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THE HUMAN RIGHTS AND WRONGS OF FOREIGN DIRECT INVESTMENT: ADDRESSING THE NEED FOR AN ANALYTICAL FRAMEWORK

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I. INTRODUCTION

The absence of a global legal framework to hold multinational corporations ("MNCs") accountable for human rights abuses has long been a concern of human rights activists, and is now receiving widespread attention as part of a worldwide movement against corporate abuses.[1] This article re-examines the relationship between foreign direct investment ("FDI") and international human rights. It concludes that human rights can be promoted more effectively by developing a framework to identify and to make operational the positive human rights impacts of FDI, in conjunction with, rather than in opposition to, a rights-based approach. To be accurate and therefore effective, a separate framework should be designed to measure the influence of FDI on human rights conditions.

Human rights advocates criticize international human rights law – traditionally built on a state-centric regime – for not effectively addressing negative corporate human rights behavior and its impacts.[2] Just as valid is the criticism that international human rights advocates do not adequately address the positive human rights impacts of FDI.[3] Human rights activists who favor a strictly rights-based approach have a fundamental aversion to acknowledging the positive impacts, since, as Smita Narula explains, "a free market approach emphasizes non-interference by the state, while international human rights law is founded on the notion that states must intervene to respect, protect, and fulfill [certain human rights]."[4] A complete and objective analysis should take into account the positive impacts of FDI in the arenas of political and civil rights and of economic, social, and cultural rights, uninfluenced by the prospect that the results might favor less governmental fiscal interference.[5]

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[1] OccupyWallStreet, http://occupywallst.org/ (last visited Dec. 19, 2011).

[2] Dina Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. Int'l & Comp. L. Rev. 273, 297 (2002).

[3] Shannon Lindsey Blanton & Robert G. Blanton, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, Annual Meeting of the Midwest Political Science Association (April 7-10, 2005), http://nathanjensen.wustl.edu/me/files/Blanton.pdf.

[4] Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 Colum. J. Transnat'l L. 691, 701 (2006).

[5] *Id.*

The next section describes the categories of human rights that FDI most directly influences and then lays the groundwork for an analytical framework of input and output indicators for the measurement of positive and negative impacts. Section III concludes that, because FDI can result in positive, though not automatic, human rights impacts, international efforts to develop universal codes of corporate social responsibility should be complemented by efforts to develop a methodology for objectively gauging and predicting impacts of FDI on human rights.[6] Efforts should be made to advise governments – especially those of developing countries – on how to turn FDI into a positive force for the advancement of human rights.[7]

II. FOREIGN DIRECT INVESTMENT AND HUMAN RIGHTS

A. *Overview*

Under the current legal framework, human rights are classified within two broad categories: economic, social, and cultural rights, and civil and political rights. Economic, social, and cultural rights include the rights to health, housing, education, and employment.[8] Civil and political rights include the rights to due process, safety, protection from certain types of discrimination, the right to participate in civil society, and other basic freedoms.[9] A great deal of the literature on the human rights impacts of FDI[10] focuses on the need for corporate responsibility, regulation, and accountability[11] given the perceived

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[6] *Public Policy for Corporate Social Responsibility* (July 7-25, 2003), http://info.worldbank.org/etools/docs/library/57434/publicpolicy_econference.pdf.

[7] *Id.*

[8] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at art. 7 (Dec. 16, 1966), 993 U.N.T.S. 3 [hereinafter ICESCR].

[9] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at arts. 20, 24 & 26 (Dec. 19, 1966), 999 U.N.T.S. 171 [hereinafter ICCPR].

[10] The United Nations Conference on Trade and Development (UNCTAD) defines FDI as an "investment made by a resident of one economy in another economy . . . of a long-term nature or of 'lasting interest'" in which "the investor has a 'significant degree of influence' on the management of the enterprise." The significant degree of influence is understood as 10 percent of the voting shares. United Nations Conference on Trade and Development, Division on Investment and Enterprise, *FDI Flows and Stocks*, UNCTAD TRAINING MANUAL ON FDI STATISTICS AND THE OPERATIONS OF TNCS 35 (2009).

[11] *See generally* John Ruggie, *Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-related Human Rights Abuse*: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/HRC/8/5/Add.2 (May 23, 2008) (summarizing alleged corporate-related human rights

negative impacts of FDI on human rights.[12] While FDI can occur in various forms, MNCs are the "major players," making FDI essentially "the cross-border expansion of production undertaken by large corporations."[13] Perceived violations by MNCs of economic, social, and cultural rights include exploitation and abuse of labor,[14] pollution and other unhealthy damage to the environment,[15] the introduction of un-

abuse in 320 cases posted on the Business and Human Rights Resource Center webpage from Feb. 2005 to Dec. 2007); *On the Margins of Profit*, HUMAN RIGHTS WATCH (Feb. 2008), http://hrw.org/reports/2008/bhr0208/ (last visited Dec. 19, 2011); *see also* Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, ¶¶ 6-7, U.N. Doc E/C.12/2000/13 (Jan. 22-26, 1997), *available at* http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html (last visited June 20, 2011); Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 DENV. U. L. REV. 183 (2010); Ole Kristian Fauchald & Jo Stigen, *Transnational Corporate Responsibility for the 21st Century: Corporate Responsibility Before International Institutions*, 40 GEO. WASH. INT'L L. REV. 1025, 1045-46 (2009); Shanaira Udwadia, *Corporate Responsibility for International Human Rights Violations*, 13 S. CAL. INTERDISC. L.J. 359, 366 (2004).

12 Int'l Comm'n of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes, Corporate Complicity and Legal Accountability*, vols.1-3 (2008), *available at* http://www.business-humanrights.org/Updates/Archive/ICJ Paneloncomplicity (last visited Dec. 19, 2011); Juliette Bennett, *Business in Zones of Conflict - The Role of the Multinationals in Promoting Regional Stability*, INT'L PEACE FORUM (2001), http://www.unglobalcompact.org/issues/conflict_prevention/meetings_and_workshops/Reg_stability.html (last visited Dec. 19, 2011).

13 INTERNATIONAL INVESTMENT FOR SUSTAINABLE DEVELOPMENT: BALANCING RIGHTS AND REWARDS 15-16 (Lyuba Zarsky ed., 2005). The analysis of other possible major players such as state-owned enterprises (SOEs) or so-called "national champions" lies beyond the scope of this article.

14 *See, e.g.,* Hope Lewis, *Embracing Complexity: Human Rights in Critical Race Feminist Perspective*, 12 COLUM. J. GENDER & L. 510, 519 (2003) ("Transnational corporations exploit the low-wage status of women . . . and, in doing so, create new avenues for sexual abuse and harassment.").

15 Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U. L. REV. 745, 745 (2004); Daniel Aguirre, *Multinational Corporations and the Realisation of Economic, Social and Cultural Rights*, 35 CAL. W. INT'L L.J. 53 (2004); Francis O. Adeola, *Environmental Injustice and Human Rights Abuse: The States, MNCs, and Repression of Minority Groups in the World System*, 8 HUM. ECOLOGY REV. 39, 43-44 (2001); Int'l Comm'n of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations – Philippines*, http://www.icj.org/dwn/img_prd/Philippines-ElecDist.pdf (last visited Dec. 19, 2011).

safe products and technologies,[16] and the displacement of local businesses.[17] Perceived violations of civil and political rights include the displacement of indigenous peoples[18] and the support of regimes that violate the human rights of their peoples.[19]

At the same time, some writers acknowledge potential socio-economic benefits of FDI such as the inflow of technology and capital equipment, improvements in infrastructure, the technical training of local labor, and an increase in exports.[20] MNCs consider labor productivity as well as labor costs because our global economy demands the "production and delivery of technologically demanding, skill-intensive goods and services."[21] Additionally, improvements in economic, social, and cultural rights can lead to improvements in civil and political rights. As Meyer observed, "Foreign investment is positively associated with both civil liberties and political freedoms."[22]

Regarding civil and political rights, political rights are improved because investors favor the free movement of goods and people, and stable, transparent regimes.[23] "The fact that a state does not repress its citizens both reflects and contributes to the political and so-

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[16] Robert J. Fowler, *International Environmental Standards For Transnational Corporations*, 25 ENVTL. L. 1, 8-10 (1995); Dinah Shelton, *Challenges to the Future of Civil and Political Rights*, 55 WASH. & LEE L. REV. 669, 674-81 (1998).

[17] United Nations Conference on Trade and Development, *World Investment Report 2003:FDI Policies for Development: National and International Perspectives*, UNCTAD/WIR/2003, at xii-xv (2003).

[18] Upendra Baxi, *What Happens Next is up to You: Human Rights at Risk in Dams and Development*, 16 AM. U. INT'L L. REV. 1507, 1509-10 (2001); Erin K. MacDonald, *Playing by the Rules: The World Bank's Failure to Adhere to Policy in the Funding of Large-Scale Hydropower Projects*, 31 ENVTL. L. 1011, 1030-39 (2001).

[19] *See generally* Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights?*, 39 DENV. J. INT'L L. & POL'Y 483, 484 (2011) ("BITs empower MNCs and encumber a State's regulatory power to promote and protect human rights.").

[20] Jeffrey J. Blatt & Phillip H. Miller, *Preparing for the Pacific Century: Fostering Technology Transfer in Southeast Asia*, 3 ANN. SURV. INT'L & COMP. L. 235, 237 (1996); James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 77 (2007) (pointing out that "the oft forgotten human rights advantages that can flow from foreign direct investment in developing countries" and that "one must not neglect the possibility that international investment law and human rights effectively can complement each other.").

[21] David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1319 (2008).

