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Away from the Spotlight: Bilateral Investment Treaties, Natural Resources and the Right to Water in Afghanistan

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In this paper I outline the practical dimension of the relationship between international investment law (IIL) and international human rights law (IHRL) in conflicted[1] Afghanistan. Specifically, I examine whether a targeted application of the first pillar of the Framework for business and human rights[2] (i.e. the state's duty to protect), as strengthened both by the international law principle of due diligence and by a complementary understanding of host state's and home states' obligations,[3] can improve the protection of both foreign investment and human rights, in particular of the right to water, within the context of extractive activities.

The structure of the paper is as follows. In part I, I briefly provide the context for my study on Afghanistan. In doing so I outline Afghanistan's deepening water crisis; the parallel growing interest in the extraction of the country's natural resources; the escalating armed conflict coupled with endemic corruption and cronyism; and the endless debates on transition/reconciliation and on the looming disengagement of international troops. This contextualisation is followed, in part II, by an analysis of relevant investment standards of protection as contained in the Afghanistan-Germany BIT, which was signed on 20 April 2005 and entered into force on 12 October 2007.[4] The role of BITs as key investment instruments aimed at consolidating a host country's obligations to protect foreign investment is widely

[1] In this paper I use the term 'conflicted' to refer to countries and societies which are enveloped in, or emerging from extreme and systematic armed violence. In my view, this term functions as a reminder of the impact of armed violence on human beings, their lives and their rights. As such, it enables a more organic discussion of such impacts, one which goes beyond the applicability and implementation of relevant norms of international humanitarian law. See F Ní Aoláin et al, *On the Frontlines: Gender, War, and the Post-Conflict Process* (Oxford University Press, 2011), 27-55.

[2] The term Framework is used throughout the paper to refer both to the Protect, Respect and Remedy Framework endorsed by the UN Human Rights Council in 2008 (individually referred to as the UN Framework) and the Guiding Principles for the operationalisation of the UN Framework adopted in 2011 (individually referred to as the Guiding Principles or GPs). For the UN Framework, see UN Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (7 April 2008). For the GPs, see UN Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31, 2011.

[3] D Davitti, 'An Emerging Framework for Investment and Human Rights Protection: Refining the Protect, Respect and Remedy Framework', paper presented at the SLS Annual Conference, Edinburgh, September 2013.

[4] UNCTAD, Country-specific Lists of Bilateral Investment Treaties, concluded as at 1 June 2012, available at www.unctad.org, last accessed on 28 August 2013.

acknowledged.[5] But with BITs, which enable a foreign investor to initiate international investment arbitration against the host country to obtain compensation when the investment is in any way adversely affected, also comes the apparent risk of regulatory freeze. As I discuss in what follows, this prospect is of particular concern for a country like Afghanistan, ravaged by armed conflict, with a profoundly weak legal system and government authorities mostly unable and unwilling to ensure human rights protection.

In part III, I analyse the state's duty to protect human rights, as enshrined in the first pillar of the Framework, within the Afghan context. Whilst proposing a recalibrated understanding of the state's duty to protect under the Framework, I identify the obligations of Afghanistan as the host state and the complementary obligations of Germany as a home state in relation to the protection of the right to water in Afghanistan. Throughout the analysis draws, at times, on the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights[6] and on the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements published by the Special Rapporteur on the Right to Food, Professor Olivier De Schutter.[7] The latter Principles, though specially tailored to the right to food, offer numerous transferrable elements that are also applicable to the protection of the right to water within the context of IIL.

I conclude the paper by outlining the need for a different approach to investment protection in Afghanistan, not least one which takes into full consideration both the host and home states' obligation to respect, protect and fulfil human rights.

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[5] See, eg, R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008) 4; R Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2006) 37 International Law and Politics 952, 952; and C Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001).

[6] See O De Schutter et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social an d Cultural Rights' (2012) 34 Human Rights Quarterly 1084-1169.

[7] Human Rights Council, Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum *Guiding principles on human rights impact assessments of trade and investment agreements*, 19 December 2011, UN Doc A/HRC/19/59/Add.5.

I. Afghanistan: Political and Economic Contextualisation

Against the backdrop of the imminent withdrawal of the majority of international military forces and international aid from Afghanistan (the so-called 2014 'transition'),[8] the country's extractive sector is perceived by many as the only solution to an otherwise bleak development scenario.[9] According to a recent World Bank report, Afghanistan will face a persistent financing gap post-2014, mainly due to the country's high aid dependency, with foreign aid at USD 15.7 billion in 2010/2011, equal to the country's total GDP.[10] Worse still, foreign aid has been 'linked to corruption, fragmented and parallel delivery systems, poor aid effectiveness, and weakened governance'.[11] According to the World Bank, the 'transition' will be successful and peaceful only if accompanied by 'a reconciliation process, cessation of hostilities, and ultimately a peace agreement with the Taliban'.[12] Otherwise, international military forces and foreign aid will decline dramatically, without the elements of a conventionally defined post-conflict transition being in place.[13] The sad reality, as I explained earlier, is that the latter scenario is the most likely to develop, given the escalating armed conflict, a strengthening of the opposition forces across the country, growing political instability, and rampant crony capitalism. Whilst World Bank's projections also clearly reveal

[8] The implication of the term 'transition' is that all control of security and political stability will be successfully handed over to the Afghan government, although doubts remain over the feasibility of this plan. The World Bank, 'Afghanistan in Transition: Looking Beyond 2014', Volume 1: Overview and Volume 2: Main Report, May 2012, Doc No 70851.

[9] See The World Bank, 'Afghanistan: From Transition to Transformation. The Afghanistan Resource Corridor', July 2012, available at http://www.worldbank.org/en/news/2012/07/01/afghanistan-transition-transformation, last accessed 12 November 2012. See also the 'New Silk Road' strategy, launched by US State Secretary Hillary Clinton in 2011: RD Hormats, 'The United States' "New Silk Road" Strategy: What is it? Where is it Headed?', Address to the SAIS Central Asia-Caucasus Institute and CSIS Forum, Washington DC, 29 September 2011, available at http://www.state.gov/e/rls/rmk/2011/174800.htm, last accessed on 12 November 2012.

[10] Afghanistan in Transition Report, volume 1, at iv.

[11] ibid.

[12] ibid.

