

# International Investment Treaty Protection of Not-for-Profit Organizations

Working Paper

Regional NGO Law Rapid-Response Mechanism, Supported by USAID

May 2008 update

*This paper is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of the authors and do not necessarily reflect the views of USAID or the United States Government.*



## I. Introduction

One of the defining features of the current phase of globalization has been the astonishing proliferation of non-governmental organizations, and the increasing influence and reach of such actors on the global stage. At the same time as there has been a sustained boom in international trade and investment activity, not-for-profit activity has also enjoyed healthy growth on the international stage. However, unlike commercial activity – which is governed by a dense universe of purpose-built trade and investment agreements – not-for-profit activities have been more neglected by the architects of global governance. At first glance, the international legal regime governing not-for-profit organizations is far more skeletal than the regimes governing commercial for-profit activities.

In cases where not-for-profit organizations encounter turbulence in their foreign operations, some limited forms of international legal recourse may be available. Not-for-profit organizations might look to regional instruments such as the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations – an agreement which obliges signatories to grant non-governmental organizations the equivalent status and protection afforded in their home territories. However, this Convention is poorly adhered to, with only 10 ratifications to date.

Not-for-profit organizations often turn to international human rights law for recourse in cases of interference or abuse at the hands of host governments. Indeed, in late 2006, the European Court of Human Rights issued the latest in a line of ringing endorsements for the right of not-for-profit organizations to associate freely.<sup>1</sup> However, the leading international human rights regimes in Europe and the Americas are limited in their geographical coverage, and, hence, in their capacity to remedy wrongs suffered by not-for-profit organizations operating internationally.<sup>2</sup>

Another alternative may lie in an earlier generation of “Friendship, Commerce and Navigation” (“FCN”) treaties concluded by governments. Several FCN treaties contain non-economic protections for foreigners, including guarantees of freedom of conscience, freedom of worship, and protection from extra-legal searches and harassment. Of particular interest for not-for-profit organizations, some FCN treaties expressly protect the rights of foreigners to form not-for-profit associations<sup>3</sup> and engage in philanthropic work without interference.<sup>4</sup> Several FCN treaties guarantee that the parties will treat not-for-profits from the other party no less favorably than

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<sup>1</sup> See *Moscow Branch of the Salvation Army v Russia*, Application No. 72881/01, 5 October 2006.

<sup>2</sup> See discussion in Nick Gallus and Luke Eric Peterson, “International Investment Treaty Protection of NGOs,” 22(4) *Arbitration International* 527 (2006) at pages 531-2.

<sup>3</sup> Article 6(7), US-Belgium Friendship, Establishment and Navigation Treaty; Article 8(1), US-Denmark Friendship, Commerce and Navigation Treaty; Article 6(2), US-Ireland Friendship, Commerce and Navigation Treaty; Article 3(2), Italy Friendship, Commerce and Navigation Treaty; Article 6(4) US-Luxembourg Friendship, Establishment and Navigation Treaty; Article 3(2), US-Italy Friendship, Commerce and Navigation Treaty; Article 8(2), US-Pakistan Friendship and Commerce Treaty.

<sup>4</sup> Article 1, Liberia-US Friendship, Commerce, Navigation Treaty; Article 1, US-Norway Friendship, Commerce and Consular Rights Treaty; Article 3(2), US-Italy Friendship, Commerce and Navigation Treaty; Article 2(2) and 3(3), US-Taiwan Friendship, Commerce and Navigation Treaty; Article 2(2), US-Togo Amity and Economic Relations Treaty.

they treat their own,<sup>5</sup> including in taxation,<sup>6</sup> and no less favorably than they treaty not-for-profits from third countries.<sup>7</sup>

While these FCN agreements offer important protections, not-for-profits cannot claim in their own right that a state failed to provide the protections but must convince their home government to assert a claim on their behalf.

Another less explored avenue for not-for-profit organizations is the existing international regime which has largely succeeded these earlier FCN agreements, specifically the vast and still-growing network of international treaties for the protection of foreign investments, commonly referred to as bilateral investment treaties (“BITs”). An earlier article by the present authors has highlighted how such agreements might provide jurisdiction for not-for-profit organizations to arbitrate against a host government pursuant to international law.<sup>8</sup> These treaties provide a slate of binding legal protections for those entities fitting underneath the agreements’ protection umbrella. These protections include compensation in case of expropriation of assets; non-discriminatory treatment; the right to transfer funds into and out of a host country; due process; physical protection (including basic police protection); and so-called “fair and equitable treatment”.

The purpose of the present paper is two-fold: to profile the features of these international investment treaties, and to offer a preliminary assessment of how – and to what extent – the protections of these agreements might be relevant to not-for-profit organizations who have suffered deprivations, interferences, and various forms of abuse at the hands of host governments. While these investment treaties were not conceived primarily as instruments for protecting not-for-profit actors, many such agreements do afford potentially significant

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<sup>5</sup> Article 6(7), US-Belgium Friendship, Establishment and Navigation Treaty; Article 7(1), US-Denmark Friendship, Commerce and Navigation Treaty; Article 9(1), 12(1) and 13(1), US-Greece Friendship, Commerce and Navigation Treaty; Article 6(4), US-Luxembourg Friendship, Establishment and Navigation Treaty; Article 1, US-Finland Friendship, Commerce and Consular Rights Treaty; Article 1(2), US-Italy Friendship, Commerce and Navigation Treaty; Article 6, US-Ireland Friendship, Commerce and Navigation Treaty; Article 9(1), US-Israel Friendship, Commerce and Navigation Treaty; Article 1(2), US-Italy Friendship, Commerce and Navigation Treaty; Article 1, US-Liberia Friendship, Commerce and Navigation Treaty; Article 8(2), US-Pakistan Friendship and Commerce Treaty; Article 2(2), 3(3) and 4(3), US-Taiwan Friendship, Commerce and Navigation Treaty.

<sup>6</sup> Article 9(1), US-Belgium Friendship, Establishment and Navigation Treaty; Article 9(1)(d), US-France Navigation and Commerce Treaty; Article 9(1)(d), US-Madagascar Navigation and Commerce Treaty; Article 11(1) and 16(1), US-Israel Friendship, Commerce and Navigation Treaty; Article 10(1), US-Luxembourg Friendship, Establishment and Navigation Treaty; Article 11(1), US-Netherlands Friendship, Commerce and Navigation Treaty; Article 11(1), US-Suriname Friendship, Commerce and Navigation Treaty; Article 7(1), US-Oman Amity, Economic Relations and Consular Rights Treaty; Article 10(1), US-Taiwan Friendship, Commerce and Navigation Treaty.

<sup>7</sup> Article 7(2), US-Denmark Friendship, Commerce and Navigation Treaty; Article 6(3), US-Ethiopia Amity and Economic Relations Agreement; Article 1, US-Finland Friendship, Commerce and Consular Rights Treaty; Article 1, US-Liberia Friendship, Commerce and Navigation Treaty; Article 8(2), US-Pakistan Friendship and Commerce Treaty.

<sup>8</sup> Gallus and Peterson, *supra* n. 2. See also earlier work by Timothy Evered and Gregory W. MacKenzie, which had raised the possibility of investment arbitration as a legal recourse for not-for-profit actors: Timothy Evered, “Foreign Investment Issues for International Non-Governmental Organizations,” 3 *Buffalo Journal of International Law* 153 (Summer 1996) and Gregory W. Mackenzie, “ICSID Arbitration as a Strategy for Leveling the Playing Field Between International Non-Governmental Organizations and Host States”, 19 *Syracuse Journal of International Law and Commerce* 215 (Spring 1993).

international law protection to such actors. In so doing, they represent a useful supplement to the patchy framework of international human rights law and international not-for-profit law.

## II. Problems faced by not-for-profit organizations in foreign countries

The organizations which are the subject of this paper are those which do not distribute profits to directors or other owners. Such not-for-profit organizations may pursue widely varying goals, be they private or public benefit. Particular attention is given in the following discussions, however, to those not-for-profit organizations which pursue some form of public good or benefit for civil society.

In recent years, there appears to have been an upsurge in harassment and obstruction of not-for-profit organizations. The International Center for Not-for-Profit Law (“ICNL”) has identified a “growing regulatory backlash against civil society organizations in many parts of the world.”<sup>9</sup> ICNL notes that restrictive laws, regulations and policies have been most common in the Middle East, the former Soviet Union, Asia and Africa.<sup>10</sup>

These restrictions come in a variety of forms.

Countries often take measures targeted at the right of not-for-profit organizations to form. Some repressive countries place severe limits on the creation of such organizations. Conversely, the right to establish a not-for-profit organization may be granted, but severely circumscribed in practice. For instance, several countries have introduced onerous registration requirements which oblige all organizations to register with the government so that their activities may be monitored.<sup>11</sup> At the same time, government agencies may exercise arbitrary sway over the registration process, with applications delayed for long periods or rejected summarily without explanation.

Another problem arises where countries apply restrictions on foreign funding of not-for-profit organizations. Such measures may ban foreign funding; require that all foreign funds be channeled through or approved by government agencies; or place onerous taxes or limits on any foreign funding.<sup>12</sup> The professed intention of such measures is often to limit foreign “meddling” in domestic political affairs, however, such measures may grant governments wide discretion to hamper the activities of not-for-profit organizations. In Uzbekistan, foreign funds intended for local non-governmental organizations must be channeled through select government banks, which enjoy broad discretion whether and when to pass those funds onwards to local actors. A local chapter of the Open Society Institute was de-registered by the Uzbek Government in 2004

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<sup>9</sup> International Center for Not-for-Profit Law, Constraints on Civil Society, Draft of January 15, 2006, pages 1-2, on file with authors.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, at pages 3-4.

<sup>12</sup> *Ibid.*, at pages 4-5. See also Article 9 of the *Indian Foreign Contribution (Regulation) Bill*, 2006, which empowers the Indian government to “prohibit any person or organization ... from accepting any foreign contribution” for a broad range of reasons including the “public interest.” CIVICUS, the World Alliance for Citizen Participation, says the Bill “gives civil servants the power to interfere with civil society activity” (CIVICUS, “Indian Government Bill Threatens Civil Society,” 9 March 2007, available on-line at: <http://www.civicus.org/csw/CIVICUS-press-release-IndiaFCRB-9.3.07.htm>).

and forced to cease its activities in that country. Prior to being de-registered, the Institute decried the onerous new requirements to channel grants through state hands, lamenting that this had effectively halted international support to many local grantees in areas such as health, education, legal reform and economic and small business support.<sup>13</sup>

A further tool which is often used to harass not-for-profit organizations is the threat of arbitrary termination or dissolution. ICNL warns that laws introduced in Belarus and Egypt grant broad discretion to shut down any organizations for vague violations of national security, public order or morals.<sup>14</sup> In a related vein, authorities may seize the assets or offices of not-for-profit organizations, making it difficult or impossible for them to carry out their work. For example, one not-for-profit organization was allegedly forced to abandon construction of a camp for children in Africa, and the money incurred in constructing the camp, when the African government arbitrarily halted construction.<sup>15</sup> Another problem may be the denial or revocation of permits which had been issued or promised.

