise to vigorously combat malaria by defunding or degrading such programs. Similarly, a government might commit to funding healthcare efforts, and successive governments might seek to defund such efforts. Such a scenario can be seen in the transition between the Obama and Trump Administrations.

relatively modest \$26 million claim can win results. Thus, even if investors may not ultimately prevail before an arbitral panel, their ability to build a colorable claim may be enough to force the government to the negotiating table. By coordinating with domestic activists, investors may be able build a political and legal strategy to push the government into maintaining its previous levels of service provision. In this way, bondholders' ISDS claims may be a tool to combat backsliding by governments that start defunding or degrading social services.

*E. Legal Strategy Three: Using Tokios Tokelés to Include Domestic Parties in the ISDS Regime*

By purchasing a social impact bond, investors can purchase the right to advocate for the policies *they* desire through ISDS provisions. However, this does not necessarily mean that they will advocate for the policies that *communities* desire. The gap between investor and community aims may be particularly strong when the investor is from the Global North and the community is in the Global South, as in the Mozambican example above. For this reason, investors seeking to advance human rights claims through ISDS mechanisms should do so in close coordination with social movements and domestic parties affected by the challenged government actions.

To ensure domestic communities' priorities are properly represented, however, ideally local communities would be able to access the ISDS system directly themselves. In theory, the ISDS system is set up explicitly to prevent this possibility—only foreign investors are supposed to be able to access it. Yet, *Tokios Tokelés* shows that the concept of the foreign investor has been expanded to the point that it has accommodated domestic claimants posing as foreign investors. Therefore, local communities are not necessarily excluded from gaining the protections of the ISDS regime.

*Tokios Tokelés v. Ukraine* is a particularly prominent example of the expansiveness of the concept of the “foreign investor.”<sup>158</sup> In *Tokios Tokelés*, Ukrainian nationals owned ninety-nine percent of the outstanding shares and comprised two-thirds of the management of Tokios Tokelés, which was constituted as a Lithuanian joint stock company.<sup>159</sup> Even though Tokios Tokelés was effectively owned and controlled by Ukrainians, the ISDS tribunal permitted Tokios Tokelés to bring a claim against Ukraine.<sup>160</sup> This is because the panel declined to analyze the nationality of Tokios Tokelés based on “the origin of [its] capital.”<sup>161</sup> Rather, the panel found that “the only relevant consideration [was] whether the Claimant [was] established under the laws of Lithuania.”<sup>162</sup> The *Tokios Tokelés* decision showcases the plasticity of the notion of a “foreign” investor. It shows how domestic nationals can use creative corporate structures

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Investors in social bonds tied to health outcomes might be able to file claims in such a scenario.

158. *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004) [hereinafter *Tokios Tokelés Decision*]; see also DUGAN ET AL., *supra* note 75, at 322-25.

159. *Tokios Tokelés Decision*, *supra* note 158, ¶ 21; DUGAN ET AL., *supra* note 75, at 322.

160. *Tokios Tokelés Decision*, *supra* note 158, ¶ 108.

161. *Id.* ¶ 80.

162. *Id.* ¶ 38.

to gain the protections of a BIT or IIA containing ISDS provisions.

The malleable way in which the nationality of an investor is interpreted in most BITs and IIAs has also had the paradoxical effect of extending the coverage of most investment agreements beyond the parties to the agreements themselves. For example, the United Nations Conference on Trade and Development (UNCTAD) notes that “as long as a country has one (broadly worded) IIA, an investor from *any country* could potentially benefit from that IIA by structuring its investment into the country concerned through an entity established in the other contracting party.”<sup>163</sup> This can have a dramatic impact in terms of enlarging the geographic coverage of an IIA. UNCTAD notes, for example, that fifty-six percent of foreign affiliates covered by the proposed Regional Comprehensive Economic Partnership (RCEP) are in fact ultimately owned by a parent company that is not a member of one of the ten Asian countries who may sign this free trade agreement.<sup>164</sup> This means that while in theory only foreign investors who are nationals of RCEP-member countries should be able to invoke ISDS protections, in fact *the majority* of the entities that could invoke ISDS protections are not nationals of these countries.