[13] Afghanistan in Transition Report, volume 2, at 4. For a detailed appraisal of the situation on the ground, see the analyses by Thomas Ruttig and Martine van Bijlert in Afghanistan Analysts Network, at http://aan-afghanistan.com, last accessed 25 August 2013.

that rapidly falling aid is almost inevitable, international experts and politicians seem increasingly to focus on what they describe as the only possible alternative to the country's collapse: the extractive sector. Ensuring that the two already started major mining investments are successful,[14] and that the remaining extractive sites planned for further development also materialise are a top priority of donor governments and Afghan ministries alike. A 'gold-rush' to Afghanistan's natural resources is therefore well under way, with aid money increasingly devoted to strengthening the Ministry of Mines and to providing advisors to streamline tendering processes and support transparency initiatives.[15]

Meanwhile, Afghanistan remains one of the poorest countries in the world, with 36 per cent of its population (approximately 9 million people) unable to meet basic survival needs.[16] Furthermore, these figures, based on household income, are more optimistic than those calculated according to the United Nations Development Programme's (UNDP) multi-dimensional poverty index, which considers deprivation from the perspective of health, education and standard of living: according to the UNDP index, 84 per cent of Afghanistan's households are considered to be multi-dimensionally poor.[17] Living standards across the country remain extremely low with access to clean water representing one of the main problems for both rural and urban Afghans. With the world's lowest access to an improved water resource (only 27 per cent of the population), Afghanistan has an infant mortality rate of approximately 161 per 1000 live births, whereby 23 per cent of the deaths are directly

[14] The copper deposit in Mes Aynak, Logar province, and the Hajigak iron deposit in Bamyan province. According to the World Bank, potential revenue from these mines amount to approximately $900 million per year until 2031. See Global Witness, 'Getting to Gold: How Afghanistan's first mining contracts can support transparency and accountability in the sector', April 2012.

[15] According to the Ministry of Mines, the World Bank, the Asia Development Bank, US, UK, Germany and Australia have all provided technical, legal and financial support to the Afghan government to attract international investment in the extractive sector and, *inter alia*, to obtain validation from the Extractive Industries Transparency Initiative (EITI). See http://mom.gov.af/en, last accessed on 13 August 2013.

[16] Centre for Policy and Human Development (CPHD), Afghanistan Human Development Report 2011, *The Forgotten Front: Water Security and the Crisis in Sanitation*, 3

[17] CPHD, ibid.

related to contaminated water and inadequate sanitation.[18] Yet the country's water resources are not scarce and would be sufficient to meet more than the population's basic needs for human survival and human dignity.[19] Afghanistan has also recently adopted a new Water Law which, at least on paper, prioritises the use of water for drinking and livelihood purposes.[20] The problem, however, is fundamentally one of irregular water geographical distribution, non-existent water storage infrastructures, land degradation and, crucially, inequitable allocation.[21] It is this latter aspect that risks being particularly exacerbated by the rise of the extractive sector in Afghanistan.

The multi-purpose use of water means that this is a highly contested resource, and that its allocation and prioritisation are intrinsically characterised by tensions between conflicting interests and competing user groups.[22] In Afghanistan, according to a recent report by the Centre for Policy and Human Development (CPHD)—a Kabul-based research centre co-founded by the UNDP and Kabul University—farmers are responsible for managing the majority of irrigation systems, whilst also acting as *mirabs* (community-based water service providers), thus *de facto* controlling water distribution and access for the villages under their responsibility.[23] Given the apparent conflict of interest of managing the irrigation systems and being responsible for water distribution at the same time, it is unsurprising that *mirabs* have mostly carried out their work in a non-transparent and non-participatory manner.[24] Afghanistan's extant water crisis is bound to deepen given the growing interest in extractive sector investments and the exclusive focus on the maximisation of economic return when extractive concessions are granted. The ensuing competition over diminishing water resources

[18] CPHD, ibid, 10.
[19] CPHD, ibid 4.
[20] The Water Law, arts 1 and 6, 26 April 2009.
[21] CPHD (n 16) 15–20.
[22] IT Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart Publishing, 2012), 31.
[23] CPHD, ibid, 126–29. See also V Thomas et al, 'Mind the Gap? Local Practices and Institutional Reforms for Water Allocation in Afghanistan's Panj-Amu River Basin' (Afghanistan Research and Evaluation Unit, 2012).
[24] CPHD, ibid.

will exacerbate an already fragile situation, where water access is characterised by unequal distribution and great disparity.[25] Thus, marginalised Afghans who already are unable to access clean water will find it even more difficult to meet their core needs, as their interests will be weighed against the competing water demands of extractive companies. Furthermore, extraction activities are notorious for their devastating impact on water sources and the related health problems caused to local populations by water contamination.[26] Water pollution caused by natural-resources extraction risks causing a reduction in the amount of water suitable for personal and household use, and consequently a further deterioration of living standards.

The chances that the extractive sector will be adequately regulated are very slim, despite the efforts by international politicians to convince their home constituencies of the opposite.[27] Many mines in Afghanistan are under the direct or indirect control of criminal organisations and anti-government elements,[28] whilst powerful warlords are already vying to gain control over resource rich areas and access routes to extractive sites.[29] The ancillary contracts related to the main mining contracts already signed remain unpublished, but unofficial sources indicate that the most lucrative ones have allegedly been awarded to relatives of President Hamid Karzai.[30] This situation of embedded corruption has not received much attention, however, either in Kabul or at the international level—perhaps because it has been deflected by political discussions on the 2014 presidential elections, as well as by the publication of the results of an independent investigation on the 2010 collapse of Kabul Bank. Interestingly, the investigation report reveals that the large-scale fraud which led to the bank's

[25] 'Water consumption patterns and inequalities tend to reflect society in general: those stakeholders and groups that are marginalised in society at large also become marginalised in water management, and are particularly disadvantaged as far as access to water is concerned'. Winkler (n 22) 34.
[26] See eg the examples of India, Ecuador and Nigeria in Winkler, 33–35.
[27] International Crisis Group, *Afghanistan: The Long, Hard Road to the 2014 Transition*, 8 October 2012, Asia Report no 236.
[28] Global Witness, *Copper Bottomed? Bolstering the Aynak Contract: Afghanistan's First Major Mining Deal*, November 2012, at 15.
[29] G Bowley, 'Potential for a Mining Boom Splits Factions in Afghanistan', The New York Times, 8 September 2012.
[30] ibid.

collapse was closely related to the Afghan President and his protégées.[31]

According to the US State Department, Afghan government authorities are not however the only ones to benefit from the country's appearance of business modernity:

> small groups of businessmen, many of whom are alleged to have connections with current or former warlords and militias, dominate the trading market in many areas. These individuals because of their wealth and insider access to land, credit and contracts, and their ability to manipulate prices, enjoy excessive advantages that result in a non-competitive environment in some fields, notable gem-mining, fuel transport, and construction.[32]

With such conditions on the ground, local grievances in relation to access to water and basic standards of living are unlikely to be addressed by the Afghan government, and the 84 per cent of Afghan households considered multi-dimensionally poor are not set to benefit from the USD 300 million that the Afghan authorities are aiming to generate from mining projects by 2016.[33]