Even where arbitrary termination or dissolution is not employed, governments may enjoy wide latitude to monitor and interfere in the activities of not-for-profit organizations. For example, a recently enacted law in Russia provides government officials with a right to attend any meetings and events of a not-for-profit organization, raising the specter of state-meddling in internal staff meetings, strategy sessions, and program development meetings.<sup>16</sup> A particular concern has been that reporting requirements are sometimes introduced which would require that any program activities (an undefined and potentially open-ended term) be reported to government officials on an ongoing basis. ICNL reports that, in some instances, government officials may harass not-for-profit organizations to such an extent that their ability to carry out program activities is compromised.<sup>17</sup> Recently, a group of major international not-for-profit organizations, including Amnesty International, Human Rights Watch and Transparency International, wrote to Russian President Vladimir Putin to warn that the reporting requirements of his government have the potential “to present serious obstacles to the functioning of these organizations, including through burdensome and unreasonable demands and arbitrary decisions by officials.”<sup>18</sup>

Not-for-profit organizations are sometimes the victim of more generalized harassment. For example, in a recent report on Zimbabwe, Human Rights Watch has chronicled a pattern of

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<sup>13</sup> Open Society Institute, “Uzbek government forces closure of local Soros Foundation”, Open Society Institute Press Release, April 18, 2004, available on-line at: [http://www.soros.org/newsroom/news/uzbekistan\\_20040418](http://www.soros.org/newsroom/news/uzbekistan_20040418).

<sup>14</sup> ICNL, *supra* n. 6 at page 6.

<sup>15</sup> Confidential information provided to one of the authors on 2 February 2006 by a Canadian-based not-for-profit organization undertaking charitable activities in various developing countries.

<sup>16</sup> Article 38, Russian Federal Law on Non-commercial Organizations: “Supervision over the observance of laws by public associations shall be exercised by the Procurator’s Office of the Russian Federation. A body rendering decisions on the state registration of public associations shall exercise control over the compliance of their activities with their statutory goals. The said body shall have the right to exercise the following: 1) summon documents containing resolutions by a public association’s governing bodies; 2) send over its representatives to participate in events held by public associations.”

<sup>17</sup> ICNL, *supra* n. 6 at page 7.

<sup>18</sup> Letter to President Vladimir Putin, January 2007, at page 2, available on-line at: <http://www.civicus.org/new/media/Global-civil-society-letter-to-PresidentPutin-february-2007.pdf>.

“sustained harassment and intimidation of human rights activists.”<sup>19</sup> The report notes that human rights organizations are a particular target of the government which has accused them of supporting the political opposition and of using Western funds to “destabilize the country.” Human Rights Watch notes that repression and intimidation are used to such an extent that they inhibit the course of the daily work by human rights organizations:

These threats take many forms including attacks in the state media by state officials, public statements by ministers, and threatening phone calls involving death threats by unknown persons purporting to speak on behalf of the government. Some human rights organizations report that their offices are sometimes subjected to random checks without warrant by police under the pretext of looking for incriminating material or evidence of criminal activities. Other activists report that police and intelligence officers often follow, harass and intimidate them.<sup>20</sup>

In addition to harassing not-for-profit organizations, governments have also reneged on commitments. Some private foundations or organizations engaged in development or relief activities may conclude legal agreements with their host countries so as to clarify the terms upon which they may enter and operate. For example, CARE International has entered into host government agreements with Tunisia and Mozambique in relation to water improvement projects and food relief activities, respectively.<sup>21</sup> Such agreements might clarify whether personnel of the foreign organization will pay income taxes; whether the organization itself will pay Value-Added Taxes or import duties on goods brought into the country; and what sort of contributions the host state may make (for example, provision of free or subsidized office space or utilities).<sup>22</sup> Governments reneging on commitments to not-for-profit organizations after they are relied on could cause severe financial difficulties.<sup>23</sup>

### **III. BIT protection of not-for-profit organizations**

Not-for-profit organizations seeking to claim that some of the actions described above breach an investment treaty must be able to establish, first, that an arbitration tribunal convened has jurisdiction to hear the claim and, second, that the treatment is inconsistent with treaty obligations.

This section addresses each of these requirements.

#### **A. Jurisdiction**

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<sup>19</sup> Human Rights Watch, “You Will be Thoroughly Beaten: The Brutal Suppression of Dissent in Zimbabwe,” 18(10A) *Human Rights Watch Country Reports* (November 2006).

<sup>20</sup> *Ibid.* at page 25.

<sup>21</sup> Mackenzie, *supra* n. 5. See also the reference to ICRC Host Government Agreement with Russia in *Protecting Eurasia’s Dispossessed: a Practical Guide*, Open Society Institute, Forced Migration Project, 1996, Chapter 2, available on-line at: [http://www2.soros.org/fmp2/html/chapter\\_2\\_ngo.html](http://www2.soros.org/fmp2/html/chapter_2_ngo.html).

<sup>22</sup> See the extensive discussion in Evered, *supra* n. 5.

<sup>23</sup> Evered, *supra* n. 5 at page 165.

A not-for-profit organization claiming a breach of a BIT faces two main jurisdictional hurdles: first, to establish that it qualifies as an “investor” or “company” under a particular treaty, and, second, to establish that it has made “investments” which fall under the same treaty.

*i. Is the not-for-profit organization a protected “investor” or “company”?*

Investment treaties differ as to whether they expressly include not-for-profit entities as “investors” or “companies” protected under the agreement. Some treaties, such as the US treaties with Kazakhstan and Kyrgyzstan expressly define companies so as to include organizations that may not be “organized for pecuniary gain.”<sup>24</sup> Indeed, the letters of transmittal submitted by the White House to the US Senate make clear that these treaties are drafted so as to cover “charitable and non-profit entities.”<sup>25</sup>

However, some investment agreements leave open the question as to whether they extend their protections to not-for-profit entities. For example, United Kingdom treaties with Azerbaijan, Kyrgyzstan, Turkmenistan, Kazakhstan, and Uzbekistan all define companies simply as “corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom.”<sup>26</sup> In the absence of any express requirement for such companies to be profit-seeking, it might be argued that a not-for-profit association constituted according to UK law falls within the cover of the treaty.<sup>27</sup>

*ii. Does the not-for-profit organization have a protected investment?*

Assuming that a not-for-profit entity falls within the definition of “investor” or “company” as set out in a relevant investment treaty, it still remains to be determined whether such an entity has made an “investment” as defined under that same treaty.

Every treaty defines what qualifies as an “investment” – even if some do so in the circular fashion of the US-Kyrgyzstan treaty which indicates that “‘investment’ means every kind of

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<sup>24</sup> US-Kyrgyz Bilateral Investment Treaty, Article 1(b); US-Kazakh Bilateral Investment Treaty, Article 1(b). See also Article 1(3)(a) of the 2005 German model BIT: “the term ‘investor’ means ... any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether or not its activities are directed at profit.”

<sup>25</sup> Letters of Transmittal available on-line at the US State Department website:

<http://www.state.gov/documents/organization/43566.pdf> and

<http://www.state.gov/documents/organization/43567.pdf>.

<sup>26</sup> See Article 1(d) of the relevant treaties. Treaty texts available on-line at the UK Foreign Office website:

<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1045739996216>.

<sup>27</sup> It is worth noting that UK treaties do not impose any nationality requirement beyond mere incorporation in the designated home country (see, for example Article 1(d) of the UK-Turkmenistan investment treaty, available on-line at: [http://www.fco.gov.uk/Files/kfile/CM6021IPPA\\_Turkmenistan.pdf](http://www.fco.gov.uk/Files/kfile/CM6021IPPA_Turkmenistan.pdf)). By contrast, US treaties set a higher standard insofar as they require that US “companies” must have substantial business activities in the US. This requirement ensures that mere shell companies incorporated in the US (and used to make onward investments) would not enjoy the coverage of the treaty. Conversely, because the UK’s treaties impose no similar requirement, they might easily be used by non-nationals of the United Kingdom merely by virtue of incorporation of a legal entity in the UK. Indeed, arbitration tribunals have confirmed that certain investment treaties operate as “portals” – through which investments emanating from a multitude of different countries might transfer while en route to a final destination in some third country (see Luke Eric Peterson, “Tribunal Split in Bechtel-Bolivia case over corporate nationality of investor,” Investment Treaty News, Dec.20, 2005, available at: [http://www.iisd.org/pdf/2005/itn\\_dec20\\_2005.pdf](http://www.iisd.org/pdf/2005/itn_dec20_2005.pdf)).

investment ... .”<sup>28</sup> It might be inferred from such an open-ended definition that assets not intended to be used for commercial or profit-seeking purposes might still constitute “investments” covered by the US-Kyrgyzstan treaty. In other cases, this may be made explicit, as, for example, in the North American Free Trade Agreement (“NAFTA”), whose definition of investment includes “enterprises,” which are elsewhere defined as entities constituted either for profit or not-for-profit.<sup>29</sup>

The plain-face of the treaty text does not provide the final word on the matter. Where a definition does not expressly encompass assets deployed for non-profit-seeking ends, arbitral tribunals have taken different approaches in defining what constitutes an investment. In some cases, arbitrators have gone beyond the text of the relevant treaty, in arguing for certain inherent or objective characteristics of “investments.”<sup>30</sup> In at least two instances, arbitrators have read-in a requirement for investments to be commercially oriented or intended to generate an economic return or profit.<sup>31</sup>

In addition to meeting the definition of investment set out in a given investment treaty, claimants may also need to satisfy a further definition of investment, depending on the means through which the investor chooses to resolve the dispute. Typically, when an investor has a dispute with a host state, that investor can choose from one of several different sets of arbitration rules identified in the dispute settlement provisions of a given investment treaty. Investors can, typically, choose between:

- a. the rules of the World Bank’s International Centre for Settlement of Investment Disputes (“ICSID”), if both parties to the BIT have signed the ICSID’s foundational Washington (or ICSID) Convention;
- b. the ICSID’s “Additional Facility” Rules, if only one of the parties to the BIT has signed the ICSID Convention; and
- c. the rules of the United Nations Commission on International Trade Law (UNCITRAL).

Investors choosing the UNCITRAL rules or the ICSID’s “Additional Facility” Rules need not satisfy any definition of investment beyond that in the BIT.<sup>32</sup> Conversely, investors choosing to resolve their dispute under the ICSID rules might also need to satisfy an implicit definition of investment within the ICSID Convention.

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<sup>28</sup> US-Kyrgyzstan BIT, Article 1(a).

