September 30, 2004

Dzidek Kedzia
Chief, Research and Right to Development Branch
Office of the High Commissioner for Human Rights
United Nations, CH-1211 Geneva, 10
Switzerland

Dear Sir,

The Columbia University Law School Human Rights Clinic is pleased to submit comments to the United Nations High Commissioner on Human Rights concerning the responsibilities of transnational corporations and other business enterprises with regard to human rights.

In this paper, we examine the increasingly complex global environment in which transnational corporations and human rights are often put at odds, focusing in particular on powers of TNCs in investment regimes. Our support of the Norms on moral, legal, and practical grounds as a vehicle for addressing this issue could no doubt extend for many pages. Rather than pursue each route, we opt here to focus in on a particular paradox in the international legal regime that illustrates why international regulation is essential.

We focus on the developing powers of corporations in Bilateral Investment Treaties (BITs) and treaties like NAFTA, based on the observation that these treaties have enabled TNCs to claim the benefits of international law while avoiding reciprocal duties thereunder. Simultaneously, TNCs have also been able to reduce the scope of their domestic law obligations by challenging government regulations through direct investor-state arbitration and law suits allowed under the investment regime. Particularly in the face of corporate challenges to domestic policies founded in human rights principles, a continuation of these practices in the status quo seems problematic. Without international obligations such as the Norms in conjunction with leeway to use investment treaties to pressure governments, international law has created a space where businesses can avoid external regulation.

Sincerely,

Peter Rosenblum
Associate Clinical Professor in Human Rights

Based on the work of Payal Shah and Mari-Emmanuelle Henry, Columbia Law School students

Submission by The Columbia University Law School Human Rights Clinic: The Paradox of International Corporate Governance*

The UN Norms reflect the need to address important issues surrounding the relationship between business and human rights. They reflect the growing realization that it no longer makes sense to view the corporation as immune from obligations for the fulfillment of international human rights law. As the growing economic power of transnational corporations gives rise to increasing political power globally, transnational corporations (TNCs) have emerged as the most influential yet unregulated actors on the international stage. The development and proliferation of regional trade agreements and bilateral investment treaties (BITs) have endowed transnational corporations with the power to directly challenge the domestic regulatory authority of national governments. At the same time, TNCs have been able to successfully prevent the implementation of a set of binding international norms that would check the power of corporations to dictate state policy. The international community's past hesitation to place direct legal obligations on corporations has allowed TNCs to escape any sort of external governance, while still granting them the right to essentially govern others.

The Increasing Rights of Transnational Corporations

Over the past few decades, international law has increasingly recognized the rights of TNCs to protect themselves against the policies of their host countries. The relationship between the corporation and the state has taken on many new forms, such as joint ventures, innovative licensing and franchising regimes, and turn-key operations.[1] However, perhaps the most prominent of mechanisms for the protection of investors has been the bilateral investment treaty.[2] Under BITs, foreign investors are granted the right to treatment at least equal to that given to a national company, most-favored-nation treatment, absolute standards of treatment, provisions guaranteeing transfers and repatriation of profits, and guarantees against expropriation or nationalization without compensation and due process.[3] But the developing foreign investment regime extends beyond non-discrimination for foreign corporations. The United States has even been successful including in later BITs and in the North American Free Trade Agreement (NAFTA) a ban on certain performance requirements, which prohibit treaty partners from asking investors for certain concessions, including technology transfers and promises to sell a certain amount of output locally or abroad.[4]

The investment regime also grants new 'enforcement' powers to corporations. BITs move beyond the state-to-state dispute resolution mechanisms of prior international

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* Prepared by Payal Shah, J.D. 2006, and Marie-Emmanuel Henry, J.D. 2006.

[1] Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443, 458 (2001).

[2] Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 Colum. J. Transnat'l L. 483, 488 (2001).

[3] Luke Eric Peterson*, International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, Swiss Federal Department of Foreign Affairs, 8 (2003), *available at* <www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf> (Last visited September 29, 2004).

[4] *See supra*, note 1 at 458.

economic agreements such as the 1994 World Trade Organization Agreements and the earlier GATT.[5] Most BITs offer investors the ability to pursue their own claims through so-called investor-status arbitration, without any prerequisite of exhausting domestic legal remedies.[6] Arbitration and adjudication takes place in for a that are specialized in ensuring investment rights but are , at the very least, unfamiliar with the human rights obligations of states.