The national and international push to attract foreign investment in the extractive sector goes hand in hand with the consolidation of a legal framework conducive for investment, whereby investors' interests are afforded paramount protection. Whilst at the moment of writing a newly-proposed mining law is still pending parliamentary approval,[34] Afghanistan is already party to BITs with Germany, Turkey and The Islamic Republic of Iran. Whereas the text of the Afghanistan-Germany BIT is deposited with the International Centre for Settlement of Investment Disputes (ICSID)[35] and is available in both German and English, the texts of the agreements with Turkey and The Islamic Republic of Iran are not currently

[31] D Kos, *Report of the Public Enquiry into the Kabul Bank Crisis*, Independent Joint Anti-Corruption Monitoring and Evaluation Committee, 15 November 2012. See also van Bijlert's analysis of 27 November 2012, 'The Rise and Fall of the Kabul Bank – making the details public', available at http://aan-afghanistan.com, last accessed on 27 August 2013.
[32] US State Department, '2012 Investment Climate Statement: Afghanistan', June 2012 Report, available at www.state.gov, last accessed 13 August 2013.
[33] D Nissenbaum, 'Doubt Cast on Afghan Mining', The Wall Street Journal, 3 October 2012.
[34] Still pending approval as of 28 August 2013 (see in general the Afghan Ministry of Mines at http://mom.gov.af/en).
[35] See https://icsid.worldbank.org/ICSID/Index.jsp (last accessed 29 August 2013).

available to the public. In 2004 Afghanistan also signed a Trade and Investment Framework Agreement (TIFA) with the US, paving the way for a potential US-Afghanistan BIT. The investment protection provisions enshrined in BITs can significantly affect a host state's (both present and future) capacity to regulate in the area of human rights, for instance in order to strengthen the protection of the human right to water. An analysis of this potential clash is the focus of the next two parts, where I examine in turn the standards of investment protection enshrined in the existing Afghanistan-Germany BIT and states' obligations pertaining to the human right to water.

II. The Afghanistan-Germany BIT: An Analysis of Relevant Protections

My analysis of the Afghanistan-Germany BIT focuses primarily on the standards of investment protection which are more likely adversely to impact human rights in Afghanistan, namely Most-Favoured Nation (MFN), Full Protection and Security (FPS), expropriation, war clauses and Fair and Equitable Treatment (FET). The decision to select these standards is supported by the way in which recent arbitration decisions have proved highly controversial in terms of their human rights impact. Furthermore, the wording of the clauses related to these guarantees in the Afghanistan-Germany BIT provides an interesting insight on the way in which the drafting of investment protection standards can significantly influence the actual enjoyment of human rights by the local population. In what follows, I analyse the various standards in turn, examining their scope under the relevant clauses in the Afghanistan-Germany BIT. And throughout the analysis, I consider pertinent arbitration awards that have dealt with similarly worded clauses, outlining a certain lack of consistency in the legal reasoning of the tribunals.

A. The MFN Clause

The MFN clause of the Afghanistan-Germany BIT is contained in its very broadly worded article 3. The clause reads as follows:

> (1) Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State.
>
> (2) Neither Contracting State shall subject investors of the other Contracting State, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own investors or to investors of any third State.

The Protocol to the BIT further defines, in a non-exclusive manner, the term 'activity'. The list refers to 'the management, maintenance, use, enjoyment and disposal of an investment'. The Protocol also offers a non-exclusive list of what will be deemed 'treatment less favourable', namely 'unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country, as well as any other measures having similar effects'. Measures 'taken for reasons of public security and order, public health or morality', according to the Protocol, will not be considered as 'treatment less favourable'.

As is often the case, the non-discrimination clause enshrined in article 3 of the Afghanistan-Germany BIT combines national treatment (NT) standard and MFN standard protections, thus ensuring that foreign investments are not treated less favourably than national and third party investments. In terms of MFN contents, the protections granted by this clause are potentially very far-reaching, in particular due to the definition of 'activity' and to the 'any other measures' wording in the Protocol in relation to article 3.

The divergence in interpretation by investment arbitrators in relation to the content and

scope of the MFN clause in general produces a high level of uncertainty for both investors and host states. Since the MFN standard is a relative standard, its potential scope and reach are strictly dependent on the contents of the investment protection clauses in other applicable treaties. Thus, it is difficult for the wider public, including non-governmental organisations (NGOs) and individuals affected by the proposed mining projects, to ascertain Afghanistan's existing obligations under the Afghanistan-Germany BIT in relation to the MFN clause that it contains. As I outline below, this lack of clarity concerning the scope of a state's obligations under existing BITs has been used in the past to deter host states from introducing regulations for public purposes.[36] Crucially, article 4(4) of the Afghanistan-Germany BIT also extends MFN treatment to full protection and security guarantees, to the protections against expropriation and to the war clause contained in article 4. It is not uncommon for MFN protection to be coupled with other standards of investment protection, but it is important to bear in mind that this extension of the clause could potentially also be applicable to future international investment agreements into which Afghanistan may decide to enter and during the negotiations of which it might wish to adopt a more discerning approach in terms of safeguarding its regulatory powers.[37] Thus, under certain circumstances, foreign investors could use the MFN clause in other BITs in order to import more favourable guarantees which the Afghanistan-Germany BIT may contain.

Alternative interpretative approaches to the meaning of 'non-discrimination', however, have been suggested, not least through the application of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).[38] According to Simma, BIT non-discrimination clauses (such as MFN and NT) should be interpreted by the investment tribunals in light of

[36] F Coomans and R Künemann (eds), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2012). See in particular chapter 1 on the Palmital/Sawhoyamaxa cases, at 52-61.
[37] F Lapova et al, 'How to Kill a BIT and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties', Society of International Economic Law, 3rd Biennial Conference, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102683 (last accessed 28 August 2013).
[38] Vienna Convention on the Laws of Treaties, Vienna 23 May 1969, entered into force on 27 January 1980, United Nations Treaty Series, vol 1155, at 331.

Articles 1(4) and 2(2) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD). CERD is one of the most widely ratified human rights instruments, and Afghanistan is also party to it.[39] According to Article 1(4) CERD, positive measures taken to tackle or reverse discrimination impacts on certain groups cannot be considered discriminatory. State parties to CERD are not only *justified* in adopting such positive measures, they are also *required* to do so, under Article 2(2) CERD, 'when the circumstances so warrant'. The relevance of both Articles to the interpretation of the non-discrimination obligations enshrined in the BITs concluded by Afghanistan, including the one with Germany, means that it would be difficult for an investment tribunal to uphold an argument from investors that anti-discrimination regulations introduced by Afghanistan have had a discriminatory effect against them. Afghanistan, in fact, could not be presumed to have significantly deviated from the language adopted in the CERD when adopting the BITs. This approach, of course, remains contingent upon it being adopted by the investment arbitrators. But as outlined by various commentators,[40] the continued disregard of human rights in the reasoning of investment tribunals has already led to a backlash against international investment arbitration and the mechanism already shows some remarkable deficiencies that need to be urgently addressed.