[22] WILLIAM H. MEYER, HUMAN RIGHTS AND INTERNATIONAL POLITICAL ECONOMY IN THIRD WORLD NATIONS: MULTINATIONAL CORPORATIONS, FOREIGN AID, AND REPRESSION 103-08, 136 (1998).

[23] Law, *supra* note 21, at 1318.

cial stability that investors covet."[24] Statistics tend to show that the promise of FDI is an incentive for a country to improve its human rights conditions.[25] Countries that uphold human rights tend to receive more FDI than countries that do not.[26] Material evidence demonstrates that FDI and the promise of FDI can help promote democracy.[27]

In sum, case studies should refrain from advocacy and strive for an objective analysis of the costs and benefits of FDI. As one writer observed, "Traditionally, the relations between human rights and economics have been poisoned by misunderstanding, mutual accusations, mistrust and suspicions."[28] While a case study may examine "crowding out" effects, it should also look at how "spillover effects" and competition have benefited local firms and resulted in greater efficiencies within an industry.[29] Case studies that document labor exploitation and abuse should also explore whether unemployment has been reduced and workers have been empowered.[30] Reports of environmental damage should also take into account whether there have been trans-

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[24] *Id.*

[25] *Id.* at 1316.

[26] *See* OECD, *More open economies receive more FDI*, OECD, (Dec. 19, 2011), http://www.oecd.org/document/22/0,3746,en_2649_34529562_47500566_1_1_1_34529562,00.html; *See also* Law, *supra* note 21, at 1317. Law's thesis is that "investors and elite workers . . . are likely to favor jurisdictions that respect 'first generation' individual rights—namely, civil liberties and property rights of the type found in the U.S. Constitution." *Id.* at 1282. In Part V of his article, Law "rejects the sometimes popular view that foreign investment has a negative impact on the observance of human rights." *Id.* at 1283.

[27] Nathan M. Jensen, *Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment*, 57 INT'L ORG. 587, 599 (2003) (describing "new growth theory"); Adam L. Resnick, *Investors, Turbulence, and Transition: Democratic Transition and Foreign Direct Investment in Nineteen Developing Countries*, 27 INT'L INTERACTIONS 381, 384 (2001); RANDALL PEERENBOOM, *An Empirical Overview of Rights Performance in Asia, France, and the USA: The Dominance of Wealth in the Interplay of Economics, Culture, Law, and Governance*, *in* HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA 21 (Randall Peerenboom et al. eds., 2006) (observing that Asian countries that have experienced high economic growth in recent years have "generally scored highly with respect to the legal protection of economic interests").

[28] Kanstantsin Dzehtsiarou, Book Review, 13 J. INT'L ECON. L. 521, 522 (2010) (reviewing DAVID KINLEY, CIVILISING GLOBALISATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY (2009)).

[29] *Id.*

[30] *Id.*

fers of greener technologies.[31] And case studies of "land grabs" should consider the agricultural benefits that have resulted from FDI.[32]

The U.N. Conference on Trade and Development ("UNCTAD") reported in 2010 that FDI increasingly "has significant social, and often political, ramifications" and that "[t]here is a great need, therefore, for new statistical information to measure these activities."[33] Objective measurement of human rights is a burgeoning field[34] and provides variable indicators that can be measured to objectively gauge the enjoyment of civil and political rights and economic, social, and cultural rights.[35] With objective information from both the human rights and investment spheres, human rights scholars can take it a step further and attempt to gauge the direct and indirect impacts of FDI on human rights conditions.[36] This will be practical in two ways. It will identify which human rights conditions are being affected and whether the impact is positive or negative.[37] If strong relationships are found between particular FDI components and human rights conditions, such findings can direct future policy that produces positive human rights impacts.[38]

In an attempt to lay groundwork for such research, this article examines the potential benefits of FDI to both civil and political rights and economic, social, and cultural rights. It suggests relationships between FDI and human rights that human rights researchers should objectively measure and analyze. This article concludes by proposing an analytical framework for such measurement and analysis.

B. Economic, Social, and Cultural Rights

1. "Crowding Out" Versus the Benefits of Competition and Spillover

Since the 1980s, states have liberalized their FDI regulations and signed increasingly more bilateral investment treaties with the goal of attracting FDI.[39] One of the major reasons for attracting FDI

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[31] *Id.*
[32] *Id.*
[33] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, 2 UNCTAD TRAINING MANUAL ON STATISTICS FOR FDI AND THE OPERATIONS OF TNCS: STATISTICS ON THE OPERATIONS OF TRANSNATIONAL CORPORATIONS 35 (2009).
[34] *See generally* TODD LANDMAN & EDZIA CARVALHO, MEASURING HUMAN RIGHTS 1-9 (2010).
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Magnus Blomström & Ari Kokko, *Multinational Corporations and Spillovers*, 12 J. ECON. SURVEYS 1, 1-2 (1998).

is the prospect of benefiting from positive externalities, or spillovers, which can occur even when a host country's FDI policies are significantly flexible and favorable to MNCs.[40] A vast amount of research on the subject of FDI has attempted to detect and measure the presence of spillovers.[41] Some of the most scrutinized forms of spillover include technology, technical knowledge, knowledge about more effective business practices, human capital, and market access. Görg and Greenaway surveyed a large number of studies to see whether a consensus existed on the relationship between spillovers and FDI, finding, as previous authors had before,[42] that the success of spillovers depends on the individual circumstances of each host economy. Although it is difficult to find an overall consensus, several case studies have found that, under certain conditions, spillovers are more likely to occur.

(a) Spillover Between Linked Firms

(1) Technology

Damijan explains that FDI can lead to technology spillover into horizontally integrated firms of less-developed economies from their foreign affiliates if the circumstances allow it. The host economy needs to have the capacity "to identify, assimilate and exploit outside knowledge," or absorptive capacity, to experience an effective spillover.[43] When the technology gap between the investing country and the host country is significantly large, the absorptive capacity might be too low to take advantage of a potential spillover.[44]

Damijan developed a model in which the technology boost of an affiliate firm in the host economy is determined by the firm's investment in research and development, which can increase the firm's absorptive capacity and help it maximize the benefit of the foreign firm's

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[40] *Id*. at 2 ("Foreign investment can result in benefits for host countries even if the MNCs decide to carry out their foreign operations in wholly-owned affiliates, since technology to some extent is a public good.").

[41] *See* Holger Görg & David Greenaway, *Much Ado About Nothing? Do Domestic Firms Really Benefit from Foreign Direct Investment?* 31-32 Tbl. 2 (IZA, Discussion Paper No. 944, 2003), *available at* http://www.econstor.eu/bitstream/10419/3091/1/dp944.pdf (displaying relevant studies on FDI and productivity spillovers since the 1970s).

[42] *See, e.g.,* Xiaohui Liu & Chenggang Wang, *Does foreign direct investment facilitate technological progress?: Evidence from Chinese industries*, 32 Res. Pol'y 945, 947 (2002); *see also* Wilfred J. Ethier and James R. Markusen, *Multinational Firms, Technology Diffusion and Trade*, 41 J. Int'l. Econ. 1 (1996).

[43] Joze P. Damijan et al., *Technology Transfer through FDI in Top-10 Transition Countries: How Important are Direct Effects, Horizontal and Vertical Spillovers* 5 (Inst. Econ. Research, Working Paper No. 17, 2003), *available at* http://www.ier.si/files/Working%20paper-17.pdf (last visited Dec. 19, 2011).

[44] *Id*. at 5.

presence.[45] If the absorptive capacity of affiliate firms is adequate, the host economy as a whole can benefit through an increase in "the rate of technical change and technological learning," which occurs "indirectly through knowledge spillovers to local firms."[46] Damijan also cites studies that suggest technology can spill over into a firm of a less-developed state from an affiliate firm with which it is vertically integrated.[47] "[F]oreign affiliates often provide resources to improve the technological capabilities" of their suppliers "to improve the quality standards."[48] A paper prepared for UNCTAD notes a "changing attitude" toward MNCs driven by the realization that they are "one of the main vehicles, or even the main vehicle, for allowing developing countries to start closing the gap with the world technology leaders."[49]

(2) Human Capital

The presence of more knowledgeable and skilled MNCs may result in a spillover effect that improves the quality of local human capital, often through training of local employees. In a case study of firms located in the Czech Republic, Djankov and Hoekman found strong positive correlations between foreign partnerships and adoption of technology and frequency of training.[50] Damijan notes that human capital spillover is important for less-developed host economies, commenting that "[t]hese spillovers are especially important for firms that lack the technological capabilities and managerial skills to compete in world markets."[51] Blomström and Kokko note studies that have found empirical evidence of human capital spillovers in less-developed countries, despite a significant gap of skill and knowledge between locals and multinational affiliates.[52] Moreover, while high-skilled positions

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[45] *Id*. at 7.

[46] *Id.*

[47] *Id*.

[48] *Id*. at 8.

[49] Daniel Chudnovsky & Andrés López, *TNCs and the Diffusion of Environmentally Friendly Technologies to Developing Countries* 2 (Copenhagen Bus. Sch. Cross Border Envtl. Mgmt. Project, Occasional Paper no. 9, Aug. 1999), *available at* http://cdi.mecon.gov.ar/biblio/docelec/dp1411.pdf.

[50] Simeon Djankov & Bernard Hoekman, *Foreign Investment and Productivity Growth in Czech Enterprises*, 14 WORLD BANK ECON. REV. 49, 55-56 (2000).

[51] Damijan, *supra* note 43, at 8.