This provides a route for local communities to gain the protection of the ISDS regime. To do so, local communities must first identify a revenue stream upon which to base their claim and a method for making that revenue stream legally “foreign.” While the suggestions below are intended only as skeletal blueprints of how this might be achieved, it appears that it can be done.

With regards to the revenue stream, low-income communities’ aggregated income represents a significant source of income. Consider, for example, the financial power of burial societies<sup>165</sup> and agricultural cooperatives.<sup>166</sup> Each of these revenue streams could serve as the basis for potential ISDS claims if they can be legally classified as a revenue stream directed to a foreign entity. In the current age of corporate inversions and Tokios Tokelés-like corporate structures, such a task should be feasible. For example, agricultural cooperatives could incorporate abroad so as to appear foreign, much as Tokios Tokelés did.

If the revenue streams underpinning burial societies and agricultural cooperatives could be made legally foreign, domestic communities would likely gain powerful protections from the ISDS regime to push back against policies they oppose. For example, suppose the government decides to remove smallholder farmers from their land, such that earning an income from farming becomes virtually impossible.<sup>167</sup> This would effectively end the revenue stream

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163. U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2016—INVESTOR NATIONALITY: POLICY CHALLENGES 185 (2016) (emphasis added).

164. *Id.* at 186.

165. See, e.g., Steve Kretzmann, *Why I Belong to a Burial Society*, GUARDIAN (Oct. 12, 2015), <http://www.theguardian.com/global-development-professionals-network/2015/oct/12/why-i-belong-to-a-burial-society-south-africa> (providing an analysis of a burial society in South Africa).

166. See, e.g., *About National Council of Farmer Cooperatives*, NAT’L COUNCIL FARMER COOPERATIVES, <http://ncfc.org/about-ncfc> (last visited Apr. 20, 2018) (explaining the purpose of farmer cooperatives in the U.S. context).

167. See, e.g., *Ethiopia: Land, Water Grabs Devastate Communities*, HUM. RTS. WATCH (Feb. 18, 2014), <https://www.hrw.org/news/2014/02/18/ethiopia-land-water-grabs-devastate-communities> (describing instances of Ethiopia removing “pastoralists” from their land).

of the cooperative. Such an action would arguably “constitute constructive expropriation” under *Biloune* as it would “ha[ve] the effect of causing the irreparable cessation” of the activities that generated the revenue stream in the first place (i.e., farming).<sup>168</sup> If the State originally had a policy in place to protect smallholders’ land tenure, it would likely be possible to argue that this policy shift constituted a violation of *Tecmed*’s principles of “consistency” and “non-arbitrary” behavior. If the agricultural cooperative had incorporated abroad, then it would have standing under *Tokios Tokelés*. As such, the “foreign” cooperative may well have strong claims under fair and equitable treatment and indirect expropriation principles.

To the extent that domestic communities’ revenue streams could be structured so as to afford them the legal protections of the ISDS regime, this would be preferable to trying to advance pro-human rights aims through bondholder claims. As such, it is worth investigating further the potential implications of *Tokios Tokelés* for domestic communities so that they could begin using the ISDS regime directly to fight for their priorities. That is not to say, however, that domestic communities should pursue justice solely through ISDS mechanisms to the exclusion of domestic avenues. Just as any effort by investors to advance human rights is most likely to be successful if coordinated with domestic movements, so, too, domestic communities would do well to use ISDS claims as one prong of a larger strategy for advancing human rights through the streets, through the courts, and through the legislature.

### III. REASONS TO USE ISDS TO ADVANCE HUMAN RIGHTS

While the previous Parts have explained how it may be possible for bondholders and domestic claimants to use the ISDS regime to advance human rights, this Part argues that doing so would be advantageous for two separate reasons. First, the strategies proposed in this Note can work in the short term to advance human rights, whereas other efforts to reform or eliminate the ISDS regime are longer-term efforts. Second, ISDS claims can serve as a potent tool for focusing the mind of the government and pushing it to adopt pro-human rights policies, especially when coupled with pressure from domestic constituencies. I consider each argument in turn.