B. Full Protection and Security, Expropriation and War Clauses

Article 4 of the Afghanistan-Germany BIT also has a significant scope and could be used by investment tribunals to further expand investment protections. The article, in fact, contains an FPS provision (article 4(1)); protections against expropriation (article 4(2)); and a war clause

[39] Afghanistan ratified CERD on 6 July 1983, which entered into force 5 August 1983. Available at http://treaties.un.org/untc/ (last viewed 20 July 2013).
[40] See M Waibel et al (eds), The Backlash against Investment Arbitration (Kluwer Law International, 2010), 433–88.

(article 4(3)).[41]

I will start my analysis by looking at the war clause under article 4(3), since this is particularly pertinent to conflicted Afghanistan. The war clause grants national treatment in the event of 'restitution, indemnification, compensation or other valuable consideration' for investments that suffer losses 'owing to war or other armed conflict, revolution, a state of national emergency, or revolt'. Arguably, because of its dire economic situation, Afghanistan would not be in a position to compensate either national or international investors for losses suffered as a result of the on-going armed conflict. However, should resources be made available for indemnification (for instance through reconstruction aid) the need for stabilisation and rehabilitation of the country would seem to suggest that compensation of *national* investors should be prioritised, in order to ensure that a recovery of the Afghan economy is supported. Yet, in the eye of an investment tribunal, such prioritisation would most likely be precluded by article 4(3), the wording of which demands that foreign investors are not treated less favourably than national investors when restitution, indemnification or compensation of any form are to be carried out for conflict-related losses.

Although the war clause in article 4 is not worded as an extended war clause (whereby requisition or destruction not meeting the requirements of military necessity would be treated as expropriatory measures), it is possible to argue that because it is placed in the same article which also grants protections against expropriation, it could be read in conjunction with the 'tantamount to expropriation'[42] wording at paragraph (2). Such a reading of article 4 would ensure that any destruction or requisition by the state affecting the foreign investment could be treated as an expropriatory measure, triggering restitution or compensation.[43] Whether such

[41] Article 4(4) reads as follows: 'Investors of either Contracting State shall enjoy most-favoured-nation treatment in the territory of the other Contracting State in respect of the matters provided for this Article.'
[42] See discussion of article 4(2) below.
[43] See in particular the case of *AMT v Zaire*.

an approach would be readily endorsed by investment tribunals remains to be seen: it would probably depend on whether the relevant arbitrators tend to favour an expansionary approach to investment protection or a restrictive one. Crucially, by virtue of article 4(4), the war clause itself is linked to the MFN standard. This means that if investment tribunals were not willing to read the war clause in conjunction with the expropriation clause, protections more favourable than those contained under article 4(3) could arguably be imported from other applicable investment agreements so as to cover destruction or requisition during armed conflict.[44]

If we turn to the FPS standard, contained in article 4(1), further reasons for concern emerge. As evidenced for instance in the *CME v Czech Republic*, *Biwater Gauff v Tanzania* and *Azurix v Argentina* awards, some tribunals have extended FPS clauses beyond physical security, so as to include legal security and encompass a restriction of the host state's regulatory powers. This approach has generally been justified on the basis of the fact that 'the stability afforded by a secure investment environment is as important from an investor's point of view'.[45]

Yet once we take into consideration the current circumstances experienced by Afghanistan, it is apparent that even ensuring the *physical* security of, for instance, the Aynak copper mine (the second world's largest copper deposit and biggest hope for the future of the country) represents a significant challenge. As I outlined at the beginning of this paper, Afghanistan's finances are under considerable strain and according to World Bank projections the country faces a further financing gap following international troops' withdrawal in 2014. In practical terms, this will amount to a shortfall of at least USD 4.1 billion a year just to

[44] As the situation currently stands, it is not possible to ascertain whether the existing BIT with Turkey and Iran contain more favourable protections. Afghanistan could also enter into new international investment agreements to which this MFN clause could be extended.
[45] *Azurix v Argentina*, para 408.

secure the payment of 350,000 security forces once NATO draws down.[46] The securing of the Aynak copper mine, on the other hand, is already stretching security forces to the limit as the mine is located in Logar province, historically one of the insurgency's strongholds in the South-East of the capital city Kabul. By the end of 2012 insurgents' efforts to block the Aynak project had increased exponentially, with several rocket attacks directly aimed at the mine. These attacks were successful in at least partially deterring the Chinese investors, who indefinitely repatriated some of their workers, claiming that security guarantees agreed with the Afghan government had not been met. Thus, whilst impeding the development of the Aynak project has become one of the declared objectives of the insurgency in Logar,[47] the security forces deployed to secure the Aynak site remain insufficient. Interestingly however, by the end of 2012 the number of Afghan National Police (ANP) officers especially assigned to the Aynak site reached 2000, a figure which almost trebled the number of ANP assigned to the whole of Logar province. These figures surely force us to question whether, given the critical security situation faced by Afghanistan, it is reasonable for the Afghan government to prioritise the security of the Aynak site over the overall security of a key province in such proximity to the capital city. Yet under the investment guarantees enshrined in article 4(1), this prioritisation is not only justifiable but also required in order to fulfil Afghanistan's FPS obligations. It is however possible to argue that, for reasons of public security and order, Afghanistan is entitled to adopt a different approach, whereby a more balanced and strategic deployment of ANP forces is envisaged.

The terms of the unpublished investment contract for the development of the Aynak deposit seem to include an obligation on the Afghan government to ensure the physical security of the site. Although this is not directly relevant to the scope of the Afghanistan-

[46] J Donati and M Harooni, 'Exclusive: Chinese halt at flagship mine imperils Afghan future', Reuters, 27 September 2012.
[47] ibid.

Germany BIT and of the FPS guarantees enshrined in it,[48] it is a good example of the consequences that this type of commitment can have when structured within the framework of a BIT. The FPS guarantees in a BIT would strengthen the obligation vested in the Afghan government and furthermore would enable a foreign investor to initiate international investment arbitration against the Afghan host state for failure to secure the 'full protection and security' of its investment. Currently the Afghan government is actively pursuing foreign investors for the development of many other natural resources deposits. The bidding processes for some of them have seen expressions of interest by German investors. Furthermore, foreign investors could decide to incorporate at least part of their activities in Germany in order to try and benefit from the protections enshrined in the Afghanistan-Germany BIT. Thus this investment instrument could soon acquire key significance for the protection of foreign investment in Afghanistan. Moreover, the Afghan government is also party to BITs with Turkey and Iran, the terms of which could not be obtained for the purposes of this research because the treaties are not publicly available in English. This means that, strategically drafted MFN clauses which might be contained in these BITs, could also enable Turkish and Iranian investors to try and import more favourable protections from the BIT with Germany.