[52] Blomström & Kokko, *supra* note 39, at 14.

tend initially to be occupied by non-locals,[53] Blomström and Kokko note that "the local share typically increases over time."[54]

Human capital spillover is particularly important for host economies because it may determine the success of technology and knowledge spillovers. In a case study of China, Fu and Li found that, when the "quality" of human capital in a host economy reaches a certain level of ability to expand knowledge and imitate and adopt technology, the negative crowding-out effects of FDI change to positive spillover effects.[55] Görg and Greenaway describe the acquisition of absorptive human capital as possibly the most important channel for spillover of technology and better business practices.[56]

The increase in the quality of human capital resulting from increased education and training and, ultimately, the increase in high-skilled workers may reduce income inequality and expand the middle class.[57] Several studies have explored the potential poverty-reduction effects of FDI.[58] A case study of Mexico found that increased flows of FDI were associated with a decrease in income inequality,[59] and a study of European countries found similar results.[60]

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[53] Bilateral investment treaties tend to stipulate something to this effect: "Nationals and companies of either Party. . . shall be permitted to engage, within the territory of the other Party, top managerial personnel of their choice, regardless of nationality." Treaty Between the Government of the United States of America and the Government of the Republic of Panama Concerning the Treatment and Protection of Investments, U.S.-Pan., Oct. 27, 1982, S. TREATY DOC. NO. 99-14 (1986).

[54] Blomström & Kokko, *supra* note 39, at 13.

[55] Miao Fu and Tieli Li, *Human Capital as a Determinant of FDI Technology Spillovers and its Threshold Effects in China: An Analysis Based on Multiple Productivity Estimates* at v (U.N. Indus. Dev. Org., Res. and Stat. Branch, Working Paper No. 21/2009, 2009), *available at* http://www.unido.org/fileadmin/user_media/Publications/RSF_DPR/WP212009_Ebook.pdf .

[56] Görg & Greenaway, *supra* note 41, at 3-4. *See also* Djankov & Hoekman, *supra* note 50, at 51.

[57] *See* Branko Milanoviæ, *Can We Discern the Effect of Globalization on Income Distribution?: Evidence from Household Budget Surveys*, 19 WORLD BANK ECON. REV. 21 (2005).

[58] *See* Carl Aaron, *The Contribution of FDI to Poverty Alleviation* (Int'l Fin. Corp. Foreign Investment Advisory Service, 1999); Michael Klein et al., *Foreign Direct Investment and Poverty Reduction* (World Bank Pol'y Res., Working Paper No. 2613, 2000) (offering a comprehensive index of other studies that have measured the effects of FDI on poverty reduction), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=632682.

[59] Nathan M. Jensen & Guillermo Rosas, *Foreign Direct Investment and Income Inequality in Mexico, 1990-2000*, 61 INT'L ORG. 467 (2007).

[60] Dierk Herzer & Peter Nunnenkamp, *FDI and Income Inequality: Evidence from Europe* (Kiel Inst. for the World Econ., Working Paper No. 1675, Jan. 2011), *avail-*

(3) Market Access

In addition, when MNCs establish a presence in a host economy, a "market access spillover" may benefit local firms that establish relationships with foreign firms. Because MNCs operate in multiple countries, they understand the international market and are able to exploit a cross-border network. Obtaining access to a broader network is one of the primary motivations of expanding operations into foreign countries, so MNCs naturally possess the know-how to operate in an international market.[61] Blomström and Kokko write that "the distribution networks and the knowledge of foreign markets that are built up through [FDI] can perhaps benefit the entire home economy." Local firms that do not possess the same skills or resources need to expand operations abroad to benefit from the presence of MNCs.[62] Blomström and Kokko note several ways that market access spillover can occur, such as when MNCs employ local firms as suppliers or subcontractors, or when MNCs lobby successfully to reduce trade barriers in other countries, thereby indirectly benefiting their local suppliers.[63]

(b) Spillover Between Competing Firms

Spillover can occur when local firms in a less-developed economy are forced to compete with proximate firms that are linked to more technologically advanced and efficient foreign affiliates. Instead of being crowded out, local firms may experience an "imitation spillover" in which they learn from the example set by firms linked to foreign affiliates.[64] Buckley observed that, over time, foreign affiliates become embedded in the local economy and increase relationships with local businesses, making technology and knowledge spillovers more natural.[65] Damijan suggests that these local firms are compelled to imitate "new products, processes and organization forms" that demonstrate "increased efficiency."[66]

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able at http://www.ifw-members.ifw-kiel.de/publications/fdi-and-income-inequality-evidence-from-europe/kwp_1675. .

[61] *See* S. Lael Brainard, *An Empirical Assessment of the Proximity-Concentration Trade-Off Between Multinational Sales and Trade*, 87 AM. ECON. REV. 520 (1997) (suggesting that MNCs' choice of location is motivated primarily by access to certain markets, more so than to cheaper factors of production).

[62] Blomström & Kokko, *supra* note 39, at 7.

[63] *Id*. at 7-8.

[64] Damijan, *supra* note 43, at 8.

[65] Peter J. Buckley et al., *Inward FDI and host country productivity: Evidence from China's electronic industry*, 15 TRANSNAT'L CORPS. 13, 17 (2006).

[66] Damijan, *supra* note 43, at 8.

Imitation may occur by way of "reverse engineering, personal contact and industrial espionage."[67] Reverse engineering may be applied not only in imitating product design but also in adopting more advanced managerial schemes.[68] A study by the Food and Agriculture Organization of the United Nations ("FAO") of spillovers in African countries found that the presence of MNCs in Ghana benefited local competing firms.[69] Researchers note, however, that local firms' ability to compete will depend on their ability to take advantage of technology and knowledge spillovers and adapt competing management skills and technology.[70] Fu and Li note that absorptive capacity can be increased through, *inter alia*, human capital spillover, as well as investment in research and development and public infrastructure.[71]

(c) Relevance to Human Rights

The positive economic spillover effects of FDI on local firms also help to improve human rights conditions on a broader scale in the host community. For example, researchers should consider the impacts of the benefits of competition, such as greater productivity and higher-quality products, on the standard of living in the region.[72] Greater efficiencies in production may result in greater consumer welfare with the transfer of new and safer technologies. The spillover of human capital, especially through "technical and vocational guidance and training programs"[73] that MNCs employ, may result in higher-skilled and higher-paid positions for local employees.[74] The pressure to develop more efficient managerial techniques and technology may improve the quality and safety of products, allowing the local populations of less-developed countries to "enjoy the benefits of scientific progress and its applications."[75] Furthermore, market access spillover occurring between foreign and local firms that are horizontally integrated may allow local firms to expand their operations, resulting in greater output and reduced unemployment.[76]

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67 *Id.*
68 Görg & Greenaway, *supra* note 41, at 3.
69 Ann-Christin Gerlach & Pascal Liu, *Resource-seeking Foreign Direct Investment in African Agriculture: A review of country case studies* 15 (FAO Commodity & Trade Pol'y, Res. Working Paper No. 31, 2010), *available at* http://www.fao.org/fileadmin/templates/est/PUBLICATIONS/Comm_Working_Papers/EST-WP31.pdf (last visited Dec. 19, 2011) .
70 *See* Buckley, *supra* note 65, at 18.
71 *See* Fu & Li, *supra* note 55, at 39.
72 *See* ICESCR, *supra* note 8, at art. 11.
73 *Id.* at art. 6(2).
74 *See also id.* at art. 6(1) (recognizing the "right to work").
75 *Id.* at art. 15(b).
76 *See id.* at art. 6(1).

2. Environmental Damage Versus the Transfer of Greener Technologies and Practices

The harmful environmental effects of MNC activities are well documented in human rights literature,[77] whereas "relatively little attention has been paid to the role of [FDI] as a contributor to green growth,"[78] and the "potential for green [FDI] is large but ignored so far."[79]

(a) The Natural Incentive of MNCs to be Environmentally Friendly

FDI can benefit the environment due to certain motivating factors that influence corporate behavior in multinational operations. While the intuitive, if cynical, assumption is that MNCs purposefully locate their operations in countries with relatively weak environmental policies (the "pollution haven" effect), empirical studies have failed to substantiate the accuracy of this assumption.[80] In fact, a 2004 study concluded that, "[i]f anything, firms in less polluting industries are more likely to invest in the region."[81] Also, a study by the Organization for Economic Co-Operation and Development ("OECD") suggests that, even if there is a negative correlation between the stringency of environmental policy and FDI, environmental policy is a relatively small factor compared to overall regulatory quality for MNCs deciding where to locate their operations abroad.[82] A "mining company does not go to a foreign country to escape environmental con-

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[77] *See supra* note 15; *see also* PETER UTTING, THE GREENING OF BUSINESS IN DEVELOPING COUNTRIES 1 (2002).

[78] Stephen S. Golub et al., *Defining and Measuring Green FDI: An Exploratory Review of Existing Work and Evidence* 9 (OECD, Working Papers on Int'l Investment, No. 2011/2, 2011), *available at* http://www.oecd.org/dataoecd/26/8/48171454.pdf (last visited Dec. 19, 2011).

[79] *Id*. at 11 (noting that FDI is a more effective avenue for the transfer of green technologies than official development assistance, in part because the presence of MNCs results in knowledge spillover that allows host countries to better absorb new technologies).

[80] *See* Judith Dean et al., *Foreign Direct Investment and Pollution Havens: Evaluating the Evidence from China* ii (U.S. Int'l Trade Comm., Office of Econ., Working Paper No. 2004-01-B, 2003), *available at* http://www.usitc.gov/publications/332/working_papers/ec200401b.pdf (last visited Dec. 19, 2011).