<sup>29</sup> Article 201(1) of the NAFTA reads: “enterprise means any entity constituted or organized under applicable law, whether or not for profit ...”

<sup>30</sup> Gallus and Peterson, *supra* n. 2 at pages 537-8.

<sup>31</sup> *CME Czech Republic BV (The Netherlands) v. Czech Republic*, Ian Brownlie’s separate opinion, Final Award, 14 March 2003 at para. 34; *Franz Sedelmeyer v. Russian Federation*, Award, July 7, 1998 at page 65.

<sup>32</sup> The UNCITRAL rules are more commonly used for arbitration of non-investment disputes (for example commercial contract or trade disputes) and are accordingly indifferent as to what constitutes an investment. Article 2 of the ICSID Additional Facility Rules provides: “The Secretariat of the Centre is hereby authorized to administer ... arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment ...”



The ICSID Convention does not offer any *explicit* definition of the types of investments which are eligible for arbitration. Some arbitrators have inferred from this that parties enjoy broad discretion to determine what constitutes a foreign investment – for example through definition in a given investment treaty – and that arbitration under the ICSID rules should be open to all such investments.<sup>33</sup> Conversely, some arbitrators have taken the view that arbitration under the ICSID rules may impose more stringent hurdles than a given investment treaty. Specifically, some arbitrators have taken the view that there is an implicit or objective definition of investment under the ICSID Convention, consisting of four chief characteristics:

- a. contribution of resources;
- b. a certain duration of performance;
- c. risk; and
- d. contribution to the economic development of the host state.<sup>34</sup>

A small number of tribunals have cited a fifth characteristic - the expectation of profit or return.<sup>35</sup>

One practical import of this divergence of approaches is that there is a great deal of uncertainty as to how this jurisdictional question will be handled by tribunals. Potential claimants will need to take specific legal advice so as to understand how the selection of arbitrators might have pivotal implications for the prospects of their claim against a host state. Where arbitrators take a restrictive approach – arguing that investments must meet four criteria to fall within the ICSID Convention – it will be necessary to examine whether commitments of capital for non-profit ends satisfy these characteristics. Clearly, many activities of not-for-profit organizations should meet the first two criteria: contribution of resources and duration of performance. Non-profit organizations often establish offices or other facilities and devote significant financial resources

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<sup>33</sup> See, for example, *Tokios Tokeles v. Ukraine*, Decision on Jurisdiction, 29 April 2004 at para. 73; *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, July 11, 1997 at para. 31; *M.E. Cement Shipping & Handling Co., SA v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002 at para 136 (and the discussion of those cases in Gallus and Peterson, *supra* n. 2 at pages 539-40); *MCI Power Group LC and New Turbine, Inc v Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007 at para. 165; *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 at paras. 249-255.

<sup>34</sup> See, for example, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001 at para. 52; *AES v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005 at para. 88; *Jan de Nul and Dredging International v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 at para. 91, discussed in Gallus and Peterson, *supra* n. 2 at pages 540-1. See also *Malaysian Historical Salvors SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, May 17, 2007 at para. 123, requiring a “significant” contribution to the economic development of the host state, but note that at the time of writing the claimant was seeking to annul this decision.

<sup>35</sup> See, for example, *Fedax NV v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, July 11, 1997 at para. 43; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction at para. 53, discussed in Gallus and Peterson, *supra* n. 2 at page 542. In the view of the authors, reading in a requirement of paying out a profit to directors or shareholders is incoherent when one considers that this profit criterion might preclude otherwise identical types of private sector activity (for example, provision of water services or administration of health clinics) from being considered “investments” for purpose of the given treaty. Indeed, given that contribution to the economic development of the host state has been identified as another important criterion by some tribunals, it seems incoherent to include only those investments which are profit-distributive (and indeed likely to take some funds out of the host country, rather than leaving more in the host country).

to programs. Likewise, many of these organizations are engaged in long-term projects or undertakings in their host state.

Not-for-profit organizations should also be able to satisfy the third criteria. A recent tribunal identified this criteria as “an economic risk entailed, in the sense of an uncertainty regarding its successful outcome”.<sup>36</sup> Another tribunal enumerated various risks assumed by a foreign investor, including the possibility that the state might cancel its contract; potential increases in the cost of labour and inputs during the life of the investment; and any unforeseeable incidents which might affect the investment.<sup>37</sup> It seems inarguable that non-profit organizations engaged in program activity or even the production of goods or services on a non-profit basis might be understood to take on similar risks. For example, so-called social enterprises routinely commit capital to so-called “earned income strategies” which are designed to generate revenue (but not profits or dividends).<sup>38</sup> There is an ongoing debate as to whether such activities are a recipe for success – suggesting that non-profit organizations take on sizable risks in pursuing such “earned income strategies”.<sup>39</sup> Likewise, even where non-profit actors are not engaged in income or revenue generating activities, their programmatic activities might engage numerous risks due to the challenges and uncertainty of operating in alien and sometimes hostile climates. Indeed, some observers have remarked upon the close similarities between certain activities of not-for-profit and for-profit investors in foreign environments. For example, Timothy Evered noted that “[b]oth types of investors confront common infrastructural or logistical problems, similar cost and administrative concerns, and the potential for host country discrimination against foreign investors.”<sup>40</sup>

The ability of not-for-profit organizations to meet the final criterion of a contribution to economic development in the host state will depend on the particular organization. Many organizations should meet the criterion; indeed, in contrast with many for-profit investments, a contribution to local economic development is very often the *raison d’etre* for non-profit activities.<sup>41</sup>

## **B. BIT Protections**

Not-for-profit organizations seeking to claim under a BIT must not only demonstrate that an arbitration tribunal convened has jurisdiction to hear the claim but also must demonstrate that the treatment is inconsistent with a treaty obligation.

### *i. Description of protections*

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<sup>36</sup> Gallus and Peterson, *supra* n. 2 at page 542; *Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/1, Decision on Annulment, 1 November 2006 at para. 27.

<sup>37</sup> *Salini v. Morocco*, ICSID *supra* n. 29 at para 55.

<sup>38</sup> Gabriel Berger, “NGOs and Socially Inclusive Businesses: Within the Market, for the Mission,” *Revista: The Harvard Review of Latin America Magazine* (Fall 2006) at pages 47-48.

<sup>39</sup> William Foster and Jeffrey Bradach, “Should Nonprofits Seek Profits,” 83(2) *Harvard Business Review* (February 2005).

<sup>40</sup> Evered, *supra* n. 5 at page 158.

<sup>41</sup> See Berger, *supra* n. 37 for a discussion of non-profit activities contributing to local economic development.

Most BITs contain eight provisions representing the core investment protections. These are the provisions on:

- a. fair and equitable treatment;
- b. full protection and security;
- c. arbitrary impairment;
- d. national treatment;
- e. expropriation;
- f. observance of obligations;
- g. free transfers; and
- h. establishing investments.

This section broadly explains these eight provisions.

Before examining these provisions, it is important to note three general points. First, while many BITs contain these core provisions, they are not included in every BIT. Furthermore, the precise wording of the core provisions often differs. Differently worded provisions could create different protections to those described in this section.

Second, many provisions only impose obligations on the state in regard to *investments*. Consequently, a state may interfere with a not-for-profit organization but if it does not interfere with a protected investment then the state may not breach the treaty.

Finally, it is important to note that even tribunals considering exactly the same provision do not always agree on its meaning. Different arbitrators hear different BIT disputes and often take advantage of the fact that there is no binding doctrine of precedent which would oblige them to hew to an interpretation adopted in an earlier case. Moreover, there is no appellate body to ensure consistency of reasoning in investment treaty awards. While consensus sometimes emerges after a few decisions addressing the meaning of a particular provision, the area of law is new and consensus is yet to emerge over all aspects of the protections BITs offer foreign investors. As a consequence, both would-be claimants and respondents may be faced with uncertainty when it comes to the concrete meaning of investment treaty commitments and the implications flowing from these obligations.

#### a. Fair and equitable treatment

Almost every BIT requires the host state to provide “fair and equitable treatment.”<sup>42</sup> The precise scope of this standard of treatment is unclear. At least two tribunals have interpreted the standard literally, simply deciding whether the state’s conduct was “fair and equitable.”<sup>43</sup> Some countries

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<sup>42</sup> Article II(2)(a) of the Kazakhstan-US BIT, for example, provides: “Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.”

<sup>43</sup> *Azurix Corp. v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006 at para 360; *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 at para. 290.

have rejected this standard as too high.<sup>44</sup> Furthermore, it is unclear whether the standard is uniform across countries or depends on the country's level of development.<sup>45</sup>

While the precise scope of the standard is unclear, it is possible to identify elements of the standard on which many tribunals have agreed. All tribunals agree that the fair and equitable treatment standard protects against "denial of justice." A state denying a foreign investor access to the justice system or administering that justice system unfairly can commit a denial of justice.<sup>46</sup>

Some tribunals agree that the fair and equitable treatment obligation protects the investor's legitimate expectations.<sup>47</sup> Tribunals have found that states failed to protect the investor's legitimate expectations and, therefore, failed to provide fair and equitable treatment by:

- failing to fulfill representations to the investor that an investment permit would be renewed;<sup>48</sup>
- issuing an investment permit for an urban renewal project that was inconsistent with local planning laws;<sup>49</sup>
- renegeing on a commitment to sell shares to an investor;<sup>50</sup> and
- drafting a law to minimize an investor's sugar production quota.<sup>51</sup>

Among those tribunals that agree the fair and equitable treatment standard requires the state to protect the investor's legitimate expectations, there is little consensus on what, precisely, investors ought legitimately expect. Some tribunals have said that foreign investors expect a stable legal and business environment.<sup>52</sup> These same tribunals have found that by failing to provide that environment, the state failed to provide fair and equitable treatment. For example, one tribunal found that Argentina breached the standard by renegeing on a commitment to allow

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<sup>44</sup> The three parties to the NAFTA have said that the "fair and equitable treatment" obligation within the NAFTA refers only to the lower customary international law standard of treatment that has evolved over the past hundred or so years: NAFTA Free Trade Commission Note of Interpretation, July 31, 2001.

<sup>45</sup> Nick Gallus, "The influence of the host state's level of development on international investment treaty standards of protection," 6(5) *Journal of World Investment and Trade* 711 (October, 2005).

<sup>46</sup> The leading text on the issue says "denial of justice occurs when the instrumentalities of a state purport to administer justice to aliens in a fundamentally unfair manner:" Jan Paulsson, *Denial of Justice* (Cambridge University Press, 2005) at page 62. Note that an investor must give local courts an opportunity to remedy their unfair treatment before the investor can successfully claim for a denial of justice (Jan Paulsson, *Denial of Justice* at pages 100-130). This is known as 'exhausting local remedies'.