If the scope of the FPS protections was to be extended beyond physical security, so as to also encompass legal protection, the consequences for the Afghan host state would be even more far-reaching. The Afghan legal system remains chronically weak, despite the significant amount of aid money aimed at reforming it which flowed to the country between 2000 and 2012.[49] Whereas some laws have been updated and subsequently approved by the Afghan parliament, many more are in urgent need of consideration, including appropriate laws aimed at equitable water distribution and protection from pollution, for instance by mining

[48] The mine is being developed by a Chinese consortium and no relevant link to Germany can be identified for the purposes of the applicability of the BIT.
[49] A Donini (ed), *The Golden Fleece: Manipulation and Independence in Humanitarian Action* (Kumarian Press, 2012), in particular chapters 4, 10, 11 and 12. See also D Davitti, 'The Failure of the Justice Agenda: Disillusionment and Growing Instability', UNAMA internal paper, December 2009 (copy on file with author).

wastewater.[50] In any case, the practical non-existence of a legal system based on the rule of law clearly indicates that even if these laws existed, they would not be able to ensure water quality and equitable access.[51] For the purposes of my analysis, the lack of adequate legislation aimed at water protection and/or management means that a broad interpretation of the FPS clause in the Germany-Afghanistan BIT, as requiring the maintenance of a 'stable legal environment for investment',[52] would result in an entrenchment and validation of the current inappropriate regulatory framework. Afghanistan, in fact, intimidated by the prospect of breaching its BIT obligations and possibly having to compensate foreign investors, could be deterred from introducing new and crucially necessary legislation.

Turning to the protections against expropriation contained in article 4(2) of the Afghanistan-Germany BIT, the main reasons for concern in relation to this clause stem from the phrase 'tantamount to expropriation', which investment tribunals have often interpreted as to include virtually any act by the host state which could directly or indirectly affect the investment. It has also been widely used to induce fear in host states that any regulation or threat of regulation affecting foreign investment would be considered 'tantamount to expropriation'.[53] Article 4, however, also includes express limitations to the applicability of the protections against expropriation: namely, it allows lawful expropriations by the host state for the 'public benefit', as established according to a due process of law.[54] This wording holds some promise for defences to be advanced by Afghanistan, were it to introduce regulations

[50] K Wegerich, 'Water Strategy Meets Local Reality' (Afghanistan Research and Evaluation Unit, April 2009).
[51] See, eg, A Suhrke and K Borchgrevink, 'Negotiating Justice Sector Reform in Afghanistan' (2009) 51(2) Crime Law and Social Change 211.
[52] Add full reference to Saluka v Czech Republic (which stated only physical protection but then extended it to legal protection). See ELSI case, CME v Czech Republic, Lauder v Czech Republic, CSOB v Slovakia, Azurix v Argentina, Siemens v Argentina, Vivendi v Argentina, Biwater Gauff v Tanzania, National Grid v Argentina, Siag v Egypt.
[53] M Sornarajah, 'Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness', in C Brown and K Miles, *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011), 631, 655.
[54] However, as highlighted in this paper, the Afghan legal system remains extremely weak. As a consequence a due process of law in Afghanistan remains highly unlikely.

aimed at fulfilling human rights obligations.[55] These types of defences, however, have not always been accepted by investment tribunals, which may decide to disregard the public benefit purpose of the regulations affecting the foreign investment.[56]

A similarly-worded article 4 of the 1993 Germany-Paraguay BIT became in practice a significant obstacle to the implementation of national agrarian reform, on the basis of which small scale farmers and indigenous peoples were able to claim the redistribution of unused land owned by German nationals.[57] Although national law enabled the expropriation of these land plots, in 2000 the German Embassy indicated in a letter to the Paraguayan government that expropriation of land owned by German nationals was in breach of the 1993 Germany-Paraguay BIT. Since the Embassy's statement, the Paraguayan Senate has been very wary of introducing measures which could result in the expropriation of land owned by German nationals, on the assumption that this would trigger costly investment arbitration proceedings and eventual indemnification of German foreign investors. In at least one of the related cases brought to the Inter American Court of Human Rights (IACtHR) in relation to access to land by indigenous peoples,[58] the IACtHR rejected the argument brought forward by the Paraguayan state that the BIT with Germany took precedence over the state's human rights obligations.[59]

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[55] See in general DA Desierto, 'Calibrating Human Rights and Investment during Economic Emergencies: Prospects of Treaty and Valuation Defenses' (2012) 9(2) Mancheseter Journal of International Economic Law 162. See also I Madalena and D Pereira, 'Human Rights as a Defence in Investor-State Arbitration' (Advocates for International Development, 2011).

[56] See for instance *Ethyl Corporation v Canada*, NAFTA, Decision on Jurisdiction, 24 June 1998); and *Compania de Desarrollo de Santa Elena SA v Costa Rica*, ICSID Case No ARB/96/1, Award, 17 February 2000. See also E De Brabandere, 'Human Rights Considerations in International Investment Arbitration', in M Fitzmaurice and P Merkouris, *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Martinus Nijhoff Publisher, 2012), 183.

[57] F Coomans and R Künnemann (eds), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia, 2012), 52.

[58] Inter-American Court of Human Rights, *Sawhoyamaza Indigenous Community v Paraguay*, Judgment of 29 March 2006 (Merits, Reparations and Costs).

[59] Coomans and Künnemann, 56. For a contrasting view see P Nikken, 'Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights', in PM Dupuy et al (eds) *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 246.

More recently, the Paraguayan indigenous communities affected by the German Embassy's letter requested that Germany issue a written statement to clarify that the Paraguayan state was indeed able, under certain circumstances, to lawfully expropriate land owned by foreign nationals, including of German nationality, and that the BIT did not create any special additional protection over and above those of due process of law and compensation in case of expropriation.[60] The German government, although it addressed the issue with the Paraguayan government through its diplomatic routes, refused to issue an official statement to rectify the position expressed by the German Embassy. This refusal by the home state ignored the rights of the indigenous peoples as well as Paraguay's sovereign right to exercise its police powers and carry out lawful expropriations. German authorities justified their decision on the basis of the fact that an official statement would have intimidated existing and potential investors, as compensation in Paraguay was considered to be 'inadequate' and below market value.[61] This example clearly indicates that clauses worded in a similar way to article 4 of the Afghanistan-Germany BIT can indeed be abused to induce fear in a host state and thus prevent measures which are legally available both under national law and in light of the BIT limitations to the protection against expropriation.

If we examine the potential impact of similar investment protections for Afghanistan, it is apparent that the expropriation clause of the BIT with Germany could have the same deterring effect, especially if Afghanistan was to consider introducing measures aimed at the protection of the right to water. Investment tribunals may consider these measures to be 'tantamount to expropriation', and as such capable of attracting lucrative compensation for the foreign investors.