[81] *See* Beata Smarzynska Javorcik & Shang-Jin Wei, *Pollution Havens and Foreign Direct Investment: Dirty Secret or Popular Myth?*, 3(2) CONTRIBS. TO ECON. ANAL. & POL'Y. 1 (2004).

[82] Margarita Kalamova & Nick Johnstone, *Environmental Policy Stringency and Foreign Direct Investment* 26 (OECD, Env't Working Paper No. 33, 2011), *available at* http://dx.doi.org/10.1787/5kg8ghvf85d5-en (last visited Dec. 19, 2011) ("the general measure of regulatory quality used in the analysis has much more significant (and positive) impacts on FDI inflows.").

siderations [but rather to escape] unreasonable costs, hostile regulatory environments, and oppressive, confiscatory environmental policies that have little to do with sound environmental protection and more to do with creating large, well-funded governmental agencies."[83] And quite the contrary to the pollution-haven assumption, MNCs have natural incentives to use greener technologies and environmentally friendly practices in general.

Several authors have asserted that the reputational costs for being environmentally unfriendly are significant enough to influence corporate behavior.[84] Reputational costs may arise in multiple ways. For example, increasingly environmentally aware consumers are willing to pay a higher price for products from clean sources. When a corporation engages in reckless environmental activity, it risks bad publicity, protests, and boycotts, which can drive down stock value. Given the rapid transmission of information worldwide, the risks of engaging in activity that will spark controversy and criticism is significant. In response to Coca-Cola's tarnished and highly-publicized environmental record, protest campaigns and boycotts were so significant that a hedge fund was established for the sole purpose of profiting from the decline of stock prices of companies that "are vulnerable to boycotts and protest campaigns based on the companies' social and environmental record."[85] The threat of bad publicity and its consequences is a particularly important consideration for high-profile MNCs, since their presence in developing countries is "highly visible" and "may be closely scrutinized by local governments."[86]

The same can be said about countries new to large-scale extraction of natural resources for energy development that are naturally skeptical and averse to new large-scale projects. For example Shell Oil's Corrib Gas Project in Ireland, faced opposition and considerable

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[83] Madeline Cohen, *A New Menu for the Hard-Rock Cafe: International Mining Ventures and Environmental Cooperation in Developing Countries*, 15 STAN. ENVTL. L.J. 130, 168 (1996).

[84] Jonathan M. Karpoff et al., *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 48 J.L. & ECON. 653, 653-54 (2005); *see also* Seema Arora & Timothy Cason, *Why Do Firms Volunteer to Exceed Environmental Regulations? Understanding Participation in EPA's 33/50 Program,* 72 LAND ECON. 413 (1996); Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307 (2004).

[85] *See* Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2152-53 (2005); *see also* Gunningham, *supra* note 84, at 323.

[86] Cohen, *supra* note 83, at 138.

negative publicity even before becoming operational.[87] MNCs also have a natural incentive to respect environmental standards because it is more cost efficient in the long run. In Latin America, mining companies are operating at high environmental standards at the outset in anticipation of more stringent environmental standards in the future, since "[d]esigning for [tougher] standards at the outset is often far less expensive than having to retrofit an operation later."[88] Furthermore, newer technology tends to be more efficient and less impactful on the environment, meaning that investment in greener technologies will be cost beneficial and more sensible anyway. "[T]here is objective data to support the view that if a large mining project includes state of the art environmental controls, the efficiency gains will more than pay for the extra costs."[89]

Besides, MNCs based in home countries with high environmental standards typically already have the resources needed to invest in new and environmentally friendly technology[90] and need not innovate technology to operate abroad in an environmentally acceptable manner. Additionally, natural resource projects are becoming more expensive, and MNCs can no longer rely on "internal cash-flows."[91] They must instead look to "public and private lenders," and "major lenders such as OPIC and the World Bank now impose stricter environmental conditions on [MNCs] seeking project financing."[92] As a result, MNCs that are pursuing expensive extractive projects find it financially wise to assess the environmental impacts of their plans,[93] since "[n]o project can be financed with major banks unless the project meets World Bank [environmental] standards."[94]

(b) FDI and the Environment

If human rights researchers and, more disconcertingly, governments are not devoting enough attention to the environmental benefits of FDI, then the international community is failing to reach its potential to promote and spread greener technologies and business prac-

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[87] *See, e.g.,* Diarmaid Fleming, *Bitter dispute over gas pipeline*, BBC NEWS, Aug. 3, 2005, http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4739831.stm (last visited July 25, 2011).

[88] R. Craig Johnson, *Negotiating Mineral Transactions in Latin America*, *in* MINING IN LATIN AMERICA, IN INTERNATIONAL OIL, GAS & MINING DEVELOPMENT IN LATIN AMERICA 6A-1, 6A-13 (Rocky Mt. Min. Law Found. ed., 1994) .

[89] Richard A. Westin, *Intergenerational Equity and Third World Mining*, 13 U. PA. J. INT'L BUS. L. 181, 188 (1992).

[90] Cohen, *supra* note 83, at 139.

[91] *Id*. at 138.

[92] *Id.*

[93] *Id*.

[94] Johnson, *supra* note 88, at 6A-13.

tices. A report by the U.S. Chamber of Commerce states "many countries impose tariffs of up to 70% on climate-friendly goods and services, impeding access to cutting edge technologies."[95] The World Bank found that, "by removing these types of barriers, trade in green technologies and services could rise 7-14% annually."[96]

Vietnam is one example of a country that is becoming proactive in utilizing FDI to invite the transfer of environmental-friendly business and technology.[97] Kazakhstan, a country with a mixed environmental history, has also signaled positive steps in the direction of becoming more environmentally friendly by way of FDI. Kazakhstan's President Nursultan Nazarbayev eyes FDI as a means of achieving development and intends to attract environmentally friendly technology financed by capital from outside investment.[98] For developing countries, FDI from developed countries is not only beneficial but vital for environmental protection, since "[t]he technical know-how for controlling pollution resides primarily in firms in more developed countries."[99]

Indeed, MNCs "are increasingly considered as leaders in the introduction of good environmental management practices and in the diffusion of environmentally sound technologies."[100] MNCs are also becoming increasingly aware of their environmental impact, "moving from simply remedying environmental problems through *ad hoc* solutions to preventing them through a more holistic or systemic approach."[101]

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[95] Global Intellectual Property Ctr., *Promoting Technology Diffusion to the Developing World: A Blueprint for Advancing, Protecting, and Sharing Innovation, Global Intellectual Property Center* 1-2 (2009), http://www.theglobalipcenter.com/sites/default/files/reports/documents/Promoting_Tech_Diffusion.pdf (last visited Dec. 19, 2011).

[96] *Id.*

[97] *Vietnam to focus on raising quality of FDI projects*, VIETNAM BUS. NEWS, Aug. 8, 2011, http://vietnambusiness.asia/vietnam-to-focus-on-raising-quality-of-fdi-projects/ (last visited Dec. 19, 2011) ("In 2011, the country will concentrate on luring FDI in infrastructure and projects using hi-tech and green technology that are capable of turning out products of high competitiveness.").

[98] Yuliya Mitrofanskaya, *Environmental Protection in Kazakhstan: The New Oil Legislation*, 1999 COLO. J. INT'L ENVTL. L. & POL'Y 76, 79 (2000) (also stating that, in addition to introducing greener technologies, "foreign investors will be required to help Kazakhstan create new jobs and improve Kazakhstan's public health and education, and its cultural and athletic offerings.").

[99] Golub, *supra* note 78.

[100] Chudnovsky & López, *supra* note 49, at 2.

[101] UTTING, *supra* note 77, at 3.

General Electric, the sixteenth largest MNC in the world,[102] became "one of several U.S. energy companies" to invest in coal-energy projects that will be less impactful than conventional power plants.[103] The investment deal partnered General Electric with Shenhua Group, China's biggest coal producer, in building integrated gasification combined cycle ("IGCC") facilities in China. The technology will "deliver immediate benefits through reduced emissions of traditional pollutants and improved thermal efficiencies"[104] in the largest coal-producing and consuming country in the world.[105] Also, IBM, Nokia, Pitney Bowes, and Sony partnered with the World Business Council for Sustainable Development in 2008 to launch the Eco-Patent Commons[106] to encourage the sharing of patents and reduce the barrier of intellectual property rights to environmental solutions.[107] Since the launch, "[m]ore than 100 eco-friendly patents have been pledged by 11 companies that covenant not to assert their rights against those using technologies in the Commons for environmental benefit."[108] Governments welcoming FDI have much to gain from a business community that is increasingly environmentally aware and voluntarily developing ways to make technologies and practices environmentally beneficial.

(c) Relevance to Human Rights

Environmental protection and human rights conditions are increasingly viewed as overlapping concerns.[109] Although the human right to a healthful environment is not yet recognized as legally bind-

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[102] *Global 500*, CNN Money, Jul. 25, 2011, http://money.cnn.com/magazines/fortune/global500/2011/full_list/ (last visited Dec. 19, 2011).

[103] Todd R. Miller & Dawn M. Amos, *Cleantech Innovators Should Be Aware of Certain Global Intellectual Property Issues*, 22 Intell. Prop. & Tech. L.J. 1 (2010).

[104] Samuel C. Schon & Arthur A. Small III, *Climate change and the potential of coal gasification*, 20 Geotimes 51.9 (2006), *available at* http://www.geotimes.org/sept06/feature_ClimateChange.html.

[105] BP, Statistical Review of World Energy 32-33 (June 2011), *available at* http://www.bp.com/assets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2011/STAGING/local_assets/pdf/statistical_review_of_world_energy_full_report_2011.pdf (last visited Dec. 19, 2011).

[106] Miller & Amos, *supra* note 103, at 5.