#### A. *A Short-Term Solution Amidst a Thicket of Long-Term Proposals*

To understand the advantages of this Note’s proposed approach, it is helpful to understand existing efforts to either reform or eliminate the ISDS regime. On the reform side, a number of academics have put forward suggestions

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168. *Biloune Award on Jurisdiction and Liability*, *supra* note 125, at 209.

for improving both the procedural<sup>169</sup> and substantive<sup>170</sup> elements of the regime. These reform efforts won a significant victory when both the United States and Canada adopted some of the proposed changes to ISDS provisions in their own model BITs.<sup>171</sup>

Other States have sought to effectively eliminate the ISDS regime altogether by withdrawing from it. In the Global North, much of the skepticism regarding ISDS emanates from Europe. For example, the ISDS provisions in the Transatlantic Trade and Investment Partnership (TTIP) threatened to sink the entire negotiation process, with the European Commission suspending negotiations for ninety days in early 2014 to allow for public consultations.<sup>172</sup> Yet the most strident antagonism towards ISDS has come from the Global South. Countries like Ecuador, Bolivia, and Venezuela have submitted written notices of denunciation of the ICSID Convention, a key convention underpinning the ISDS regime.<sup>173</sup> Brazil has refused to sign any treaties with ISDS mechanisms in them.<sup>174</sup> South Africa<sup>175</sup> and Indonesia<sup>176</sup> have both begun withdrawing from key BITs, in part due to the ISDS provisions contained within them.

While efforts to eliminate the ISDS regime may succeed in the long term,

169. WORLD INVESTMENT REPORT 2015, *supra* note 34, at 28 (“Reform options include improving the existing system of investment arbitration (refining the arbitral process, circumscribing access to ISDS), adding new elements to the existing system (e.g. an appeals facility, dispute prevention mechanism) or replacing it (e.g. with a permanent international court, State-State dispute settlement, and/or domestic judicial proceedings).”); *see also* David Gartner, *Private Investment and Public Health*, 43 GA. J. INT’L & COMP. L. 141, 153 (2014) (“Critics of the current international investment regime have suggested a number of possible reforms to the system of investor-state dispute settlement. These proposed reforms range from greater transparency, to a permanent appellate body. . . .”); Maria Sarmiento, *General Proposals To Improve the Current Dominating System of Investor-State Disputes Settlement* (Nov. 30, 2015) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2702564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2702564).

170. *See, e.g.*, Trans-Pacific Partnership art. 9.6(4), *opened for signature* Feb. 4, 2016, <http://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (not yet in force) (trying to cabin the “fair and equitable treatment” doctrine by stating that “the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of [fair and equitable treatment]”); *id.* art. 29.5 (stating that the ISDS regime cannot be used to challenge tobacco control measures).

171. Mavluda Sattorova, *Reassertion of Control and Contracting Parties’ Domestic Law Responses to Investment Treaty Arbitration: Between Reform, Reticence and Resistance*, in REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME 53, 54-55 (Andreas Kulick ed., 2016) (noting that these review efforts led the United States and Canada to include “references to the promotion of sustainable development as one of the overarching treaty objectives alongside investment protection, more detailed and elaborate provisions on expropriation and the guarantee of fair and equitable treatment and public policy exceptions” in their treaty policies going forward).

172. Shawn Donnan & Stefan Wagstyl, *Transatlantic Trade Talks Hit German Snag*, FIN. TIMES (Mar. 14, 2014), <http://www.ft.com/cms/s/0/cc5c4860-ab9d-11e3-90af-00144feab7de.html>.