Ultimately, for a country like Afghanistan, afflicted by a protracted armed-conflict and

[60] ibid.
[61] ibid.

by a deepening water crisis, regulatory changes to ensure access to water for the most vulnerable segments of its population may soon become a pressing need. Any change in the regulatory system, however, is likely to affect existing foreign investments, and investors who have structured their investment in such a way as to be able to benefit from the protections of existing BITs will certainly attempt to seek compensation through international investment arbitration. As in the case of the interpretation of the MFN clause discussed above, however, it is possible to argue that investment tribunal should take into consideration human rights when interpreting the relevant BIT clauses at hand. Specifically in relation to economic, social and cultural rights (ESCR), Simma argues that minimum core obligations should be pivotal to the interpretation of contasting obligations vested upon the host state.[62] As clearly explained by the CESCR in General Comment 3, minimum core obligations cannot be easily dismissed, since 'even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances'.[63] Minimum core obligations, therefore, can strengthen the defence of necessity put forward by a host state to justify certain measures adopted in time of emergency. The obligation to protect ESCR requires a host state to adequately regulate the activities of third parties, including companies, so as to prevent them, for instance, from polluting 'water, air and soil by extractive and manufacturing industries'.[64] This obligation to protect, also reiterated by the UN Committee on Economic Social and Cultural Rights (CESCR) in relation to the right to water,[65] can be of further use to inform the interpretation of indirect expropriation, not least to counter reliance on 'sole effect' doctrine, whereby any action that impairs the investment would trigger a compensable claim for expropriation. Whilst the General Comments by the CESCR are not binding in nature, they are authoritative

[62] B Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 International and Comparative Law Quarterly 573, 587.
[63] CESCR, *General Comment 3, The Nature of States Parties Obligations, Art 2(1) ICESCR*, UN Doc 12/14/1990 para 11.
[64] CESCR, *General Comment 14, The Right to the Highest Attainable Standard of Health, Art 12 ICESCR*, UN Doc E/C.12/2000, para 51.
[65] CESCR, *General Comment 15, The Right to Water, Arts 11 and 12 ICESCR*, UN Doc E/C.12/2002/11, para 44.

interpretations of the obligations flowing from the International Covenant on Economic Social and Cultural Rights (ICESCR). Indeed, as argued by Simma, 'if an investment tribunal confronted with a Covenant matter neglected to consider these pronouncements, its reasoning with regard to that matter would be insufficient, with all the consequences attached to this default'.[66]

C. The FET Clause

Article 2 of the Afghanistan-Germany BIT contains a standard FET clause, according to which '[e]ach Contracting State shall in its territory accord Investments by Investors of the other Contracting State fair and equitable treatment as well as full protection under the Treaty'. It is not unusual for FET clauses to appear in the same article which also contains an FPS clause. It is interesting to note, however, that FPS protections are therefore contained both in this article, which refers to 'full protection' only, and in article 4(1), discussed above, which refers to 'full protection and security'. One of the reasons for this repetition might be simple: FPS and FET protections traditionally do appear in the same article. At the same time, as I have argued above, the contracting parties might have also thought it was appropriate to reiterate this obligation in article 4 since this article also contains a war clause and an expropriation clause, leaving the possibility open for a joint interpretation of the clauses by an investment tribunal.

Yet the main concern in relation to the FET standard is not related to its relationship with expropriation, but rather to the expansive approach that investment tribunals have adopted for its interpretation, in particular through the deployment of the doctrine of legitimate expectations. As I outlined elsewhere,[67] since the *Metalclad* award in 2000 FET has

[66] Simma (n 62) 591.
[67] D Davitti, 'On the Meanings of International Investment Law and International Human Rights Law: The

become the most successfully invoked clause in international investment law.[68] Furthermore, since the *Tecmed* award in 2003 and that tribunal's elaboration of the doctrine of legitimate expectations as the principal element of FET, the standard has also developed as the most important tool for investment protection. The centrality of article 2 of the Afghanistan-Germany BIT, therefore, cannot be underestimated: in line with the doctrine of legitimate expectations, investment tribunals increasingly understand FET as requiring a host state to ensure transparency, as well as legal and regulatory stability to foreign investments,[69] based on the 'expectations' that a foreign investor might have formed at the moment of first investing in the host state. Accordingly, any alteration of the legal and policy framework in existence at the beginning of the investment would be deemed to be a breach of FET. The risk of regulatory freeze attached to the doctrine of legitimate expectations is apparent, and as such it has been amply criticised.[70]

The most comprehensive and convincing rejection of the doctrine of legitimate expectations as the central element of FET is offered by Pedro Nikken, former judge and president of the Inter-American Court of Human Rights, in his capacity as arbitrator in *Suez Vivendi*[71] and *AWG*.[72] In relation to these awards, Nikken issued a separate opinion, identical for both awards, in which he confirms a breach of FET by Argentina but openly disagrees with the tribunals' reasoning that such a breach was caused by a frustration of legitimate expectations. Nikken clarifies his position towards the use of the doctrine in IIL by extending his disagreement to all other awards that identify FET with the protection of the legitimate expectations of the investors, as this approach 'goes beyond the meaning of the terms of the

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Alternative Narrative of Due Diligence' (2012) 12(2) Human Rights Law Review 393.

[68] JE Alvarez, *The Public International Law Regime Governing International Investment Law* (Hague Academy of International Law, 2011), 177.

[69] AH Ali and KD Tallent, 'The Effect of BITs on the International Body of Investment Law: The Significance of Fair and Equitable Treatment Provisions' in CA Rogers and RP Alford (eds), *The Future of Investment Arbitration* (Oxford University Press, 2009), 214.

[70] Add full ref.

[71] Add full ref

[72] Add full ref

BITs and the intention of the parties'.[73] The emphasis placed by tribunals on the expectations of the investors is misplaced and misleading, Nikken contends, because it is fundamentally at odds with international customary rules of interpretation of treaties, as well as with state parties' intentions as expressed in the relevant investment treaties.[74]

Nikken conceives of FET as primarily a standard of conduct or behaviour of the state in relation to foreign investment: '[t]he conduct that each State Party to a BIT is willing and obliged to adopt for the promotion and protection of investment and, conversely, what each State is entitled to expect and does expect from the behavior of the other Party in the same situation.'[75] This standard of conduct cannot automatically become a source of rights for investors, since international investment agreements only establish the obligations that state parties undertake towards each other in relation to their respective investments.[76] Nikken considers it 'illogical to understand that the intention of the Parties was to extend the protection of fair and equitable treatment that they undertook to give to the investments (*not investors*) of the other Party, above what is implied in good governance'.[77] He argues that investment tribunals who have outlined the doctrine of legitimate expectations as a key element of FET have systematically failed to justify this interpretation by applying the customary rules of interpretation *as per* Article 31.1 Vienna Convention of the Law of Treaties (VCLT).[78] When states arbitrarily contravene the commitments undertaken in international investment agreements, their FET breaches are to be linked to their improper