[107] William M. Bulkeley, *Companies to Share Eco-Friendly Patents*, Wall St. J., Jan. 14, 2008, *available at* http://online.wsj.com/article/SB120027151743287307.html (last visited Dec. 19, 2011).

[108] Miller & Amos, *supra* note 103, at 5.

[109] *See generally* Alison Lindsay Shinsato, *Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria*, 4 Nw. U. J. Int'l Hum. Rts. 186 (2005); *see also* United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Aug. 12,

ing under international law, there are recognized rights that may be affected by environmental harm (or enrichment). Plaintiffs in *Flores v. Southern Peru Copper Corp.*[110] pointed out that environmental pollution can threaten, for example, the rights to life[111] and health.[112] The U.S. Environmental Protection Agency ("EPA") notes numerous health effects of environmental changes.[113] Temperature change,[114] contamination of waters,[115] changes in air quality,[116] and several other environmental changes have negative impacts on humans, including their overall health and occupational success.

The human rights impacts of environmental damage are well documented,[117] but the fact that MNC activities can have positive and needed impacts on the environment and, ultimately, human rights conditions, is often ignored. When FDI introduces more efficient and greener technologies that emit less greenhouse gas, it replaces less efficient, environmentally harmful technologies.[118] Replacement technologies are especially beneficial in developing countries, which typically have limited access to electricity and rely primarily on carbon-emitting fuel sources.[119] With the improvement of environmental conditions, developing countries will inevitably see improvements in health and reduced risk of diseases associated with environmental damage. It is therefore counterproductive for human rights advocates to ignore that FDI is essential to spread greener technologies to developing countries with weak environmental standards.

1992) ("Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.").

110 Flores v. Southern Peru Copper Corp., 343 F.3d 140, 144 (2d Cir. 2003).

111 ICCPR, *supra* note 9, at art. 6.

112 ICESCR, *supra* note 8, at art. 12.

113 CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (M.L. Parry et al. eds., 2007), *available at* http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg2_report_impacts_adaptation_and_vulnerability.htm (last visited Dec. 19, 2011) [hereinafter EPA 2007].

114 *Id.* at 396.

115 *Id.* at 400.

116 *Id.* at 401.

117 *See, e.g.*, Judith Kimerling, *Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon*, 14 HASTINGS INT'L & COMP. L. REV. 849 (1991); *see also, e.g.*, Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L.J. 261 (1997).

118 *See* EPA 2007, *supra* note 113, at 418.

119 *Id.* at 419.

3. "Land Grabs" Versus Agricultural Advancement

FDI that involves land acquisition has been criticized as "a new form of colonialism" that will negatively impact food security of the host region and drive people from their land.[120] The FAO notes that, on the other hand, "if the objectives of land purchasers are reconciled with the investment needs of developing countries," then land investments can significantly benefit the host region.[121] Indeed, studies suggest that FDI in land can bring socio-economic benefits to host regions and have direct positive human rights impacts.

(a) Negative Impacts of FDI in Land

It is well recognized that FDI in land can be detrimental to economic, social and cultural human rights conditions if the interests and priorities of host regions are not adequately considered in investment agreements. The 2009 Deutsche Gesellschaft für Technische Zusammenarbeit ("German Society for International Cooperation" or "GTZ") study notes a number of potential negative economic, social, and environmental impacts, including conflict over land due to strong competition, "marginalization of small-size land owners" which negatively effects "development geared towards the needs of the poor," reduced access to land, social friction due to income inequality between foreign and local employees, and various threats to the environment.[122]

The FAO notes the risk of displacing indigenous peoples and decreasing standards of living,[123] which may undermine economic, social and cultural rights.[124] Regarding the right to food, investment in land may be counterproductive to the goals of the World Food Summit if food is exported and not made available for local consumption.[125] Authors have noted with concern that regional interests are likely to be compromised due to the strong leverage of MNCs over host countries.[126]

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120 FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, FROM LAND GRAB TO WIN-WIN: SEIZING THE OPPORTUNITIES OF INTERNATIONAL INVESTMENTS IN AGRICULTURE, 4 (2009), ftp://ftp.fao.org/docrep/fao/011/ak357e/ak357e00.pdf (last visited Dec. 19, 2011) [hereinafter FAO POLICY BRIEF].
121 *Id*.
122 *GTZ Study, infra* note 127, at 23-24.
123 Gerlach & Liu, *supra* note 69, at 9.
124 *See* ICESCR, *supra* note 8, at arts. 1, 11 (recognizing the rights to self-determination and an adequate standard of living).
125 *See GTZ Study*, *infra* note 127, at 22.
126 *See, e.g.*, Nadia Cuffaro & David Hallam, *"Land Grabbing" in Developing Countries: Foreign Investors, Regulation and Codes of Conduct* 13 (Int'l Conf. on Global Land Grabbing, Paper, 2011), http://www.future-agricultures.org/index.

(b) Positive Impacts of FDI in Land

The 2009 GTZ study of FDI in land also lists several economic impacts that may have important positive implications for human rights conditions in host regions. Positive economic impacts include increased productivity on agricultural land through the use of more advanced and efficient technologies, which "raises" yields and reduce post-harvest losses."[127] Increased productivity may also accompany knowledge spillover to local farmers, more efficient use of existing resources through investment in irrigation schemes, and improvement of marginal land through "melioration measures."[128] Some additional positive impacts include market access spillover to local farmers, human capital spillover, increased consumption, and improved infrastructure such as road building and investment in transportation and communication.[129] Furthermore, increased commodity production for export "generates foreign currencies and additional taxes and may expand the ability of national governments to invest in projects that improve living conditions."[130] The FAO also acknowledges potential benefits of FDI in land, including technology transfer to local farmers, reduced unemployment, and more food supplies for both the region and for export.[131]

An FAO survey of case studies on FDI in African agriculture provides empirical evidence of positive impacts. The FAO survey reported significant increases in employment in Sudan, Uganda, Ghana, Morocco, and Mali as a result of FDI in land, generating both direct and indirect jobs.[132] Some case studies demonstrated a positive relationship between FDI and productivity, which resulted in higher and more diversified output and lower prices for the domestic population.[133] The survey also found evidence of positive spillover effects, resulting in more efficient marketing, the adoption of technical and organizational knowledge, significant technology transfers, new infrastructure in rural areas, and better access to credit facilities.[134] Regarding environmental impacts, the survey notes negative impacts on

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php?option=com_docman&task=doc_download&gid=1305&Itemid=510 (last visited Dec. 19, 2011).

[127] Matthias Görgen et al., *Foreign Direct Investment (FDI) in Land in Developing Countries* 21 (Division 45 - Agriculture, fisheries and food, Deutsche Gesellschaft für Technische Zusammenarbeit) (Dec. 2009) [hereinafter *GTZ Study*].

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] FAO POLICY BRIEF, *supra* note 120.

[132] Gerlach & Liu, *supra* note 69, at 9.

[133] *Id.* at 10.

[134] *Id.* at 10-12.

forests and biodiversity, but also notes the introduction of greener production techniques by MNCs.[135]

(c) Relation to Human Rights

The human right most apparently impacted by FDI in land is the right to food. Article 11 of the International Covenant on Economic, Social and Cultural Rights establishes as a part of the right to an adequate standard of living the right to adequate food and the right of "everyone to be free from hunger."[136] Article 11 calls upon states parties to "improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge" and to "achieve the most efficient development and utilization of natural resources."[137] Therefore, FDI in land by MNCs brings not only more efficient and productive agricultural use to host lands, but also addresses the broader concerns of world hunger and the right to food. As the FAO reports: "In order to halve the world's hungry by 2015, as targeted by the 1996 World Food Summit[ ] . . . at least US$ 30 billion of additional funds are required annually."[138] The FAO regrets that "[t]he gravity of the current food crisis is the result of 20 years of under-investment in agriculture and neglect of the sector"[139] and notes that official development assistance in agriculture is trending downward and "offers no real alternative."[140] MNCs possess the resources and efficiency that governments lack to make a serious impact on hunger. Consider Wal-Mart (a frequent target of human rights critics), which announced in 2011 its plan to open 275 to 300 stores serving "food deserts" between now and 2016.[141] Like the hundreds of existing Wal-Mart stores located in food deserts, these new stores will provide healthy and affordable food for over one million food-desert in-

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135 *Id*. at 13.
136 ICESCR, *supra* note 8, at art. 11.
137 *Id.*
138 FAO POLICY BRIEF, *supra* note 120.
139 FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, WORLD SUMMIT ON FOOD SECURITY (2009), http://www.fao.org/wsfs/world-summit/en/ (last visited Dec. 19, 2011).
140 FAO POLICY BRIEF, *supra* note 120; *see also* Rome Declaration on World Food Security and the World Food Summit Plan of Action, Commitment Six (49), 13-17 November 1996, http://www.fao.org/docrep/003/w3613e/w3613e00.htm (last visited Dec. 19, 2011) ((arguing "Foreign Direct Investment (FDI) and other private financial flows have increased considerably recently and provide an important source of external resources. Official Development Assistance (ODA) has exhibited a decline in recent years.").
141 Press Release, Walmart, Walmart to Open up to 300 Stores Serving USDA Food Deserts by 2016; More than 40,000 Associates Will Work in These Stores, (July 20, 2011), http://walmartstores.com/pressroom/news/10635.aspx.

habitants.[142] The activity of MNCs in land investment will therefore be critical to upholding the universal right to food and meeting the goals of the World Food Summit.