<sup>47</sup> *Azurix v Argentina*, *supra* n. 42 at para 372, *Técnicas Medioambientales, TECMED S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 at para .154; *Eastern Sugar BV v Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 at para. 207.

<sup>48</sup> *Tecmed v Mexico*, *ibid.* at para. 154 and 174.

<sup>49</sup> *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 at para. 188.

<sup>50</sup> *Eureko B.V. v Republic of Poland*, Partial Award, 19 August 2005 at para. 233.

<sup>51</sup> *Eastern Sugar BV v Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 at para. 335.

<sup>52</sup> See *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 25 April 2005 at para. 274; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, at para. 124; *Occidental Exploration and Production Company v The Republic of Ecuador*, Award, 1 July 2004 at para. 183; *Metalclad Corporation v Mexico*, Award, 30 August 2000 at para. 99.

US investors to charge local Argentine customers in US dollars for the transport and distribution of gas.<sup>53</sup>

Where tribunals have not equated a state's obligation to provide fair and equitable treatment with an obligation to protect the investor's legitimate expectations, tribunals have found the state breached its obligation by, for example:

- permitting money to be transferred from an investor's bank account without consulting the investor on the terms of that transfer;<sup>54</sup>
- imposing excessive and harassing administrative burdens on the investor;<sup>55</sup> and
- forcing the investor to accept an unfair settlement of its dispute with the state.<sup>56</sup>

Tribunals have rejected several claims that states breached their obligation to provide fair and equitable treatment. For example, a tribunal rejected a claim that Estonia's revocation of the investor's license to operate a bank breached the obligation, where the revocation was "contrary to generally accepted banking and regulatory practice" but "justified" having "regard to the totality of the evidence."<sup>57</sup>

#### b. Full protection and security

In many cases, BIT provisions requiring fair and equitable treatment also make reference to the obligation to provide "full protection and security."<sup>58</sup> This obligation potentially provides broader protection than provided by the non-binding standards found in international human rights agreements, such as the United Nations Declaration on Human Rights Defenders.<sup>59</sup>

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<sup>53</sup> *CMS v Argentina*, *supra* n. 51 at paras. 275-281.

<sup>54</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, at para. 83.

<sup>55</sup> *Pope & Talbot Inc v. Canada*, Award on the Merits of Phase 2, 10 April 2001 at para. 181. See also *Saluka Investments BV v Czech Republic*, Partial Award, 17 March 2006 at para. 308, noting that "it transpires from arbitral practice that, according to the 'fair and equitable treatment' standard, the host State ... must grant the investor freedom from coercion or harassment by its own regulatory authorities."

<sup>56</sup> *Desert Line Projects LLC v Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 at para. 179.

<sup>57</sup> *Alex Genin, Eastern Credit Limited, Inc and A.S. Baltoil v The Republic of Estonia*, ICSID Case No. ARB/99/2 at para. 364 and 371. For a general discussion of the obligation to provide fair and equitable treatment, see Christoph Schreuer, "Fair and Equitable Treatment in Arbitral Practice," 6 *Journal of World Investment and Trade* 357 (2005) and Stephan Schill, "Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law," IILJ Working Paper 2006/6 (Global Administrative Law Series), available at <http://www.iilj.org/20066SchillGAL.htm>.

<sup>58</sup> Article II(2)(a) of the Kazakhstan-US BIT, for example, says: "Investment shall at all times be accorded fair and equitable treatment, *shall enjoy full protection and security* and shall in no case be accorded treatment less than that required by international law [emphasis added]."

<sup>59</sup> Article 12.2 of the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (A/RES/53/144, March 8, 1999) provides: "The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration." For a general discussion of the obligation to provide full protection and security, see Helge Elisabeth Zeitler, "The Guarantee of 'Full Protection

At a minimum, the obligation to provide “full protection and security” requires the state to protect the investment’s *physical* security. For example, a tribunal found Sri Lanka failed to provide full protection and security when its army destroyed the investor’s shrimp farm as part of a military operation against Tamil Tiger rebels.<sup>60</sup> Similarly, another tribunal found Zaire failed to provide full protection and security when its army looted the investor’s battery factory.<sup>61</sup>

Both these cases concerned states that injured an investment through their own actions. However, the state’s obligation to provide full protection and security is even broader, requiring the state to protect investment against injury by private parties. An ICSID Tribunal, for example, found Egypt failed to provide full protection and security when it failed to prevent private parties taking over the investor’s hotel and failed to subsequently prosecute those parties.<sup>62</sup>

Some tribunals have endorsed an even broader interpretation of the full protection and security provision by applying the provision to protect the investment’s *legal* security, as well as its physical security.<sup>63</sup> One tribunal, for example, found that Argentina failed to provide full protection and security by failing to provide a secure investment framework.<sup>64</sup>

Not all investors have succeeded in their claims that states breached their obligation to provide full protection and security. The International Court of Justice, for example, found that failing to prevent local workers from occupying a factory was not sufficient to amount to a failure to provide full protection and security, where there was no evidence the workers damaged the plant and some level of production was maintained.<sup>65</sup> A BIT tribunal later partly relied on the International Court of Justice’s decision in rejecting a claim that Romania’s reaction to labor unrest breached the State’s obligation to provide full protection and security.<sup>66</sup>

### c. Arbitrary impairment

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and Security’ in Investment Treaties Regarding Harm Caused by Private Actors,” 3 *Stockholm International Arbitration Review* 1 (2005).

<sup>60</sup> *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990.

<sup>61</sup> *American Manufacturing & Trading v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997.

<sup>62</sup> *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 at paras 84-95.

<sup>63</sup> See, for example, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Partial Award, September 13, 2001 at para. 613: “The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued.” See also *Azurix v. Argentine Republic* *supra* n. 42 at para. 408: “The cases referred to above show that full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor’s point of view;” and *Occidental Exploration and Production Company v. The Republic of Ecuador*, *supra* n. 51 at para. 187, finding that Ecuador’s amendment of its tax laws breached Ecuador’s obligation to provide full protection and security.

<sup>64</sup> *Azurix v. Argentine Republic*, *supra* n. 42 at para. 408.

<sup>65</sup> *Case concerning Elettronica Sicula S.p.A. (ELSI) (US v Italy)*, 20 July 1989, ICJ Reports [1989] 15 at para. 108.

<sup>66</sup> *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award of October 12, 2005, at paras 164-166.

A state's earlier-discussed obligation to provide fair and equitable treatment may also oblige the state not to treat the investor in an arbitrary fashion.<sup>67</sup> Nevertheless, several BITs include a separate explicit provision protecting investors against arbitrary impairment of their operations.<sup>68</sup> Tribunals have said a measure is arbitrary if it is "founded on prejudice or preference rather than on reason or fact"<sup>69</sup> or is a "willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety."<sup>70</sup> A tribunal has applied this latter definition to find that a government acted arbitrarily, in breach of its BIT obligations, by:

- interfering with the investor's ability to collect payment from consumers for water services;
- preventing the investor from increasing tariffs in accordance with the concession agreement; and
- penalizing the investor and then denying the investor access to the documents on the basis of which it was penalized.<sup>71</sup>

Conversely, another tribunal rejected a claim of "arbitrary treatment" where a state's conduct merely arose from administrative confusion.<sup>72</sup>

#### d. National treatment

The national treatment obligation prevents states from treating foreign investors "less favorably" than local investors in "like situations" or "like circumstances."<sup>73</sup> The precise scope of the provision is unclear. Indeed, a recent survey of investment treaty disputes cautions that the national treatment obligation, as interpreted by arbitral tribunals, "remains open to further refinement."<sup>74</sup> Tribunals chiefly disagree on the meaning of the two key phrases, "less favorably" and "like situations (or circumstances)."

A state clearly treats a foreign investor "less favorably" than local investors when the state *intentionally* discriminates against a foreign investor because of the investor's nationality.<sup>75</sup> It is

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<sup>67</sup> See, for example, *Waste Management, Inc v Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 at para. 98.

<sup>68</sup> Article II(2)(b) of the Kazakhstan-US BIT, for example, reads: "Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments."

<sup>69</sup> *Lauder v. Czech Republic*, Final Award, 3 September 2001 at paras. 221 and 232; *Occidental v. Ecuador*, *supra* n. 51 at paras. 162-163.

<sup>70</sup> *ELSI*, *supra* n. 64 at para 128, quoted with approval in *Azurix v. Argentine Republic*, *supra* n. 42 at para. 392.

<sup>71</sup> *Azurix v. Argentina*, *supra* n. 42 at para. 393.

<sup>72</sup> *Occidental v. Ecuador*, *supra* n. 51 at para. 163.

<sup>73</sup> Article II(1) of the Kazakhstan-US BIT, for example, reads: "Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies. ..."

<sup>74</sup> UNCTAD, *Investor State Disputes arising from Investment Treaties: a Review*, (United Nations: New York and Geneva, 2005) at page 34.

<sup>75</sup> See, for example, Mexico's submission to the *Methanex* Tribunal: *Methanex Corporation v. United States of America*, Final Award, 3 August 2005 at para. 32 of Chapter C of Part II.

less clear whether a state breaches the provision by effectively treating a foreign investor less favorably while pursuing a legitimate policy objective.<sup>76</sup>

Which local investors are in “like situation” or “like circumstances” with foreign investors is also unclear. One NAFTA tribunal supported a narrow interpretation of “like,” comparing the treatment of the foreign investor with the treatment of the local investor producing the same product.<sup>77</sup> Another NAFTA tribunal supported a broader interpretation, examining the treatment of all local investors operating in the same economic sector.<sup>78</sup> Another tribunal went even further, comparing the foreign investor with all local investors that exported other types of products. That tribunal found that Ecuador failed to provide national treatment by refunding value-added tax to a local flower exporting company and not to the foreign investor exporting oil.<sup>79</sup>

It is also unclear whether the “situation” or “circumstances” includes the policy goals of the impugned measure. One tribunal said the “assessment of ‘like circumstances’ must also take into account circumstances that would justify governmental regulations that treat [foreign investors] differently in order to protect the public interest.”<sup>80</sup> Conversely, another tribunal conspicuously did not consider the legitimate policy goals of the impugned measure when determining if the foreign and local investors were in like circumstances.<sup>81</sup> Nevertheless, that latter tribunal went on to reject a claim that a Californian law proscribing the use of an ingredient in a gasoline additive breached the US’ obligation to provide national treatment because, regardless of the law’s legitimate goals, US companies producing the ingredient were harmed in the same way as the Canadian claimant.<sup>82</sup>

#### e. Expropriation

Almost every BIT requires states to pay compensation when they expropriate foreign investments.<sup>83</sup> The precise protection provided by such provisions depends on the meaning of the two key words, “investment” and “expropriation.”