[73] Separate Opinion of Arbitrator Pedro Nikken, *Suez Vivendi* and *AWG*, para 2.
[74] Para 3: 'The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the ordinary meaning to be given to the terms "fair and equitable." Therefore, *prima facie*, such a conception of fair and equitable treatment is at odds with the rule of interpretation of international customary law expressed in Article 31.1 of the Vienna Convention of the Law of Treaties (VCLT). In addition, I think that the interpretation that tends to give the standard of fair and equitable treatment the effect of a legal stability has no basis in the BITs or in the international customary rules applicable to the interpretation of treaties.'
[75] ibid, para 4.
[76] ibid, paras 19 and 20.
[77] ibid, para 20.
[78] ibid, para 25.

conduct rather than to a frustration of an investor's legitimate expectations.[79] An expectation that the host state will adopt certain policies to promote investment cannot be inferred under FET, as such an expectation is not legally enforceable.[80] Similarly, tribunals cannot infer, through the broad interpretation of FET clauses, a state's willingness to forsake its regulatory power in order to preserve the profitability of the investment. This is mainly because a state's regulatory power goes to the core of state sovereignty, and is crucial for its ability to function: 'so to renounce to exercise it is an extraordinary act that must emerge from an unequivocal commitment; more so when it is at stake its ability to deal with a serious crisis.'[81]

Crucially, Nikken's approach to FET as a measure of state conduct serves the purpose of repositioning the standard within the remit of the due diligence principle. A closer look at Nikken's argument discloses that, as a standard of conduct, FET prescribes an *obligation of due diligence* that state parties have pledged to each other with respect to investments from their respective nationals.[82] This obligation of due diligence can be equated to the conduct which is to be expected of 'a reasonably well-organized State'.[83] The legitimate expectations of investors, on the other hand, cannot be considered an appropriate tool to measure whether a state has acted according to the canons of good governance pertaining to a well-organised state.[84] A state's due diligence obligation, more appropriately, should reflect the concept that this principle encompasses in international law. It is possible to agree with Nikken[85] that the due diligence principle indicates a conduct or behaviour that a state must follow in order to effectively protect other states from harm, through legislative and administrative action.[86] Accordingly, I submit, FET should be repositioned as a mutual standard of conduct, rather

[79] ibid, para 26.
[80] ibid.
[81] ibid, para 31.
[82] ibid.
[83] *Asian Agricultural Products Ltd v Sri Lanka*, ICSID Case No ARB/87/3. Final Awards on Merits and Damages, 27 June 1990, para 170.
[84] Nikken, para 20.
[85] ibid paras 4 and 31.
[86] See, eg, P Birnie and A Boyle, *International Law and the Environment* (Oxford: Oxford University Press, 2nd edn, 2002), 112.

than as a source of investors' rights, thus enabling a more balanced approach to the context of the host country.[87] Such a conceptualisation of FET reflects the obligation of due diligence that states have pledged to each other with respect to investments when entering into the relevant investment treaty.[88]

If we apply the above argument to Afghanistan, it is possible to argue that Afghanistan's FET obligations under article 2 of the Afghanistan-Germany BIT do not encompass a duty not to frustrate the legitimate expectations of German investors. What the FET standard does entail, however, is an obligation of conduct, that is a duty to exercise due diligence in ensuring that the other state party's investments (i.e. German investments) are protected from harm. Afghanistan's international responsibility can only be engaged for a failure to exercise the necessary level of due diligence, not for failing to meet an investor's legitimate expectations.

As I have outlined so far, the Afghanistan-Germany BIT enshrines significant obligations for the protection of foreign investment in Afghanistan. Such obligations, taking into consideration the political, conflict and socio-economic context of Afghanistan, can have significant consequences both in terms of security and of protection of human rights in the country. In the next part I analyse the obligations of both Afghanistan and Germany in relation to the right to water, both at core level and in terms of progressive realisation of the right. This analysis builds on the IIL analysis carried out in this section, as it considers the existing tensions between contrasting obligations under IIL and IHRL and the practical implications of trying to operationalise the first pillar of the Framework for business and human rights.

[87] D Davitti (n 67) 444–45.
[88] Nikken paras 4 and 34.

III. Operationalisation of the First Pillar of the Framework

A. Afghanistan's Obligations as the Host State

Afghanistan is a state party to various international human rights instruments, including those which strongly underpin the existence of an independent right to water: namely, the International Covenant on Economic Social and Cultural Rights (ICESCR);[89] the International Covenant on Civil and Political Rights (ICCPR);[90] the Convention on the Rights of the Child (CRC);[91] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);[92] and the Convention on the Right of Persons with Disabilities (CRPD).[93] Accordingly, Afghanistan (as a host state receiving foreign investment for the development and exploitation of mining sites) is under a three-fold obligation to respect, protect and fulfil the right to water, including in the current situation of armed conflict.[94]

Under the obligation to *respect*, Afghanistan is obliged to ensure that its acts and omissions do not result in a deterioration of already realised elements of the right. More specifically in relation to the mining context, this duty includes any activity which could result in reduced access to safe potable water for essential household purposes, due for instance to reallocation of water resources for increasing mining needs or to contamination resulting from mining activities. In this regard, in April 2009 Afghanistan adopted the Water Law which aims at: 'conservation, equitable distribution, and the efficient and sustainable use of water resources, strengthen the national economy and secure the rights of the water users'.[95] This provision, read in conjunction with article 6 of the Water Law which prioritises

[89] Ratified on 24 January 1983, see the United Nations Treaty Collection, Status of Treaties at http://treaties.un.org/Pages/ParticipationStatus.aspx (last accessed on 6 March 2013).
[90] ibid.
[91] Ratified on 28 March 1994, see the United Nations Treaty Collection, Status of Treaties at http://treaties.un.org/Pages/ParticipationStatus.aspx (last accessed on 6 March 2013).
[92] Ratified on 5 March 2003, see the United Nations Treaty Collection, Status of Treaties at http://treaties.un.org/Pages/ParticipationStatus.aspx (last accessed on 6 March 2013).
[93] Ratified on 18 September 2012, see the United Nations Treaty Collection, Status of Treaties at http://treaties.un.org/Pages/ParticipationStatus.aspx (last accessed on 6 March 2013).
[94] Add reference to Sassoli etc.
[95] The Water Law, Article 1, Preamble, 26 April 2009.

the use of water for drinking and livelihood purposes, indicates the existence of a so-called 'no injury' standard that mining investors will have to respect in relation to water usage as it is enshrined in binding national law.[96] Although there is no cap on the level of water that can be used to meet the requirements for extractive activities, extractive companies will have to ensure that existing users incur 'no injury' as a consequence of their operations. This standard, at first glance, seems to reflect Afghanistan's obligation to respect the right to water. In reality, however, under the Water Law the management and allocation of water through a permit system is envisaged through stakeholders' participation in relevant River Basin Councils, charged with the responsibility for monitoring and regulating the water usage; developing plans and strategies for the management of water resources; as well as for issuing activity permits.[97] The transparency and fairness of these monitoring bodies has been widely challenged[98] and the presence of foreign investors as additional stakeholders within these bodies will further complicate the picture and enhance the potential for corruption and inequitable distribution. Afghanistan currently ranks at the bottom of the Corruption Perceptions Index published by Transparency International,[99] mainly due to the lack of accountability of its government and public institutions. As some have argued, Afghanistan's membership of the Extractive Industry Transparency Initiative (EITI), rather than being aimed at genuinely ensuring transparency and at preventing corruption, is being used to satisfy the requests of international donors who are currently supporting the Afghan government, and thus promote the country as an investment destination for extractive companies, so that lucrative ancillary contracts can be controlled and shared amongst well-established power elites.[100]