The Increasing International Role of TNCs

The rights accorded to corporations through BITs vis-à-vis host states illustrate the growing privilege and autonomy of TNCs in international law. Like the development of human rights law a half century ago, these treaties are transforming corporations from 'third party beneficiaries' of interstate agreements into subjects of international protection. NAFTA's controversial Chapter 11 and the aborted Multilateral Agreement on Investment were drawn from the regular practice of hundreds of BITs.[7] BITs "extend the domain of public international law to relationships between the state and private parties—a radical departure from its traditional scope."[8] Further, BITs "rely on private parties for enforcement by way of submission of claims rather than from any state-initiated proceedings or state-supported institution."[9] Decisions are rooted in treaty-based causes of action rather than national law, and successful prosecution leads to actual damages that can be enforced under international conventions.[10] Foreign investors essentially become global actors who are protected by international law.

The Implications of TNCs as International Actors

Beyond the prima facie obligations placed on host governments in the majority of BITs, government discretion is limited by the fear (and costs, both political and economic) of the TNCs power to challenge them. One of the first clear signs of this problem was the *Ethyl Corporation* case in Canada. Despite the potential hazardous health effects of a particular gasoline additive used by the U.S.-based Ethyl Corporation, in the face of arbitration, the Canadian government agreed to repeal its trade ban on the additive and offered $13 million in compensation. The case showed how NAFTA could be used to challenge government regulation of issues traditionally held within the public sphere, including health and the environment.[11] Recently, BITs have been used to challenge a decision by Mexican authorities to renew a permit for a toxic waste facility; to combat an order by the Chilean government to move a factory located adjacent to an ecological preserve; and to undermine a proposed system for economic empowerment of

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[5] *See id .at* 9.
[6] *See id.* at 8.
[7]Luke Peterson, *Changing Investment Litigations, Bit by BIT*, 2, *available at* <http://www.iisd.org/pdf/2001/trade_inv_litigation.pdf>(Last visited September 29, 2004).
[8] Carlos C. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin-America, and the Necessary Evil of Investor- State Arbitration*, 16 Fla. J. Int'l L. 301, 310 (2004)
[9] *See* id*.* at 310.
[10] *Id.*
[11] *See supra*, note 3 at 13.

disadvantaged ethnic groups in South Africa.[12] As the previous examples show, the international economic treaties relied on by TNCs allow them significant power to affect the domestic regulations of countries in which they are not even based. Particularly in the realm of human rights, where economic considerations are not usually the justification for proposed reform, pressure from TNCs may detrimentally undercut domestic policy.

A Call for International Standards

Much of the critique of BITs from human rights groups targets the lack of reciprocal duties for TNCs in the face of being granted so many rights. Professor Jose Alvarez described the NAFTA proposed Chapter 11, which was based on various BITs, as a "human rights treaty for special interest groups." As Jeffery Atik commented,

> "Like conventional human rights treaties, Chapter 11 imposes international norms on the NAFTA Parties. Further, it grants both standing and effective remedy to protected parties (here investors) affected by breaches of these norms. . . Both Chapter 11 and the human rights movement grew out of the customary international law tradition of state responsibility. But here Alvarez' critique takes bite: where are the counterpart protections for political dissidents, for indigenous peoples, for women? Why does NAFTA build the Chapter 11 edifice for transboundary corporate actors and ignore the needs of real people?"[13]

While critiques such as Atik's are insightful, they come too late. Even for governments that value human rights, the competitive nature of the global market for investment is a significant disincentive against imposing what may be perceived as cumbersome obligations upon potential sources of capital. As Steven Ratner explains, after the Cold War, "many developing-world states could no longer count either on economic aid from one side of the iron curtain or the other, or on political support in the North-South battles at the UN. International banks, stung by the failure of many developing-world nations to service their debts, stopped much of their lending."[14] The reality today is that international obligations must be placed on the corporations themselves, as well as governments.

By exercising the private right to action granted through investment treaties, TNCs have been able to claim the benefits of international law while avoiding reciprocal duties thereunder. Simultaneously, TNCs have also been able to reduce the scope of their domestic law obligations by challenging government regulations through direct investor-state arbitration. Particularly in the face of corporate challenges to domestic policies founded in human rights principles, a continuation of these practices in the status quo seems problematic. Without international obligations such as the Norms in conjunction

[12] *See* supra, note 3 at 15, 24.
[13] Jeffery Atik, *NAFTA Chapter 11: Repenser NAFTA Chapter 11: A Catalogue of Legitimacy Critiques*, 3 Asper Rev. Int'l Bus. & Trade L. 215, 228 (2003)
[14] *See supra,* note 1 at 458.

with leeway to use investment treaties to pressure governments, international law has created a space where businesses can avoid external regulation.