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<sup>76</sup> The *S.D. Myers, Feldman and Pope & Talbot* Tribunals said a state cannot breach the obligation if the measure pursues a legitimate public policy objective in certain circumstances: *S.D. Myers*, Partial Award, 12 November 2000 at para. 250; *Pope & Talbot*, Award on Merits Phase 2 at para. 79; *Feldman v. Mexico* at para. 170. For example, the *S.D. Myers* Tribunal found Canada breached the obligation by preventing US waste processing companies from exporting waste to the US to process. The Tribunal acknowledged that Canada’s goal of ensuring the strength of the Canadian waste processing industry was laudable but found Canada overlooked other, less restrictive means of doing so: *S.D. Myers*, Partial Award, 12 November 2000 at para. 255.

<sup>77</sup> *Methanex v US*, *supra* n. 74 at para 19 of Chapter B of Part IV.

<sup>78</sup> *S.D. Myers*, *supra* n. 75 at para. 250.

<sup>79</sup> *Occidental v Ecuador*, *supra* n. 51 at para. 179.

<sup>80</sup> *S.D. Myers v. Canada*, *supra* n. 75 at para. 250.

<sup>81</sup> *Methanex v US*, *supra* n. 74, Part IV, Chapter B.

<sup>82</sup> *Methanex v US*, *supra* n. 74, Part IV, Chapter B at para 38.

<sup>83</sup> For example, Article III(1) of the Kazakhstan-US BIT provides: “Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (“expropriation”) except for: public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2).”



Every BIT includes a definition of investment. This definition will invariably include tangible property, such as land and buildings, thereby protecting such property against expropriations.

In addition to defining investments so as to include tangible property, almost every BIT also defines investment to include intangible property, such as contractual rights and intellectual property. BIT tribunals have found states breached BITs by failing to pay compensation for expropriating intangible property rights. Egypt, for example, breached the Greece-Egypt BIT by expropriating the investor's license right to import cement;<sup>84</sup> Egypt had passed legislation proscribing cement imports three years before the investor's license was due to expire.

The protection provided by expropriation provisions is also, not surprisingly, largely determined by the meaning of the term "expropriation." The term expropriation typically covers both *direct* and *indirect* expropriations. States can directly take tangible property rights. One tribunal, for example, found that Russia expropriated a German investor's property through a Presidential Decree confiscating the property.<sup>85</sup> States can also directly take intangible property rights; in a 2006 case, another tribunal found Hungary had directly taken the investor's contractual right to manage an airport by passing legislation extinguishing the right.<sup>86</sup>

Most BIT expropriation provisions expressly protect against *indirect* expropriations or measures *tantamount* to expropriation.<sup>87</sup> These are measures which do not overtly expropriate property but have the same effect. There is no test for what amounts to an indirect expropriation. There is not even consensus as to whether tribunals hearing a claim for an indirect expropriation should only focus on the *effect* of the measures on the investment or whether they should also look at the *legitimacy* of the purpose behind the measures (for example, a legitimate public health purpose). While some tribunals focus on the effect of the measures on the investment,<sup>88</sup> one NAFTA tribunal found that a Californian law proscribing the use of an ingredient in gasoline was not an indirect expropriation because the law pursued a legitimate purpose.<sup>89</sup>

While there is no agreement on a test, some tribunals have identified what types of measures they might deem to be an indirect expropriation. A NAFTA tribunal said that a measure is more likely to be an indirect expropriation if the measure is inconsistent with specific commitments given to the foreign investor.<sup>90</sup> Another tribunal found a measure is more likely to be an indirect expropriation if the measure is disproportionate to the purpose the state hopes to achieve.<sup>91</sup>

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<sup>84</sup> *Middle East Cement Shipping and Handling Co. S.A. v The Arab Republic of Egypt*, *supra* n. 32 at para. 107.

<sup>85</sup> *Franz Sedelmayer v The Russian Federation*, *supra* n. 30 at page 73.

<sup>86</sup> *ADC Affiliate Limited and ADC & ADC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 at para. 476.

<sup>87</sup> On indirect expropriation generally, see Andrew Newcombe, "The Boundaries of Regulatory Expropriation," 20 *ICSID Review-Foreign Investment Law Journal* 1 (2005).

<sup>88</sup> See, for example, *Azurix v Argentina*, *supra* n. 42 at para 310.

<sup>89</sup> *Methanex v US*, *supra* n. 74, Part IV, Chapter D, Page 4, para. 15. See also *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award, 17 March 2006 at paras 254-5; and *Fireman's Fund Insurance Company v Mexico*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006 at para. 176(j).

<sup>90</sup> *Methanex v US*, *supra* n. 74, Part IV, Chapter D, Page 4, para. 7. See also *Fireman's Fund Insurance Company v Mexico*, *supra* n. 88 at para. 176(k).

<sup>91</sup> See *Azurix v. Argentina*, *supra* n. 42 at paras. 311-312; *Tecmed v. Mexico*, *supra* n. 46 at para. 122; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic*, *supra* n. 51 at para. 175; and *Fireman's Fund Insurance Company v Mexico*, *supra* n. 88 at para. 176(j).

Suffice to say that there is a lack of certainty as to how to draw the line between legitimate non-compensable exercises of government regulation and those actions which amount to an expropriation for which compensation must be paid. While debate continues to rage as to what amounts to an expropriation,<sup>92</sup> some governments have moved to provide more detailed written guidance in more recent treaties. For example, the United States now provides that “[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriation.”<sup>93</sup>

#### f. Observance of Obligations

Most BITs contain a provision requiring the state to “observe” its “obligations.”<sup>94</sup> Tribunals have sharply disagreed at times over the scope of this provision. In particular, tribunals disagree over the precise obligations a state must observe. One tribunal found Argentina breached the provision when it failed to fulfill a specific legislative commitment to maintain gas distribution tariffs in US dollars.<sup>95</sup> At the same time, other tribunals expressed doubt as to whether “observance of obligations” provisions elevate breaches of domestic legislation to the level of a treaty-breach.<sup>96</sup>

On its face, the provision also appears to protect *contractual* obligations. Indeed, the provision is often called an “umbrella provision” because it appears to bring contractual obligations within the BIT’s protective umbrella. Precisely which contractual obligations fall within the umbrella is unclear. Some tribunals say the provision protects all contractual obligations.<sup>97</sup> Other tribunals view such provisions as protecting only those obligations that a state makes in its sovereign capacity.<sup>98</sup> For example, one tribunal said that this provision “will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State ... but will cover additional investment protections contractually agreed by the State as a sovereign inserted in an investment agreement.”<sup>99</sup> An agreement to refrain from changing certain regulations or laws affecting a particular foreign investor is an example of such a protection.

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<sup>92</sup> See, for example, the discussion in Newcombe, *supra* n. 86.

<sup>93</sup> US-Chile FTA, Chapter 10, Annex 10-D, Article 4 (b).

<sup>94</sup> Article II(2)(c) of the Kazakhstan-US BIT, for example, reads: “Each Party shall observe any obligation it may have entered into with regard to investments.” Most US and UK BITs, for example, contain such provisions but the BITs of other capital exporting countries, such as Canada, do not.

<sup>95</sup> *LG&E v. Argentina*, *supra* n. 51 at para. 175.

<sup>96</sup> *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 at paras. 71-88. See also *SGS Société Générale de Surveillance S.A. v. Pakistan*, Decision on Jurisdiction, at paras. 166-168.

<sup>97</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, 29 January 2004 at para. 128. See also *Fedax NV v. Republic of Venezuela*, *supra* n. 32 at para. 112, holding that the provision protected the contractual obligation to pay the debt on a promissory note and *Eureko v. Poland*, *supra* n. 49 at para. 260, holding that the provision protected the contractual obligation to issue shares.

<sup>98</sup> *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 at para. 81.

<sup>99</sup> *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, at para 109. See also the discussion in *El Paso v. Argentina*, *ibid.* at paras 71-88.

The *obligations* protected is not the only aspect of the provision that is unclear. Which *breaches* of contract breach the provision is also unclear. Some tribunals say the provision protects all breaches.<sup>100</sup> Other tribunals arguably say only breaches through sovereign act breach the provision.<sup>101</sup> A state implementing legislation extinguishing a contractual obligation is an example of a breach through such a sovereign act.<sup>102</sup>

Further aspects of the application of the provision to contractual disputes are also unclear. It is still unclear whether investors can rely on the provision where the investor's contract contains a clause choosing domestic courts to resolve the dispute.<sup>103</sup> The parties entitled to the protection of the provision also remain unsettled. Some tribunals have suggested that the provision only protects contracts to which the foreign investor and the state, themselves, are parties.<sup>104</sup> Other tribunals have arguably extended the provision's protection to contracts to which the foreign investor's local subsidiary and sub-state entities are parties.<sup>105</sup> On this approach, a foreign investor might claim that the state breached the BIT by failing to fulfil a contractual obligation – notwithstanding the fact that the foreign investor is not personally a party to the contract in question.

#### g. Free transfers

Many BITs contain a provision requiring the host state to allow investors to freely transfer money into and out of the country.<sup>106</sup> We are unaware of any arbitral decision considering the meaning of such a treaty provision. While the meaning of the provision appears plain on its face, future tribunals may read in restrictions.

#### h. Establishing investments

The above provisions all protect investments once they are established in the host state; they do not confer rights to establish investments. Indeed, a 1998 UN study notes that BITs “do not usually confer on investors of one contracting party the right to establish investments in the territory of the other contracting party.”<sup>107</sup>

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<sup>100</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* *supra* n. 96 at para. 128.

<sup>101</sup> *Joy Mining Machinery Limited v. Arab Republic of Egypt*, *supra* n. 30 at para. 72 and 81.

<sup>102</sup> See *CMS v. Argentine Republic* *supra* n. 51 at para 303, where the tribunal found Argentina breached the provision by passing legislation extinguishing Argentina's contractual obligation to pay its debt. Note that Argentina has applied to annul this Award and a decision on that annulment application is still pending.

<sup>103</sup> Compare *SGS v Philippines*, *supra* n. 96 at para. 155 with, for example, *Eureka v Poland*, *supra* n. 49 at para. 112.

<sup>104</sup> *Azurix v. Argentine Republic*, *supra* n. 42 at para. 384; *Impregilio S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 at para. 223.

<sup>105</sup> *CMS v. Argentine Republic*, *supra* n. 51 at paras 302-303; *SGS v. Pakistan*, *supra* n. 95 at para. 166; *Noble Ventures v. Romania*, *supra* n. 65 at para. 86.

<sup>106</sup> Article IV(1) of the Kazakhstan-US BIT, for example, reads: “Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. ...”

<sup>107</sup> UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (United Nations, New York and Geneva 1998) at page 46.