173. Sattorova, *supra* note 171, at 54 (regarding Ecuador and Bolivia); Sergey Ripinsky, *Venezuela’s Withdrawal from ICSID: What It Does and Does Not Achieve*, INT’L INST. FOR SUSTAINABLE DEV. (Apr. 13, 2012) <https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve> (regarding Venezuela).

174. *The Arbitration Game*, ECONOMIST (Oct. 11, 2014), <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration>.

175. Jonathan Lang, *Bilateral Investment Treaties—A Shield or a Sword?*, BOWMAN GILFILLAN (Nov. 8, 2013), <http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-Bilateral-Investment-Treaties.pdf>.

176. Rick Beckmann, Remco Smorenburg, Jessica de Rooij & Kayla Feld, *BIT by BIT in Indonesia: Signs of a Push-Back on Foreign Investment*, NORTON ROSE FULBRIGHT (Oct. 2014), <http://www.nortonrosefulbright.com/files/20141002-bit-by-bit-in-indonesia-121533.pdf>.

they are unlikely to yield meaningful results in the near to medium term. This is not only because the United States, which maintains a dominant position within the global trade infrastructure, remains a supporter of ISDS.<sup>177</sup> More significantly, many BITs include “sunset” provisions so they can survive even after one side terminates. For example, the 2012 U.S. Model BIT ensures that ISDS mechanisms remain in place for a decade, even if one party unilaterally withdraws.<sup>178</sup> Germany’s 2008 Model BIT contains a similar clause that keeps the ISDS provision in place for two decades after termination.<sup>179</sup> As a practical matter, therefore, ISDS provisions in some form or another are almost certain to remain for at least another generation.

It is therefore worth asking whether existing ISDS provisions can be used to influence governments to adopt, or at least not roll back, pro-human rights policies. Preferring instead to focus on macro-level questions, scholars and activists have left this question largely unaddressed. Investors and domestic communities can answer this question by pursuing the three legal strategies detailed above.

If ISDS claims could be used to pressure States to maintain pro-human rights policies, they would act as an effective counterweight to investors’ attempts to challenge State policies. Governments have begun accounting for ISDS-related risk in their decision-making processes.<sup>180</sup> Because existing ISDS claims are almost always brought in order to preserve private business interests, governments typically consider ISDS as a factor against pursuing a pro-human rights policy that will negatively impact corporate concerns. If social impact investors and domestic communities begin to bring human rights-related ISDS claims, governments will have to recalibrate how they understand the risks posed by the ISDS regime. Over time, governments may come to understand that pursuing a course of action that backtracks on their human rights obligations could provoke an ISDS claim. Thus, the cumulative effect may be to alter the policymaking environment so as to disincentivize governments from failing to fulfill their human rights obligations. If investors’ claims are putting countries into a regulatory freeze, claims that push States to pursue pro-human rights policies could bring some much-needed defrosting.

### *B. The Advantages of Using Private Arbitration to Advance Human Rights*

Channeling human rights disputes into a private arbitration system is not without its pitfalls. Even when proceedings are made public, ISDS mechanisms can remain opaque to the public, meaning that many people will not understand the proceedings that are adjudicating their human rights. While conceding that this is troubling, this Note argues for a practical response to existing realities.<sup>181</sup>

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177. See, e.g., U.S. MODEL BIT, *supra* note 12, art. 24; Grewal, *supra* note 13 (noting America’s apparent unwillingness to abandon the ISDS system).

178. See U.S. MODEL BIT, *supra* note 12, art. 22(3).

179. GERMAN MODEL TREATY–2008, *supra* note 12, art. 13.

180. See Van Harten & Scott, *supra* note 59.

181. One reason it is important that investors coordinate with domestic constituencies is to help

Whether desirable or not, companies are already bringing human rights claims into the ISDS arena. This Section identifies three important reasons why investors should respond by affirmatively seeking to vindicate human rights claims in ISDS proceedings.