FDI in land also has potential social impacts, including improved living conditions[143] and improved living infrastructures ". . . by establishing [for example] schools or health care organizations."[144] Empirical studies support this conclusion. The FAO survey of African agriculture reported that MNCs in Uganda contributed to the construction of schools, HIV prevention, and counseling services.[145]

Considering the crucial role of FDI in land and its potential to bring economic, social and environmental benefits to host regions, it is clear that practical research and application can help governments of developing countries develop the best legal framework to ensure that FDI in land has a positive effect on human rights conditions.

C. Civil and Political Rights: "Race to the Bottom" Versus Using Human Rights to Attract FDI

1. Nexus of FDI and Civil and Political Rights

Recent literature and empirical evidence demonstrate that FDI has a positive impact on civil and political rights. There remains, however, a discrepancy between empirical evidence and the sentiments of human rights advocates. The popular view is that countries trying to attract FDI are in a race to the bottom with civil and political rights to appease MNCs, who prefer "repressive states capable of crushing efforts by labor to secure better wages or working conditions."[146] Yet several studies have found a positive relationship between "the extent to which a country honors civil liberties . . . and the amount of foreign investment that the country receives."[147]

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142 *Id.*

143 *See* ICESCR, *supra* note 8, at art. 11 (discussing the right to "an adequate standard of living").

144 *See id*. arts. 12, 13 (listing rights to health and education).

145 Gerlach & Liu, *supra* note 69, at 16.

146 *See* Law, *supra* note 21, at 1313.

147 *See id.* at 1314; *see* MEYER, *supra* note 22, at 103-08, 136 (noting that "[f]oreign investment is positively associated with both civil liberties and political freedoms"); *see also* David Kucera, *The Effects of Core Workers Rights on Labour Costs and Foreign Direct Investment: Evaluating the "Conventional Wisdom"* (Int'l Inst. for Labour Stud., Discussion Paper DP/130/2001, 2001), *available at* http://ilo.org/public/english/bureau/inst/publications/discussion/dp13001.pdf (last visited Dec. 19, 2011) (finding that "no solid evidence is found in support of the 'conventional wisdom,' with all evidence of statistical significance pointing in the opposite direction.").

2. Obtaining Human Capital

This positive relationship is explained by the practical implications of securing fundamental human rights for inward FDI. As discussed above, human capital spillover is a useful and necessary means of spreading the use of more advanced and efficient technologies. It is the gateway to newer technology and innovation. Repressive governments in developing countries realize they lack the absorptive capacity required for the adoption of new technologies. They are therefore drawn to the logical conclusion that, to attract right human capital and the inward investments they desire, they must guarantee fundamental human rights.[148]

Law notes that Silicon Valley, "the high-tech envy of the world," has profited significantly from talented imported human capital: "[E]ntrepreneurs of Chinese and Indian origins have founded over thirty percent of its technology firms over the last quarter-century."[149] Naturally, skilled workers from developed countries that uphold basic civil and political rights are more inclined to do business in a foreign country with adequate human rights guarantees.[150] In fact, skilled workers require certain rights as a prerequisite to conducting business. As Levy points out, "Given the requirements of modern broad-based international commerce, successful economic engagement requires a country to broaden the ability of its citizens to communicate, allow the development of a potential leadership class, and expand the rule of law."[151] As a result, countries competing for FDI are engaged in what Law describes as a "race to the top" in terms of securing those rights that skilled workers from developed countries expect and value.[152] Governments do not need to be composed of altruistic, selfless leaders to realize the importance of human rights; they should find in the cost-benefit analysis that guaranteeing fundamental human rights is economically advantageous.[153]

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[148] *See* Law, *supra* note 21, at 1307-08.

[149] *Id.* at 1327.

[150] *Id.* at 1330-41.

[151] Philip I. Levy, *Economic Integration and Incipient Democracy* (Am. Enterprise Inst. for Pub. Pol'y Res, Working Paper No. 142, Mar. 26, 2008), *available at* http://www.aei.org/files/2008/03/26/20080327_IncipientDemocracy20Mar08.pdf (last visited Dec. 19, 2011).

[152] Law, *supra* note 21, at 1316.

[153] *Id.* at 1331-33 (explaining the economic incentive for governments to guarantee human rights).

3. Rights Affected

Freedom House[154] evaluates the civil and political rights of countries by looking at freedom of expression or belief,[155] associational and organizational rights,[156] rule of law,[157] individual rights, electoral process,[158] political participation,[159] and functioning of government. Law finds a positive correlation between Freedom House's scores and globalization.[160] A study sponsored by the International Labour Organization found a positive relationship between "core labour standards" and FDI.[161] These labor standards included fundamental workers' rights such as freedom of association, the right to collective bargaining, elimination of forced or compulsory labor,[162] abolition of child labor,[163] and the elimination of discrimination.[164]

D. The Development and Use of an Objective Analytical Framework

Once FDI-influenced human rights conditions are identified, they should be objectively measured and analyzed in a meaningful framework.[165] As Malhotra and Fasel note, "there is a near absence of a conceptual framework in these initiatives that could be readily considered as a starting point for undertaking a meaningful work on human rights indicators."[166] This article recommends a framework

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154 Freedom House, *Methodology* (2012), www.freedomhouse.org/report/freedom-world-2012/methodology (last visited Dec. 19, 2011).
155 *See* ICCPR, *supra* note 9, at arts. 18-19.
156 *See id*. art. 22.
157 *See* Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, adopted Oct. 24, 1970, preamble, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc.A/8028 (1971) (recognizing "the paramount importance of the Charter of the United Nations in the promotion of the rule of law").
158 *See* ICCPR, *supra* note 9, at art. 25(b).
159 *See id*. arts. 25(a), 25(c).
160 Law, *supra* note 21, at 1298-1307.
161 Kucera, *supra* note 147, at 2.
162 *See* ICCPR, *supra* note 9, at art. 8.
163 *See* ICESCR, *supra* note 8, at art. 10(3).
164 *See* ICCPR, *supra* note 9, at art. 26.
165 *See generally* LANDMAN & CARVALHO, *supra* note 34.
166 RAJEEV MALHOTRA & NICHOLAS FASEL, QUANTITATIVE HUMAN RIGHTS INDICATORS: A SURVEY OF MAJOR INITIATIVES 24 (Mar. 3, 2005), http://hrbaportal.org/wp-content/files/1237942217malhotra_and_fasel.pdf (last visited Dec. 19, 2011) [hereinafter Malhotra & Fasel]; *see also* BARD ANDERS ANDREASSEN & HANS-OTTO SANO, WHAT'S THE GOAL? WHAT'S THE PURPOSE? OBSERVATIONS ON HUMAN RIGHTS IMPACT ASSESSMENT, NORWEGIAN CENTRE FOR HUMAN RIGHTS 2 (2004), http://www.fao.org/righttofood/kc/downloads/vl/docs/214054.pdf (last visited Dec. 19, 2011)

that measures the influence of FDI on the human rights conditions discussed above.

Beginning with the premise that human rights reform is a process and that processes have measurable input and output,[167] the first step of developing a framework is to identify appropriate input and output indicators that measure the impacts of FDI on human rights conditions.[168] In such a framework, input indicators would measure aspects of FDI, and output (or outcome or impact) indicators would measure FDI-influenced human rights conditions.

1. Input Indicators: Measuring FDI

Measuring FDI involves measuring two, interrelated indicators, the business atmosphere and the foreign investment itself.[169] If a country changes its employment, property, immigration, or environmental laws, for example, to attract or accommodate FDI, such changes are indicators that should be measured,[170] since they can directly affect human rights, either positively or negatively. The U.S. Department of State[171] and the United Nations[172] both provide measurements of the openness of countries to foreign investment. In addition, The Heritage Foundation is a private think tank that measures the "economic freedom" of 184 countries with its "Index of Economic

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(advocating the development of "better methods and analytical tools for making inferences about the impact of human rights projects than has been done so far.") [hereinafter Andreassen & Sano].

[167] *See* ILAN KAPOOR, INDICATORS FOR PROGRAMMING IN HUMAN RIGHTS AND DEMOCRATIC DEVELOPMENT: A PRELIMINARY STUDY 5 (1996), *available at* http://brownschool.wustl.edu/sites/DevPractice/Human%20Rights%20Reports/Programming%20in%20Human%20Rights%20and%20Democratic%20Development.pdf (last visited Dec. 19, 2011) [hereinafter Kapoor].

[168] *See* G.T. Doran, *There's a S.M.A.R.T. way to write management's goals and objectives*, 70 MGMT. REV. 35-36 (1981) (stating that indicators should be specific, measurable, acceptable, relevant, and time-specific (SMART)).

[169] *See* OECD, MORE OPEN ECONOMIES RECEIVE MORE FDI, http://www.oecd.org/document/22/0,3746,en_2649_34529562_47500566_1_1_1_34529562,00.html (last visited Dec. 19, 2011).

[170] *See* U.N. Conference on Trade and Development, July 2006, *Measuring Restrictions on FDI in Services in Developing Countries and Transition Economies*, 17 (2006), *available at* http://www.unctad.org/en/docs/iteiia20061_en.pdf (last visited Dec. 19, 2011) ("A strong negative correlation is clear between restriction measures and FDI activity.").

[171] U.S. DEPT. OF STATE, BUREAU OF ECONOMIC AND BUSINESS AFFAIRS, INVESTMENT CLIMATE STATEMENTS 2011 (2011), http://www.state.gov/e/eb/rls/othr/ics/2011/index.htm.

[172] The World Bank, *Doing Business: Economy Rankings* (2011), http://www.doingbusiness.org/rankings.