However, a small but growing subset of these treaties do extend certain qualified rights of entry to foreign investors. For example, some BITs oblige states to “admit” investments in certain circumstances.<sup>108</sup> Other BITs oblige the host state to provide national and Most Favoured Nation (“MFN”) treatment regarding “permitting” investments.<sup>109</sup> This seems to mean that if a host state permits its own domestic investors to establish or acquire an investment in its territory – or permits the investors of a favoured third-country to do the same – then, as a matter of treaty obligation, that host state accords the same prerogatives to investors hailing from the other treaty party provided that the investors being compared are deemed to be “in like situations.”

*ii. Application of BIT protections to problems*

Several of the state actions against not-for-profit-organizations, described in Section II above, could breach these BIT obligations. Before explaining which actions might breach which obligations, it is important to note three general points. First, some of the state actions could be mandated by domestic law existing before the not-for-profit-organization begins operating in the country. At least one tribunal has said that government actions mandated by laws existing before an investment will not breach BIT obligations. The tribunal said that BIT tribunals can only evaluate new laws and how existing laws are applied to specific investors.<sup>110</sup> Any not-for-profit-organization impugning laws existing before the organization entered the country will need to confront this decision.

The second general point is that states sometimes justify those actions that interfere with investments on the grounds that they are necessary to protect such interests as national security or public order. We described above how such purposes can be considered within some individual BIT obligations.<sup>111</sup> Some BITs also contain provisions exempting such measures from the scope of the treaty.<sup>112</sup> Any not-for-profit-organization claiming that a state breaches its BIT obligations may need to respond to arguments that the measure falls within such an exception. Tribunals may be asked to review a wide range of circumstances where a state invokes a national security, public morals or other similar defence. It may fall to tribunals, in the absence of detailed treaty language, to develop tests which pass judgment on the legitimacy of such actions.

Third, treaty dispute settlement mechanisms vary. While most investment treaties enable the investor to claim for failure to provide any of the treaty protections, some treaties only allow the investor to challenge the amount of compensation awarded in the event of an acknowledged expropriation. Investors have attempted to detour around these narrowly-cast arbitration clauses via the treaty Most Favored Nation (“MFN”) clause. Investors have argued that the treaty’s promise of MFN treatment includes a promise to provide access to more favorable disputes settlement provisions in other treaties, including provisions enabling the investor to claim for

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<sup>108</sup> For example, Article II(2) of the Canada-Russia BIT provides: “Subject to its laws, regulations and published policies, each Contracting Party shall admit investments of investors of the other Contracting Party.”

<sup>109</sup> See Article 2(1) of the US-Kyrgyzstan BIT.

<sup>110</sup> *GAMI Investments, Inc v. Mexico*, Final Award, 15 November 2004 at para. 93.

<sup>111</sup> See sections III(B)(i)(d) and (e) above.

<sup>112</sup> Article X(1) of the Kazakhstan-US BIT, for example, reads: “This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”

failure to provide any of the treaty protections. In recent cases against Russia, one tribunal has accepted this argument while another has rejected it.<sup>113</sup>

With these general points in mind, we will now identify which state actions against not-for-profit-organizations, described in Section II above, could breach BIT obligations.

#### a. Interfering with the formation of not-for-profit organizations

As a general matter, host governments have the discretion to admit investments (including not-for-profit ones). However, as was discussed above,<sup>114</sup> some small proportion of treaties, such as the Canada-Russia BIT, will oblige states to provide national treatment regarding the *establishment* of investments. Thus, if a host state were to prevent a not-for-profit-organization from *establishing* a presence in its territory, it will be relevant to determine whether nationals of that host state have, in similar situations, been granted the right to establish not-for-profit activities. Where similarly-situated locals receive more favourable treatment there may be grounds that the foreign entity has been denied national treatment as required by the treaty.

Where a host state has gone so far as to represent that it would allow a foreign organization to establish a presence in its territory, that state could breach its obligation to provide fair and equitable treatment if the state were to renege on those representations.<sup>115</sup> Indeed, the facts supporting the Salvation Army's successful claim that Russia breached its European Convention on Human Rights obligations by refusing to *re-register* its Russian branch might also provide the basis for a potential BIT claim – without speculating as to whether such a claim could be borne out on the merits. It is notable that the European Court found that Russia's conduct had “no legal or factual basis;”<sup>116</sup> tribunals have said that states breach their BIT obligation not to act arbitrarily through actions “founded on prejudice or preference rather than on reason or fact.”<sup>117</sup>

#### b. Denying and restricting foreign funding

A state prohibiting foreign funding of a foreign-owned not-for-profit-organization for no legitimate reason could breach various investment treaty obligations. First, a state may breach its treaty obligation to permit free investment-related transfers both into and out of the territory. In some treaties, this obligation specifically protects “additional contributions to capital for the maintenance or development of an investment.”<sup>118</sup>

Second, the state may run afoul of its obligation to not arbitrarily impair the organization's operation.<sup>119</sup> If the not-for-profit organization is dependent upon foreign funding to survive, and that foreign funding is choked off, then the denial could amount to an indirect expropriation.<sup>120</sup>

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<sup>113</sup> See *RosInvestCo UK v Russia*, SCC Case V079/2005, Award on Jurisdiction, October 2007 at para. 132 and *Vladimir and Moise Berschader v Russia*, SCC Case 080/2004, Award, 21 April 2006 at para. 181.

<sup>114</sup> See section III(B)(i)(h).

<sup>115</sup> See, for example, *MTD v. Chile*, *supra* n. 48 discussed in section III(B)(i)(a) above.

<sup>116</sup> *Moscow Branch of the Salvation Army v Russia*, *supra* n. 1 at para 97.

<sup>117</sup> *Lauder v. Czech Republic*, *supra* n. 68 at paras. 221 and 232; *Occidental v. Ecuador*, *supra* n. 51 at paras. 162-163.

<sup>118</sup> See US-Kyrgyzstan BIT, Article IV(1).

<sup>119</sup> See section III(B)(i)(c) above.

Fourth, a state denying foreign funding to a particular foreign-owned not-for-profit organization could breach its obligation to provide national treatment if other local organizations remain able to draw upon foreign funding or if the denial of foreign funding effectively disadvantaged foreign owned not-for-profit-organizations compared to their local counterparts.<sup>121</sup> A not-for-profit-organization that can establish it is treated less favorably than a local investor will still need to establish that the investor is in “like situation” or “like circumstances.” The organization should have little difficulty if similarly-situated local not-for-profit-organizations can obtain foreign funding. The organization may have problems if there are no local not-for-profit-organizations with which it can be compared or if those not-for-profit-organizations can also not obtain foreign funding. Tribunals adopting a narrow interpretation of “like situation” or “like circumstances” could deny the claim on this ground. Tribunals adopting a broader interpretation might compare the treatment of the foreign owned not-for-profit-organization with any local organization, regardless of whether it is not-for-profit.<sup>122</sup>

Even if the state is not *denying* foreign funding, the state may still breach BIT obligations merely through *restricting* such funding. If there are no legitimate reasons for the restrictions, the state could breach its obligation not to arbitrarily impair the operation of the organization or breach its obligation to provide fair and equitable treatment through its failure to protect the organization’s legitimate expectations.<sup>123</sup>

The state could also breach BIT obligations through banks interfering with not-for-profit-organizations’ foreign funding. For example, foreign banks confiscating foreign funding before it reaches the local organization could directly expropriate the organization’s intangible right to the money.<sup>124</sup> In such cases, the duration of such an interference may be critical to proving an expropriation; brief delays in receiving foreign-originating funds will be viewed much differently than prolonged or indefinite delays. Indeed, there may be no need to argue that an expropriation has taken place, if the relevant investment treaty also obliges host governments to permit investment-related transfers *without delay*.<sup>125</sup>

While the above scenarios involve would-be *recipients* of foreign-funding, another scenario arises where foreign *funders* establish branch offices in a given host country with the intention of funding local development through grant-making activity. The Open Society Institute has complained of restrictions introduced in Uzbekistan, whereby a government committee would review all financial grant-making activity.<sup>126</sup> By preventing foreign funders from funding local actors, Uzbekistan might face BIT claims, including in relation to the obligation to provide fair and equitable treatment.

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<sup>120</sup> See section III(B)(i)(e) above.

<sup>121</sup> See *ADF Group Inc v USA*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 at para. 157.

<sup>122</sup> See section III(B)(i)(d) above.

<sup>123</sup> See sections III(B)(i)(a) and (e) above.

<sup>124</sup> See section III(B)(i)(c) above. A claim impugning such an action of a foreign bank would also need to establish that the actions of the foreign bank are attributable to the foreign state.

<sup>125</sup> See US-Kyrgyzstan BIT, Art IV (1).

<sup>126</sup> Open Society Institute, “Uzbek Government Forces Closure of Local Soros Foundation”, Press Release, April 18, 2004, [http://www.soros.org/newsroom/news/uzbekistan\\_20040418](http://www.soros.org/newsroom/news/uzbekistan_20040418).

It bears reminding, however, that because of the architecture of investment protection treaties, such agreements provide no recourse for *domestic* not-for-profit organizations (that is, those not established or owned by a foreign entity) in cases where their own governments deny or delay the access of such groups to foreign funding. In this respect, it warrants repeating that investment protection treaties are no substitute for more broadly-cast human rights treaties, which squarely address the treatment of domestic actors at the hands of their own government.<sup>127</sup>

### c. Dissolving not-for-profit-organizations and seizing assets

States failing to renew the licenses of not-for-profit-organizations already operating in the country may, in some circumstances, breach BIT obligations. A state denying a not-for-profit-organization a license could breach its obligation to provide fair and equitable treatment if the state represented that it would renew the license.<sup>128</sup> A tribunal could also view the state's conduct as an expropriation of the investment.<sup>129</sup> For example, if Egypt reneges on a representation to grant a license in accordance with its law on not-for-profit-organizations, it might face potential claims for breach of Egypt's BIT obligations.<sup>130</sup>

In bringing such a claim, the not-for-profit organization's precise investment protected by the treaty is important. A not-for-profit organization, whose license to operate is a protected investment, is more likely to succeed in such a claim than an organization whose license is not.

In addition to potentially breaching their BIT obligations by interfering with a not-for-profit organization's license, states dissolving not-for-profit-organizations without reason could breach their obligations, including the obligation to provide fair and equitable treatment or the obligation not to arbitrarily impair the operation of investments.<sup>131</sup> Arguably, even states which dissolve not-for-profit organizations with reason may breach BIT obligations if the organization has a license allowing it to operate for a certain period of time. Tribunals could view the dissolution as inconsistent with the organization's legitimate expectations and, therefore, a breach of the obligation to provide fair and equitable treatment or even as an expropriation of the intangible rights inherent within the license.<sup>132</sup> However, tribunals might consider the legitimacy of the policy objectives being pursued by the host government in weighing a potential treaty breach.