One reason that investors might want to pursue the strategies proposed in this Note is that ISDS mechanisms can provide a unique, private right of action to proceed directly against governments attacking human rights. This sort of private right is rare in international law, in which, traditionally, “nation-states bring public claims against one another based on treaty or customary international law before international tribunals of limited competence.”<sup>182</sup> While domestic courts do sometimes allow private individuals to proceed directly against governments on human rights claims, the space for this sort of action may be closing. For example, the U.S. Supreme Court has narrowed the possibility for litigants to bring Alien Tort Statute (ATS) claims against foreign officials for violations of human rights.<sup>183</sup>

Meanwhile, although BITs, IIAs, and free trade agreements can include provisions or side agreements related to issues of human rights, they often do not provide an effective private right of action on human rights-related claims. The NAFTA, for example, includes “side agreements” on labor and environmental provisions.<sup>184</sup> These side agreements allow private actors to file petitions that trigger investigatory procedures. However, as opposed to investors, private actors are not easily able to compel arbitration over these environmental and labor provisions.<sup>185</sup> Even when groups do petition governments, these efforts are often in vain or delayed.<sup>186</sup> Given that international law mechanisms rarely provide a private right of action on human rights-related issues—and those that do are often slow and ineffective—the promise of a private right of action through ISDS mechanisms is significant.

A second reason investors might want to work within the ISDS regime to

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ensure that those who are affected by the legal proceedings will have at least a basic understanding of the claims themselves.

182. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2348 (1991).

183. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117 (2013) (“The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS.”).

184. See North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499 (1993); North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 (1993); see also Patricia Isela Hansen, *Dispute Settlement in the NAFTA and Beyond*, 40 TEX. INT’L L.J. 417, 421-22 (2005) (discussing the functionality of these side agreements).

185. See Jack I. Garvey, *Trade Law and Quality of Life—Dispute Resolution under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT’L L. 439, 445 (1995) (“The Side Agreements specifically reject the creation of private rights of action against any party beyond rights under that party’s own national law.”); see also Hansen, *supra* note 184 (noting that private citizens can “petition for investigation of specific environmental and labor issues and for the publication of factual reports regarding the results of these investigations” but that “these dispute settlement mechanisms are far less powerful than investor-state arbitration.”).

186. See Alex Lawson, *U.S. Loses First Labor Trade Case as Guatemala Prevails*, LAW360 (June 26, 2017), <http://www.law360.com/articles/938456/us-loses-first-labor-trade-case-as-guatemala-prevails> (“After nine years, the U.S. has come up short in its bid to punish Guatemala for labor violations under the Central American Free Trade Agreement—the first labor case brought under a trade deal.”).

advance human rights is that governments routinely comply with ISDS arbitral awards and, when they do not, private actors have succeeded in aggressively enforcing even large awards. This means that if social impact investors and domestic communities prevail on their claims, they may be able to recoup damages for affected communities. For example, if malaria bondholders prevail in a case against a government seeking to end malaria treatment, the funds they recoup could go towards buying medicines or other necessary treatment for affected populations.

Most importantly, as the examples of *Ethyl*, *Vattenfall*, and *Piero Foresti* show, often the real impact of ISDS claims is not measured in terms of their legal success, but whether they bring the government to the negotiating table. Once at the negotiating table, these companies are able to use the leverage of the ISDS claims in order to extract important policy concessions from the government. Similarly, social impact investors and domestic communities could use ISDS claims to force the government to negotiate over particular policy changes negatively affecting human rights. Such a strategy is most likely to prove effective when coupled with a popular domestic campaign. For instance, an ISDS claim regarding a government's decision to degrade malaria treatment could be coupled with domestic protests from affected communities. The collective influence of domestic political pressure and international legal pressure may help convince the government to change course.<sup>187</sup>

One important limitation on this strategy is that the threat of an ISDS claim must be credible in order for the government to take it seriously. It is likely that Germany only agreed to settle with *Vattenfall*, for example, because it believed that *Vattenfall* might actually succeed if the case were to proceed. Similarly, human rights-related ISDS claims will grow more potent once they prove a track record of success. As such, the first investors to try to use the ISDS mechanism to advance human rights would do well to advance claims that are well-grounded in existing jurisprudence. Returning to the example of the malaria bond, an ideal first case might be one against a government that initially issues a malaria bond and then later decides to ban essential anti-malaria medication, or ceases supporting anti-malaria activities altogether. Such a scenario would fall squarely within existing jurisprudence regarding indirect expropriation or fair and