Freedom."[173] The Foundation defines economic freedom as "the fundamental right of every human to . . . work, produce, consume, and invest in any way they please, with that freedom both protected by the state and unconstrained by the state."[174] And the responsibility of government is to "allow labor, capital and goods to move freely, and refrain from coercion or constraint of liberty beyond the extent necessary to protect and maintain liberty itself."[175] Specific or "component" freedoms measured concern business, trade, fiscal and monetary, government spending, investment, finance, property, corruption, and labor. Relevant indicators of FDI itself include amount, type and source. Such information is readily available from such sources as the OECD[176] and UNCTAD.[177]

2. Output Indicators: Measuring FDI-influenced Human Rights Conditions

Human rights trends are difficult to measure, and achieving objectivity is especially challenging when FDI-influenced measurements are qualitative[178] and therefore vulnerable to subjectivity and political biases. A Carr Center for Human Rights Policy Project Report notes, regarding human rights research, that "[w]e often approach qualitative research with an anecdotal attitude that lacks methodological rigor; and generally speaking, our track record with quantitative research is even worse."[179]

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173 The Heritage Foundation, The Countries, http://www.heritage.org/index/book/chapter-6 (last visited Feb. 20, 2012).

174 The Heritage Foundation, Frequently Asked Questions, http://www.heritage.org/index/faq (last visited Feb. 20, 2012).

175 *Id.*

176 *See* OECD, *About the Organisation for Economic Cooperation and Development*, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Feb. 20, 2012); OECD Directorate for Financial and Enterprise Affairs, *Foreign Direct Investment (FDI) Statistics - OECD Data, Analysis and Forecasts* (Oct. 26, 2011), http://www.oecd.org/document/8/0,3746,en_2649_33763_40930184_1_1_1_1,00.html; Golub, *supra* note 78.

177 UNCTAD, *UNCTADStat*, http://unctadstat.unctad.org/ReportFolders/reportFolders.aspx (last visited Dec. 19, 2011); UNCTAD, *World Investment Report* (July 26, 2011), http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf (last visited Feb. 20, 2012).

178 *See* Kapoor, *supra* note 167, at 7 ("Qualitative indicators aim at capturing people's socio-economic and political beliefs, opinions, perceptions, narratives.").

179 Carr Center for Human Rights, Measurement & Human Rights: Tracking Progress, Assessing Impact 4 (2005), *available at* http://www.hks.harvard.edu/cchrp/mhr/publications/documents/Measurement%20and%20Human%20Rights%20Tracking%20Progress,%20Asessing%20Impac%20Report%202005.pdf (last visited Jan 20, 2012); *see also* Todd Landman, *Measuring Human Rights: Principle, Practice, and Policy*, 26 Hum. Rts. Q. 906 (2004).

Objective analyses should rely, as much as possible, on quantitative indicators of human rights conditions such as socio-economic information related to standards of living and other facets of life.[180] The U.N. Statistical Office is one source of such information.[181] The U.N. Statistical Office is bound to impartiality according to principles set forth in 1994 by the U.N. Statistical Commission.[182] Sources of potentially FDI-influenced quantitative information include the following:

Development
- U.N. Development Programme Human Development Reports[183]
- World Bank World Development Indicators[184]

Education
- OECD Education and training database[185]
- World Bank Education Statistics (EdStats)[186]

Food and Agriculture
- Food and Agriculture Organization of the United Nations (FAOSTAT)[187]
- OECD Agricultural Policy Indicators[188]

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[180] Malhotra & Fasel, *supra* note 166, at 9.

[181] *See* UNITED NATIONS HANDBOOK OF STATISTICAL ORGANIZATION, OPERATION AND ORGANIZATION OF A STATISTICAL AGENCY, U.N. DOC. ST/ESA/STAT/SER.F/88 (2003), *available at* http://unstats.un.org/unsd/dnss/hb/default.aspx (last visited Dec. 19, 2011); UNITED NATIONS HANDBOOK ON SOCIAL INDICATORS, DEPARTMENT OF INTERNATIONAL ECONOMIC AND SOCIAL AFFAIRS, at 15-17, U.N. DOC. ST/ESA/STAT/SER.F/49 (1980), *available at* http://unstats.un.org/unsd/publication/SeriesF/SeriesF_49e.pdf (last visited Dec. 19, 2011).

[182] Malhotra & Fasel, *supra* note 166, at Annex 3.

[183] U.N. Development Programme Human Development Reports, *International Human Development Indicators*, http://hdr.undp.org/en/statistics/ (last visited Dec. 19, 2011).

[184] The World Bank, *World Development Indicators 2011* , http://data.worldbank.org/data-catalog/world-development-indicators/wdi-2011 (last visited Dec. 19, 2011).

[185] OECD, *Education and Training*, http://www.oecd.org/topicstatsportal/0,2647,en_2825_495609_1_1_1_1_1,00.html (last visited Dec. 19, 2011).

[186] The World Bank, *Edstats - Education Statistics*, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTEDUCATION/EXTDATASTATISTICS/EXTEDSTATS/0,,menuPK:3232818~pagePK:64168427~piPK:64168435~theSitePK:3232764,00.html (last visited Dec. 19, 2011).

[187] Food and Agriculture Organization of the United Nations, *FAOSTAT*, http://faostat.fao.org/default.aspx (last visited Dec. 19, 2011).

[188] OECD, *Agriculture and Fisheries, Agricultural Policy Indicators*, http://www.oecd.org/topicstatsportal/0,3398,en_2825_494504_1_1_1_1_1,00.html#494525 (last visited Dec. 19, 2011).

Health
- OECD Health Database[189]

Labor
- Human Rights First, Measurement Units for Workers Rights (MUWR)[190]
- International Labour Organisation (ILO)
  - Bureau of statistics databases[191]
  - LABORSTA internet[192]
  - ILO Statistical Databases[193]

Living Standards
- World Bank Living Standards Measurement Study (LSMS)[194]

Prominent sources of qualitative measurements of human rights conditions include Human Rights Watch[195] and The Heritage Foundation.[196] Human Rights Watch "conducts regular, systematic investigations of human rights abuses . . . in more than 90 countries."[197] In closed regions, researchers have to overcome practical challenges, "including identifying rights violations, gaining a thorough understanding of the local context, identifying victims and witnesses, and identifying suitable recommendations and advocacy opportunities."[198] The gathered information is then assembled and published in a formal report.[199] The reports are organized by country and by issues.[200] Listed topics that most directly relate to potential impacts of FDI in-

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189 OECD, *Health Data 2011*, http://www.oecd.org/health/healthdata (last visited Dec. 19, 2011).

190 Human Rights First, WWW.HUMANRIGHTSFIRST.ORG (last visited Apr. 16, 2012).

191 International Labour Organization [ILO], *Department of Statistics*, http://www.ilo.org/public/english/bureau/stat/index.htm (last visited Dec. 19, 2011).

192 ILO, *LABOSTA Internet*, http://laborsta.ilo.org/ (last visited Dec. 19, 2011).

193 ILO, *Statistics and Databases*, http://www.ilo.org/global/statistics-and-databases/lang—en/index.htm (last visited Dec. 19, 2011).

194 The World Bank, *Living Standards Measurement Study*, http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTLSMS/0,,contentMDK:21610833~pagePK:64168427~piPK:64168435~theSitePK:3358997,00.html (last visited Dec. 19, 2011).

195 HUMAN RIGHTS WATCH, WHO WE ARE, http://www.hrw.org/node/75136 (last visited Dec. 19, 2011).

196 THE HERITAGE FOUND, INDEX OF ECONOMIC FREEDOM, http://www.heritage.org/Index/ (last visited Dec. 19, 2011).

197 HUMAN RIGHTS WATCH, OUR RESEARCH METHODOLOGY, http://www.hrw.org/node/75141 (last visited Dec. 19, 2011).

198 *Id.*

199 *See* HUMAN RIGHTS WATCH, PUBLICATIONS, http://www.hrw.org/publications/reports (last visited Dec. 19, 2011).

200 *Id.*

clude Education, Environment, ESC Rights Health, Labor, Child Labor, Migrant Workers, and Forced Labor & Trafficking.[201] Other sources of qualitative measurements of FDI-influenced human rights conditions include governmental, non-governmental and inter-governmental sources such as Amnesty International,[202] Human Rights First,[203] and the U.N. human rights program.[204]

3. Analytical Framework

Below is a tabular representation of indicators that ought to be considered in the development of an analytical framework. Once measurable input and output indicators have been identified and the data has been collected, the next, and perhaps most difficult, step is to analyze the information in an objective and meaningful manner. Apart from the normal risk that information will be used selectively to satisfy a political or other agenda, the most significant obstacle to honest, unbiased analysis is the fallacy of equating statistical correlation with causation.[205] Andreassen and Sano call this the "problem of attribution."[206] A change in human rights conditions can stem from a number of factors other than FDI, including the work of human rights organizations, lobbying, regime changes, and so on.[207] Also, short-term effects may differ from long-term effects.