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<sup>127</sup> Note that not-for-profit-organizations may be able to overcome this problem in some instances by incorporating in a foreign state with a favorable BIT with the country in which the organization intends to operate. Recent BIT decisions indicate that foreign companies can claim against a state even if the corporation is controlled by entities within that state and pursues all its activities there. However, this practice is not without its critics, particularly as it may be used by nationals of a given state to detour around national courts, and to bring disputes to international fora. See, generally, *Tokios Tokelès v Ukraine*, *supra* n. 32 and Markus Burgstaller, "Nationality of Corporate Investors and International Claims Against the Investor's Own State", 7(6) *Journal of World Investment and Trade* 857 (December 2006).

<sup>128</sup> See, for example, *Tecmed v Mexico*, *supra* n. 46, discussed in section III(B)(i)(a) above.

<sup>129</sup> See, for example, *Tecmed v Mexico*, *supra* n. 46, discussed in section III(B)(i)(e) above.

<sup>130</sup> Article 54, Associations and Non-Governmental Institutions Law (2002).

<sup>131</sup> See sections III(B)(i)(a) and (c) above.

<sup>132</sup> See section III(B)(i)(a) and, for example, *Middle East Cement Shipping v Egypt*, *supra* n. 32 discussed in section III(B)(i)(e) above.

Even states imposing particularly onerous reporting requirements could breach BIT obligations. Such states could breach the state's obligation not to arbitrarily impair investments or to treat investments fairly and equitably.<sup>133</sup> The application of the administrative requirements in Russia's new not-for-profit-organization law, which some allege make it "impossible" for organizations to operate,<sup>134</sup> might give rise to potential BIT claims by not-for-profit organizations. Indeed, it is easy to conceive that organizations whose activities are hobbled might bring claims for *indirect* expropriation of their investment in Russia – without speculating as to the merits of such claims.<sup>135</sup> At the same time, not-for-profit organizations might pursue claims for *direct* expropriation if the state seizes their assets.<sup>136</sup>

d. State officials attending and monitoring meetings of not-for-profit organizations and other forms of harassment or intimidation

It is unclear whether a law forcing a not-for-profit-organization to allow state officials to attend meetings, of itself, breaches any BIT obligations. The organization could argue that such interference goes beyond its legitimate expectations and, therefore, breaches the state's obligation to provide fair and equitable treatment. The authors are unaware of any decisions or literature addressing these sorts of expectations and such a claim would, therefore, need to overcome the hurdle of not having any real authority from which to draw. Such a claim would also need to confront the authority of an International Court of Justice decision finding that the state did not breach its obligation to provide full protection and security by failing to prevent workers from occupying the investor's factory.<sup>137</sup> However, if state officials caused some physical damage or impeded the meeting, then their conduct could rise to the level of a BIT breach.<sup>138</sup>

More generalized harassment or intimidation might breach the host state's obligation to provide for the physical protection and security of not-for-profit organizations or the obligation not to arbitrarily interfere with an investment.<sup>139</sup> One tribunal commented that a "deliberate campaign" to "punish" an investor for supporting an opposition party or to "expose [the investor] as an example to others who might be tempted to do the same ... must surely be the clearest infringement one could find of the provisions ... of the Treaty."<sup>140</sup> (On the facts of the particular dispute, the tribunal ultimately found that there was insufficient evidence of such a deliberate campaign.)<sup>141</sup>

Consequently, Zimbabwe's reported harassment of not-for-profit organizations could expose that country to claims for breach both of these obligations. States could even face claims for failing to prevent private parties from harassing not-for-profit organizations.<sup>142</sup>

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<sup>133</sup> See section III(B)(i)(c) above and *Pope & Talbot v Canada*, *supra* n. 54, discussed in section III(B)(i)(a) above

<sup>134</sup> Adrian Blomfield, "Russia silences human rights group," *Daily Telegraph* (London), 22 December 2005.

<sup>135</sup> See section III(B)(i)(e) above.

<sup>136</sup> See *Sedelmayer v Russia*, *supra* n. 30, discussed in section III(B)(i)(e) above.

<sup>137</sup> See *ELSI*, *supra* n. 64, discussed in section III(B)(i)(b) above.

<sup>138</sup> See sections III(B)(i)(a), (b) and (e) above.

<sup>139</sup> See section III(B)(i)(c) above.

<sup>140</sup> *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 at para. 123.

<sup>141</sup> *Ibid.* at para. 137.

<sup>142</sup> See section III(B)(i)(b) above.



#### e. Failing to fulfill obligations

States breaching contracts or other agreements with not-for-profit-organizations could be liable for breach of BIT provisions requiring states to “observe” their obligations.<sup>143</sup> Even if the not-for-profit-organization is not protected by a contract or some other written agreement, the organization could also mount a claim for breach of investment treaty obligations which prohibit arbitrary impairment or which require fair and equitable treatment (and, thus, may protect the investor’s legitimate expectations).<sup>144</sup> States breaching contracts or other legal agreements and effectively preventing the not-for-profit-organization from claiming in the contractually chosen forum could also expropriate the organization’s contractual rights.<sup>145</sup> Indeed, a Croatian investor is currently claiming that the Czech Republic expropriated the investor’s contractual rights in a long-term rental agreement for non-residential space.<sup>146</sup> The precise details of the claim are not public and, depending upon the formulation of the treaty in question, other claims might be alleged, including that the host state has failed to observe contractual obligations as required under the terms of the relevant investment treaty.

Even if the not-for-profit organization does not have a contract or agreement with the state, the state may breach a BIT by failing to fulfill obligations contained in legislation. A not-for-profit organization would have a potential claim that a given country breached its BIT obligations to observe its obligations and provide fair and equitable treatment if that country failed to fulfill specific obligations in the state law applicable to not-for-profit organizations.<sup>147</sup> For example, a not-for-profit organization could have a claim if that country reneged on its commitment to exempt organizations from paying certain taxes.<sup>148</sup>

### C. BIT remedies for not-for-profit organizations

#### i. Remedies

A tribunal finding a state breached its BIT obligations can, generally, order the state to:

- a. stop breaching its obligations;
- b. perform a certain act in order to fulfill its BIT obligations;<sup>149</sup> or

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<sup>143</sup> See section III(B)(i)(f) above.

<sup>144</sup> See sections III(B)(i)(a) and (c) above.

<sup>145</sup> See, for example, *Waste Management v. Mexico*, *supra* n. 66 at paras. 175-177.

<sup>146</sup> See Luke Eric Peterson, “Croatian firm invokes investment treaty to challenge Czech eviction notice,” October, 1 2004, INVEST-SD News Bulletin, available on-line at: [http://www.iisd.org/pdf/2004/investment\\_investsd\\_oct1\\_2004.pdf](http://www.iisd.org/pdf/2004/investment_investsd_oct1_2004.pdf).

<sup>147</sup> See, for example, *LG&E v Argentina*, *supra* n. 51, discussed in sections III(B)(i)(a) and (f) above.

<sup>148</sup> Egypt, for example, offers such exemptions in Article 13 of its Associations and Non-Governmental Institutions Law (2002). As always, such a claim’s likelihood of success depends on the wording of a particular treaty. In some cases, governments move to limit the applicability of treaty protections in cases where taxation is at issue. See for example, how Article 19 of Japan’s investment treaty with Vietnam limits the reach of the treaty where taxation measures are involved:

<http://www.mofa.go.jp/region/asia-paci/vietnam/agree0311.pdf>.

<sup>149</sup> Some treaties limit remedies to monetary damages. See, for example, Article 10.15 of the US-Chile and US-Singapore Free Trade Agreements and Article 34 of the 2004 US Model BIT, which restrict compensation to

- c. compensate the foreign investor for any monetary damages suffered by the investor as a result of the breach.

Claimants overwhelmingly claim only monetary damages. Damages awards vary. One NAFTA tribunal, for example, awarded the claimant US\$450,000, a small fraction of its original claim.<sup>150</sup> Conversely, another tribunal awarded the claimant almost US\$300 million in a case where the state interfered with the control of a large broadcasting enterprise.<sup>151</sup>

Not-for-profit organizations claiming monetary compensation through a BIT need to demonstrate they have suffered quantifiable damages. In some instances, this will be straightforward. For example, a state:

- a. seizing assets causes damages amounting at least to the value of the assets;
- b. physically harming assets causes damages to the extent of the harm; and
- c. renegeing on a commitment to apply a favorable taxation rate to the organization will damage the organization to the extent of the new tax that it imposes.

Identifying the damages of a not-for-profit organization arising simply from the inability to continue to operate is not so straight forward. The organization could likely claim for the amount it has invested in the country minus the proceeds from the sale of any assets. While BIT tribunals sometimes award future profits to foreign investors crippled by state interference, most not-for-profit organizations will, by definition, not earn any future profits. However, an organization could claim the loss of future profits of an arm earning profits to fund the organization's other activities. Such a claim would need to demonstrate that future profits are not speculative.<sup>152</sup>

A recent decision demonstrates that not-for-profits may be able to claim non-monetary damages. The tribunal in the *Desert Line Projects v. Yemen* case awarded so-called "moral damages" of US\$1 million to a company whose executives "suffered the stress and anxiety of being harassed, threatened and detained by (Yemen security forces) as well as by armed tribes".<sup>153</sup>

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monetary damages and restitution of property, while giving the respondent state the ability to pay monetary damages instead of restitution. On BIT tribunals' ability to order performance or injunction, see, for example, *Enron Corp. and Ponderosa Assets, LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 at para 79: "An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available;" *Antoine Goetz v. Burundi*, Award, 10 February 1999, (2000) 15 ICSID Rev-FILJ 457 at page 516 and *Siemens v. Argentina*, *supra* n. 42 at para. 387. Although see *LG&E Energy Corp and others v Argentina*, ICSID Case No. ARB/02/1, Damages Award, 25 July 2007 at para. 87, limiting tribunals' ability to order performance: "The judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty."

<sup>150</sup> *Pope & Talbot v. Canada*, Damages Award, 31 May 2002 at para. 91.

<sup>151</sup> *CME v. Czech Republic*, *supra* n. 62.

<sup>152</sup> See, for example, *PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Serketi v Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007, at paras. 310-315.

<sup>153</sup> *Desert Line Projects LLC v Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 at para. 286.