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187. In rare instances, it may be possible for social impact investors or domestic communities to bring claims to directly counteract the claims of individual companies. As part of the settlement following *Vattenfall*, for example, Hamburg ended up taking action that the European Commission believed was contrary to existing EU environmental obligations. See Press Release, European Comm'n, *supra* note 47. In that case, domestic communities dependent on the Elbe River—or social impact investors with a financial stake in the fish of the Elbe—may have been able to bring a claim against the German government because Hamburg had harmed their own financial interests. The tensions created by the potential for competing claims might have had two positive effects. First, the German government may have felt compelled *not* to settle with *Vattenfall*, or to settle with *Vattenfall* on less conciliatory terms, in order to lessen the risk of claims from domestic communities or social impact investors. Second, if the German government had allowed *Vattenfall*'s claims to proceed to the arbitral panel, a parallel suit from investors or a domestic community would have highlighted for the arbitral panel the other potentially conflicting human rights obligations of the German government. Cf. Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L L. 200 (2011) (discussing human rights-related amicus curiae in ISDS). This may have helped make the panel more amenable to the government's position.

equitable treatment principles. If these early cases succeed, then cases that fall more on the edges of existing jurisprudence, such as a case concerning a situation where the government reduces its investment in the medical supply chain, may be credible enough to force the government to consider altering its policies.

#### CONCLUSION

Since the late 1950s, the ISDS regime has expanded both geographically and substantively. Key procedural elements of the ISDS regime enabled its substantive expansion, particularly with regards to fair and equitable treatment, indirect expropriation, and the concept of foreignness. As a result, companies have grown increasingly adept at using ISDS mechanisms to challenge social policies that they feel negatively affect their investments. Threatened with costly lawsuits and potential losses, States have often backtracked on pro-human rights policies. This trend has led to attempts to reform or eliminate the ISDS regime, but the regime appears deeply embedded within the international legal order.

Recognizing this reality, this Note has identified the types of claimants, and claims, that might advance a human rights agenda through ISDS mechanisms. If investors and domestic communities act with foresight, they can gain the right to make these claims through either a social impact bond or by structuring their assets to be covered by the relevant treaty. Following these strategies will allow them to pursue ISDS claims to challenge State attempts to degrade or eliminate important social policies.

Though these strategies require a significant investment of resources, they are likely to be well worth the effort given the potential for ISDS claims to lead to broader policy victories. As Ethyl's success against the Canadian government shows, ISDS claims by themselves can convince governments to quickly reverse course on a national policy. ISDS claims may be even more likely to convince governments to change course when coordinated with domestic social movements that can pressure the government to adopt pro-human rights policies. Beyond purely utilitarian considerations, investors would be wise to coordinate any ISDS claims with domestic movements. Failure to do so risks the possibility that foreign investors will impose their own vision of human rights on the domestic communities most directly affected.

Those working on longer-term efforts to reform or eliminate the ISDS regime may also have reason to support the proposals made in this Note. If domestic communities and investors begin filing claims, governments and even some commercial interests may rethink their support of the current ISDS regime. First, businesses may grow to resent the power that the ISDS regime affords social impact investors and domestic communities to push governments to maintain programs that, in some instances, may run counter to these businesses' interests. Second, governments may become even more aware of the degree to which the ISDS system's doctrinal provisions have expanded to allow multiple challenges to their policies. This may convince governments to push for procedural or treaty-based reforms of existing ISDS mechanisms. Alternatively, it may push governments to abandon the system altogether. Either way, investors and domestic communities who pursue the strategies outlined in this Note may

do more than other efforts already underway to hasten the reevaluation of the ISDS regime.