201 *Id.*
202 AMNESTY INT'L, ANNUAL REPORT 2011, http://www.amnesty.org/en/annual-report/2011 (last visited Dec. 19, 2011).
203 HUMAN RIGHTS FIRST, 2010 ANNUAL REPORT (2011), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-2010-Annual-Report.pdf (last visited Dec. 19, 2011).
204 Office of the High Commissioner for Human Rights [OCHR], *OHCHR Report 2010*, *available at* http://www2.ohchr.org/english/ohchrreport2010/web_version/media/pdf/0_Whole_Report.pdf (last visited Dec. 19, 2011).
205 *See* Andreassen & Sano, *supra* note 166, at 12.
206 *Id.*
207 *See id.*

HUMAN RIGHT	**INPUT INDICATOR (FDI +)**	**OUTPUT INDICATOR**	**NEGATIVE IMPACT**	**POSITIVE IMPACT**
ECONOMIC FREEDOMS				
Economic freedoms		Market access; host nation laws; fees and taxes	Lower FDI	Increased FDI
ECONOMIC, SOCIAL AND CULTURAL RIGHTS				
Environment: Health, Life & Safety (*see also* consumer welfare)	Technology transfers; R&D; construction of health care facilities	Pollution indices; host nation laws; sources of energy; forest volume; biodiversity; mortality/illness rates	Pollution; damage to environment; unsafe products and technology	Transfer of cleaner environment ("green growth"); safer products and technologies
Standard of Living (consumer welfare)	Infrastructure changes: transportation & communications	Consumer price index; consumption; access to public utilities; product liability	Dangerous products and technologies	Cheaper, higher quality and/or safer products; *see also* Food and Agriculture
Economy		GNP; balance of payments		Economic growth; improved balance of payments
Labor & Employment	Technical and vocational training	Unemployment index; average income; distribution of income; host nation laws	"Crowding out"; exploitation of local labor	"Knowledge spillover"; Increased employment; increased skills; increased pay
Education	Construction of schools; *see also* Labor and Employment	School attendance & graduation rates; test scores; *see also* Labor and Employment		*See* Labor and Employment
Local Business	Technology transfers	Local business start-ups and closures; product imitation; productivity; profits; exports; unemployment index	"Crowding out"; anti-competition	"Market access (know-how) spillover"; increased productivity and efficiencies; increased employment
Food & Agriculture	Technology transfers; land ownership	Yields; losses; productivity; food exports; food prices; demographics; *see* Labor & Employment	Displacement of peoples ("Crowding out")	"Knowledge spillover"; increased yields and efficiencies; increased consumption; cheaper and greater variety of foods
CIVIL AND POLITICAL RIGHTS				
Basic Freedoms	All of the above	Host nation laws; workers' rights; child labor; demographics	MNC support of oppressive regimes; displacement of peoples	Greater freedoms

III. CONCLUSION AND RECOMMENDATIONS

FDI has demonstrated a potential to be a positive force for human rights. It can result in transfers of human capital and more efficient and greener technologies, reduced unemployment and poverty, improvements in agriculture, and other things that positively impact human rights conditions. Human rights advocates should attempt to harness FDI to improve human rights conditions consistently.

An OECD publication notes that "the main policy conclusion that can be drawn . . . is that the economic benefits of [FDI] are real, but they do not accrue automatically."[208] With this in mind, Kumar puts forth recommendations for developing countries such as "promoting national enterprises, assisting them in the process of building technological capability by costing linkages with R&D institutions and by giving protection from the threat of take-over, especially in the strategic sectors."[209] The GTZ study states, "foreign investors and the target country can and should contribute to minimise the negative and increase the positive impacts."[210] Similarly, "win-win situations should be possible if the right business model is in place."[211]

Ironically, demonization of FDI and promotion of solely hard-law approaches subvert human rights goals. An international legal framework that subjects all MNCs to a universal human rights code will require the universal support of governments and vast, intricate resources to enforce such a framework. The existing state-centered framework in which states are expected to monitor MNCs in their territory with due diligence is an increasingly unfeasible and unsatisfactory way to adequately hold MNCs accountable for failing to respect international human rights. Governments hesitate to take actions that may impede FDI.

Consider, for example, the potential effect of relying on the Alien Tort Statute ("ATS")[212] as an enforcement mechanism. *The*

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[208] OECD, FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: MAXIMISING BENEFITS, MINIMISING COSTS 25 (2002).

[209] Nagesh Kumar, *Foreign direct investments and technology transfers in an era of globalization and prospects for developing countries: a policy postscript*, *in* NAGESH KUMAR, GLOBALIZATION, FOREIGN DIRECT INVESTMENT AND TECHNOLOGY TRANSFERS 209 (1998).

[210] *GTZ Study*, *supra* note 127, at 52.

[211] *Id.*

[212] 28 U.S.C. § 1350 (2006). *See generally* Kathleen Jaeger, *Environmental Claims Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 519, 530 (2010); Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC'Y REV. 635 (2004); Mark W. Wilson, *Why Private Remedies for Environmental Torts Under the Alien Tort Statute Should Not Be Constrained by the Judicially Created Doctrines of Jus Cogens and Exhaustion*, 39 ENVTL. L. 451 (2009).

Awakening Monster,[213] a study which measures the potential economic costs of the ATS, found that "[a]ny MNC that operates a subsidiary in a target country necessarily has contacts with the government" and that "[t]hese contacts can easily turn the firm into an ATS defendant."[214] The study reasons that since MNCs doing business in countries with sub-par human rights standards could give rise to corporate liability under the ATS, the MNCs will shy from doing business in any of those countries, thereby stifling FDI.[215] The 2003 study calculated that the ATS put $55 billion of U.S. FDI stocks in target countries as well as $270 billion of world FDI at risk.[216] Also, foreign-based MNCs with assets in the United States are vulnerable to ATS litigation and therefore compelled to divest their operations in the United States.[217] This is troubling from a human rights standpoint because, as the study suggests, it has the counterproductive effect of causing foreign-based MNCs to divest in their U.S. operations instead of divesting in operations in countries with sub-par human rights standards.[218] As the U.S. Chamber of Commerce noted, ATS suits could deter outbound U.S. FDI headed "where it is needed most."[219]

Soft-law approaches to FDI do not suffer from the same counter-productivity of hard-law approaches. Corporate accountability instruments such as the 2011 Guiding Principles, however, give inadequate attention to the positive aspects of corporate influence on human rights. The Guiding Principles suffer from functional fixedness, viewing states solely as preventative agents in the protection against human rights abuses. Recommendations to states on the subject of MNCs and human rights should consider that MNCs present an opportunity – not just a threat – for the improvement of human rights conditions. For example, the Guiding Principles declare that businesses should "maintain adequate domestic policy space to meet their human rights obligations when pursuing . . . investment treaties," yet offer no policy recommendations regarding the use of investment treaties to improve socio-economic rights. The document merely notes that

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[213] Gary Clyde Hufbauer & Nicholas Mitrokostas, Awakening Monster: The Alien Tort Statute of 1789 (2003).

[214] *Id.* at 17.

[215] *Id.* at 16-17; *see also* Brief for the Chamber of Commerce of the United States as Amicus Curiae Supporting Appellee at 23, Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011) (arguing that ATS corporate lawsuits "deter U.S. business activity abroad . . . . and chill foreign investment") [hereinafter U.S. Chamber Brief].

[216] Hufbauer & Mitrokostas, *supra* note 213, at 38-39.

[217] *Id.* at 41.

[218] *Id.*

[219] U.S. Chamber Brief, *supra* note 215, at 25.

investment treaties "create economic opportunities for States" and then advises caution in proceeding with them.

Yet, there is substantial evidence supporting the idea that states' human rights practices are more effectively regulated through preferential trade agreements, which, unlike international human rights treaties, "supply hard standards that tie material benefits of integration to compliance with human rights principles" and are better at "changing repressive behaviors."[220] Similarly, bilateral investment treaties, which typically contain provisions on "standards of treatment, expropriation, losses from armed conflict or internal disorder, transfers and convertibility of payments, [and] settlement of disputes,"[221] may provide governments attracting FDI opportunities to direct corporate activity in a way that will improve human rights conditions.

Indeed, with globalization moving governments toward privatization and market liberalization, the incentive-based approach to human rights is the way of the future. As one author proposes, "advocates should begin to supplement their ongoing efforts to promote and protect human rights by starting to use arguments that take account of the instrumental or market value of human rights, rather than relying on arguments that are focused exclusively on the intrinsic value of human rights."[222] Realistically, the risk of being held accountable by regional or international treaty-based human rights bodies may weigh significantly less than the opportunity cost of forgoing inward investment that increases technological and economic development. If governments can avoid this opportunity cost through the fulfillment of human rights, they will benefit. It is indicative of the distressing question facing human rights advocates of whether the growth of multinational business activity renders the traditional international human rights framework aloof and obsolete.

Responsible efforts to guard against the human rights abuses of MNCs therefore should include objective consideration of the potential positive impacts of FDI on human rights so that they can be operationalized. The formulation of empirically based models can be used to advise governments – especially those of developing countries – on how to turn FDI into positive forces for human rights.

In an age of increasing power and speed of information proliferation, as well as increasing concern over climate change and environ-

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220 Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593, 593 (2005).

221 Zakia Afrin, *Foreign Direct Investments and Sustainable Development in the Least-Developed Countries*, 10 ANN. SURV. INT'L & COMP. L. 215, 226 (2004).

222 Mark Freeman, *Doing Well by Doing Good: Linking Human Rights with Corporate Self-Interest*, 6 INT'L BUS. L. J. 741, 742 (2001).

mental impacts in general, MNCs find it increasingly advantageous to convey an image of environmental friendliness and prevent images of environmental carelessness and disrespect. Shamir's main contention is that MNCs emphasize social responsibility and corporate citizenship through extensive campaigns to combat the urge to hold MNCs accountable under international human rights law.[223] Whether strategic, altruistic, or both, MNCs are "becoming more proactive rather than defensive" and "instead of simply complying with legislation, they move 'beyond compliance' and become more a 'policy-maker, not a policy-taker.'"[224] With a better understanding of how FDI can benefit human rights conditions, human rights advocates can be more effective in implementing the ideals that are set forth in soft-law documents and in campaigns of corporate social responsibility.

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[223] Shamir, *supra* note 212, at 659.
[224] UTTING, *supra* note 77, at 3.