While several potential remedies – including pecuniary and moral damages - are available to not-for-profit-organizations, potential litigants should realize that BIT arbitration entails high costs. Simply registering a claim at the ICSID will cost a claimant US\$25,000,<sup>154</sup> and each of the three arbitration tribunal members will charge hundreds of dollars an hour for their time.<sup>155</sup> BIT disputes often last several years, in which time, lawyer, arbitrator and institution fees can amount to several million dollars.<sup>156</sup> Losing claimants are sometimes ordered to pay the entire fees of the winning respondent state.<sup>157</sup> Even “victorious” claimants are not always awarded their legal costs,<sup>158</sup> which may diminish the attraction of arbitration over smaller claims.<sup>159</sup>

## ii. Enforcement

Even if a not-for-profit organization successfully claims a state breached a BIT, a state may refuse to provide the remedies ordered by the tribunal. The state may refuse to cease its act breaching the treaty or may refuse to undertake the actions necessary to comply with its BIT obligations. The authors are unaware of a BIT tribunal ordering a state to cease or undertake action, let alone a state refusing to comply with such an order and, therefore, we can only speculate on the consequences of such a refusal. It is difficult to identify the recourse of a not-for-profit-organization in those circumstances. However, there is a debate as to whether the ICSID’s status as a World Bank agency might give added weight to political and diplomatic pressure on a recalcitrant state.<sup>160</sup>

A state may refuse to pay the compensation ordered by the tribunal. It seems unlikely that a state would refuse to comply with a BIT in this way. Indeed, the authors are only aware of one instance of a state refusing to pay compensation ordered in a BIT award. Russia refused to pay the compensation to the German investor, Franz Sedelmeyer, for breaches of the Germany-Russia BIT.<sup>161</sup>

If the state does refuse to pay then the claimant can seek to enforce the award. ICSID awards are easier to enforce than others. The ICSID Convention requires states party to the Convention to enforce ICSID awards as if they were “a final judgment of a court in that State.”<sup>162</sup> By contrast, investors seeking to enforce non-ICSID awards, or seeking to enforce ICSID awards in states not party to the ICSID Convention, must rely on the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. The New York Convention allows local courts to refuse to enforce arbitral awards on a number of grounds.<sup>163</sup>

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<sup>154</sup> ICSID Schedule of Fees, 6 July 2005, paragraph 1.

<sup>155</sup> See, for example, paragraph 3 of the ICSID Schedule of Fees, 6 July 2005, which provides that arbitrators can charge US\$3000 per day.

<sup>156</sup> For example, the lawyer, arbitrator and ICSID fees in the recent *PSEG v. Turkey* dispute amounted to US\$20,851,636.62: *PSEG v Turkey*, *supra* n. 151 at para. 352.

<sup>157</sup> See, for example, *Methanex v United States*, *supra* n. 74, Part VI.

<sup>158</sup> See, for example, *CMS v Argentina*, *supra* n. 51 at para. 472; *MTD v Chile*, *supra* n. 48 at para. 252.

<sup>159</sup> On costs generally, see Stephan Schill, “Arbitration Risk and Effective Compliance: Cost-Shifting in Investment Treaty Arbitration,” 7 *Journal of World Investment and Trade* 653 (2006).

<sup>160</sup> Edward Baldwin, Michael Nolan, and Mark Kantor, “Limits to Enforcement of ICSID Awards,” 23(1) *Journal of International Arbitration* 22 (2006).

<sup>161</sup> See *Sedelmeyer v Russia*, *supra* n. 30, discussed in section III(B)(i)(e) above.

<sup>162</sup> ICSID Convention, Article 54(1).

<sup>163</sup> New York Convention, Article V.

Not-for-profit organizations may face additional obstacles because of the “commercial” reservation to the New York Convention. Article I.3 of the Convention entitles contracting states to declare that they will only apply the Convention to disputes arising from relationships which are “commercial” under the country’s domestic law.<sup>164</sup> Approximately a third of signatories to the Convention have made this reservation.<sup>165</sup>

Courts in these countries could find that an organization’s charitable purpose renders the organization’s disputes non-commercial. It is difficult to precisely identify the size of this obstacle. The few courts addressing the meaning of the reservation have not considered a dispute involving a not-for-profit-organization; courts have generally considered whether the dispute is “personal” rather than “commercial.”<sup>166</sup> Nevertheless, with the exception of Tunisia, courts have interpreted “commercial” disputes broadly,<sup>167</sup> which augurs well for not-for-profit-organizations claiming their dispute is commercial. Some treaties specifically provide that all claims under the treaty are commercial, for the purposes of the Convention, and claimants under these treaties will not face this problem.<sup>168</sup>

#### IV. Conclusion

Not-for-profit organizations appear to enjoy protection under the some 2500 BITs which have been concluded over the last half century. While these instruments were often developed with for-profit investment in mind, some of these agreements expressly contemplate commitments of capital made on a not-for-profit basis. Furthermore, many other investment treaties are silent on such questions, and therefore susceptible to interpretations which would place not-for-profit investments under the protective canopy of the treaty.

Claims under the ICSID dispute resolution system might encounter some tribunals supplementing the definition of investment found in a given investment treaty with that believed to be implicit in the ICSID Convention. Nevertheless, there are strong arguments for holding not-for-profit investments to meet this heightened jurisdictional test imposed by some ICSID tribunals. Moreover, where potential claimants have the option of bringing a claim under the UNCITRAL or ICSID “Additional Facility” arbitration rules they would not need to contend with the “objective” criteria sometimes imposed by tribunals operating under the ICSID rules.

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<sup>164</sup> See, generally, Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (3<sup>rd</sup> edn, Sweet and Maxwell, 1999) at page 457.

<sup>165</sup> Of the 120 signatories to the Convention, 49 have made this reservation: see [www.sice.oas.org/DISPUTE/comarb/uncitral/nysig\\_e.asp](http://www.sice.oas.org/DISPUTE/comarb/uncitral/nysig_e.asp).

<sup>166</sup> See, for example, the decision of the Tunisian Court de Cassation, 10 November 1993, finding that the relationship between a company and an architect was personal rather than commercial (Reported in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration* (Vol. 28, 2003)).

<sup>167</sup> See Albert Jan van den Berg, *ibid.* at 574: “In practice, the commercial reservation generally has not caused problems as the courts tend to interpret the coverage of ‘commercial’ broadly. The only court that interprets the commercial reservation narrowly at present is the Tunisian Supreme Court.”

<sup>168</sup> See, for example, Article 26(5)(b) of the Energy Charter Treaty. See also *Mexico v Metalclad* [2001] BCSC 664 at paras. 40-49 finding that a NAFTA investment dispute was “commercial” for the purposes of Canadian arbitration legislation.

Where claims can clear the jurisdictional hurdles set forth in the treaties and relevant arbitration rules, the substantive protections of BITs may be relevant to a range of different scenarios faced by not-for-profit organizations engaged in foreign activities. Perhaps most obvious, where not-for-profit organizations are subject to the outright seizure of their assets, they may bring a claim for direct expropriation of their property. However, other treaty obligations such as those on the free transfer of capital, fair and equitable treatment, full protection and security and national treatment could prove valuable where organizations encounter interference with their right to transfer funds into and out of the host state; where they are discriminated against when seeking to establish a presence in a new territory; where they are denied re-registration on arbitrary grounds or contrary to prior representations from state officials; or where organizations and their principals suffer harassment, abuse or other forms of intimidation at the hands of state or non-state actors.

At the same time, certain treaty protections are not always ideally suited to the problems commonly faced by not-for-profit organizations. For example, provisions requiring the free transfer of funds protect not-for-profit organizations bringing capital into and out of the host state but do not protect the free disbursement of funds within a targeted host country. Another problem is the lack of clarity as to what constitutes an “indirect expropriation”. Investment treaties give little guidance as to which exercises of government authority are legitimate non-compensable measures, and which would trigger liability for expropriation of an investment. Further, the quantification of damages may be vexing in some cases where certain activities of not-for-profit organizations are at issue.

Despite such problems, where not-for-profit organizations feel themselves to be victim of mistreatment, they might have recourse to their potential treaty rights and protections in discussions with their host states. Indeed, many disputes which might give rise to formal arbitration may be susceptible to informal resolution provided that state authorities are made aware of the potential for a treaty claim. Here it should be acknowledged that not-for-profit organizations may have reasons to shy away from recourse to formal arbitration – particularly where the organizations are committed to the long-term development of the host state and wish to remain active in that territory – however, the potential for such arbitration appears to be a genuine option.

In addition to qualms about fracturing a relationship with a host government, not-for-profit organizations may harbour differing views as to the legitimacy of investment treaties as instruments of global governance. Some policy-based organizations have leveled criticism at these treaties – including the perceived failure to provide sufficient latitude for governments to regulate foreign investment activity in the public interest.<sup>169</sup> In some cases, this has led to outright opposition to the negotiation of such agreements,<sup>170</sup> while in other instances it has

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<sup>169</sup> See, for example, Oxfam International, *The Emperor’s New Clothes: Why Rich Countries want a WTO Investment Agreement*, Briefing Paper No. 46, May 2003, at page 9.

<sup>170</sup> See, for example, the various actions against bilateral investment agreements (and trade agreements with investment provisions) discussed on the activist website, *Bilaterals.org*, at: [http://www.bilaterals.org/rubrique.php3?id\\_rubrique=74](http://www.bilaterals.org/rubrique.php3?id_rubrique=74)

stimulated efforts to design new international agreements which strike a different balance between investor protection and legitimate government regulation.<sup>171</sup>

While the policy debate over investment treaties continues, there are signs that certain not-for-profit organizations (for example those with extensive on-the-ground operations in developing countries) may be experimenting with different legal arrangements to protect their own investments. Moreover, due to the fact that arbitrations under some rules may proceed without any public announcement or disclosure, it is possible that not-for-profit organizations have already begun to invoke investment protection treaties in certain instances. Indeed, there is a vigorous policy debate as to whether investment treaty lawsuits ought to be arbitrable without any public disclosure – not least because such disputes often implicate important legal, policy and financial matters - however in the absence of mandatory disclosure of such cases, an unknown number of them will be proceeding without public notice.<sup>172</sup> In the course of researching this paper, the co-authors have learned of at least one arbitration which has been brought on behalf of an undisclosed European not-for-profit organization against a host state. There may be other such cases proceeding without publicity.

Ultimately, international investment treaties appear to protect not-for-profit actors and activities in some circumstances, and may supplement the often meager international protections afforded to development agencies, human rights organizations and the myriad other not-for-profit actors with an international presence. While not tailor-made for such actors and activities – and, as such, prone to certain shortcomings and omissions – investment treaties may offer a surprising amount of recourse and redress in a range of different circumstances.

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<sup>171</sup> See, for example, the IISD Draft Model Investment Agreement for Sustainable Development, a template co-drafted by one of the co-authors of this present paper at: [http://www.iisd.org/investment/model\\_agreement.asp](http://www.iisd.org/investment/model_agreement.asp).

<sup>172</sup> On the case for more transparency see: Fiona Marshall and Howard Mann, “Good Governance and the Rule of Law: Express Rules for Investor-State Arbitration Required,” International Institute for Sustainable Development briefing paper, September 2006, available at: [http://www.iisd.org/pdf/2006/investment\\_uncitral\\_rules\\_revision.pdf](http://www.iisd.org/pdf/2006/investment_uncitral_rules_revision.pdf). On the case against more transparency see, Noah Rubins, “Opening the Investment Arbitration Process: At What Cost for What Benefit?,” 3(3) *Transnational Dispute Management* (June 2006).