[96] USAID IPP document.
[97] USAID IPP document.
[98] See, eg, Wegerich (n 50).
[99] See www.transparency.org, last accessed 6 August 2013.
[100] At paras 42 and 43 of GC 15, the CESCR reiterated that violations of the right to water can occur both through acts of commission and acts of omission, either when these are direct actions of States parties or of other entities insufficiently regulated by the state party. Retrogressive measures incompatible with core obligations also amount to violations, and so does a failure to enforce relevant water laws.

If we return to the example of the Aynak copper mine in order to further contextualise Afghanistan's obligation to respect, the overlap between the obligation to respect and the obligation to protect the right to water becomes apparent. The CESCR confirmed in General Comment 15 that a failure to enact or enforce law to prevent the contamination or inequitable extraction of water is a violation of the obligation to protect,[101] according to which states must take necessary measures to prevent private actors from encroaching on the enjoyment of the right to water. The possible water impact of the Aynak mining project raises concerns both in terms of water use and reallocation for copper extraction and processing, and in terms of water contamination. The mine, in fact, not only is located in a drought-prone area, but it also sits on the Kabul River Basin, which serves Kabul (with its population of over 4.7 million people) and the areas stretching to the border with Pakistan. Copper mining activities will affect this already-receding water table in terms of further depletion of groundwater levels—with consequences for domestic water usage—and in terms of water quality, because of likely contamination by open-pit mining activities, such as drilling, blasting, cooling and management of waste.[102] As no agreement appears to be in place between the government and the foreign investor on how to prevent water pollution, concerns have already been voiced that inadequate measures could bring long-term damage to the area surrounding the mine as well as to the entire water basin.[103] Furthermore, as outlined earlier, Afghanistan's ability and willingness[104] to regulate the preservation and allocation of water resources remains questionable, and steps are more likely to be taken in whatever direction will serve the vested

[101] GC 15, para 44.
[102] According to recent research, 80-90 percent of the rocks originally removed for copper extraction become waste that will have to be somehow disposed of. (Add ref.)
[103] Add ref.
[104] In GC 15 (para 41) the CESCR makes a legitimate distinction, between when a state is unable and when it is unwilling to comply with its obligations in relation to the right to water. This distinction is based on articles 11(1) and 12 of the ICESCR, respectively on the right to an adequate standard of living and the right to health, as well as on the obligation to take the necessary steps, to the maximum of its available resources (article 2(1) ICESCR): '[a] State which is unwilling to use the maximum of its available resources for the realization of the right to water is in violation of its obligations under the Covenant. If resource constraints render it impossible for a State party to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above.'

interests of the ruling powerbrokers.[105]

The obligation to fulfil requires Afghanistan, *inter alia*, to take all necessary positive measures to enable every person to enjoy the right to water. This includes a requirement to ensure that those who do not currently have access to water gain such access. In light of the likely impact of the Aynak copper mine on water resources, it is improbable that the people living in the area served by the Kabul River Basin will see their access to potable water improve.

More specifically in relation to BITs or other types of international investment agreements, the obligation to respect imposes on Afghanistan a duty not to enter into agreements imposing measures that may result in an infringement of human rights that they have agreed to uphold.[106] Similarly, I submit, it imposes a duty to renegotiate existing BITs so as to reclaim the necessary regulatory space which would enable the Afghan government to meet its international obligations under international human rights law, including in relation to the right to water. This approach is also supported by the Draft Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements: the commentary to Guiding Principle IV explains that when a state is 'unable to comply with its human rights obligations within the constraints of the agreement, it should be released from such constraints to the extent of the incompatibility'.[107] The commentary also expands on this point by stating that when the obligations imposed under an investment treaty would inevitably lead to a breach of the state's obligations under IHRL, the problematic provisions within the treaty should be considered void, or the treaty be denounced.[108]

[105] Add reference to Giustozzi and Donini.
[106] See Draft Guiding Principles on HRIA.
[107] Draft Guiding Principles, para 16.
[108] Draft Guiding Principles, para 16: 'While the possibility of denunciation or withdrawal should be provided for in any trade of investment agreement entered into by the State, a right of denunciation or withdrawal may be implied in any trade or investment agreement to the extent necessary for a State to comply with its human rights

Under the obligation to protect, Afghanistan has a duty to retain control over foreign investors, who may violate human rights during their operation in the country. A breach of this obligation may flow, for instance, 'as a result of an excessively high level of protection of foreign investors established on their territory or because of a broad understanding of the prohibitions of imposing performance requirements on such investors'.[109] A failure to introduce and enforce appropriate legislation in order to prevent contamination and inequitable extraction of water by non-state actors would also amount to a violation of the obligation to protect.[110] The obligation to fulfil imposes a duty to avoid a regulatory freeze, which would inevitably render impossible the progressive realisation of the right to water to the maximum of the state's available resources. As confirmed by the CESCR, a violation of the obligation to fulfil includes a 'failure of a State to take into account its international legal obligations regarding the right to water when entering into agreements with other States or with international organizations'.[111] As recognised in the Draft Principles on Human Rights Impact Assessments of Trade and Investment Treaties, 'States should refrain from concluding such agreements which would affect their public budgets or balance of payments in a way that would impede the full realisation of human rights, making the fulfilment of human rights impossible or delayed'.[112] This point was also emphasised by the former SRSG on business and human rights, when he stated that there is an expectation that states 'will maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts'.[113]

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obligations, even in the absence of such an explicit clause. This follows from the fact that human rights obligations prevail on other treaty obligations.'

[109] Draft Guiding Principles on HRIA, para 9.

[110] CESCR, GC 15 para 44(b).

[111] CESCR, GC 15, para 44 (c).

[112] Draft Guiding Principles on HRIA, para 10.

[113] Guiding Principles on Business and Human Rights, UN Doc A/HRC/17/31, Principle 9.

As I have argued elsewhere,[114] it is generally uncontested that a host state may incur international responsibility if it fails to exercise due diligence in preventing or reacting to acts or omissions by a non-state actor. When it comes, however, to a state's extraterritorial obligations (ETOs), the consensus starts to wane, the fundamental question being whether a due diligence obligation can be said to extend to *home states*. Consider the Afghanistan-Germany BIT: what are the ETOs of Germany, as a home state, in relation to the right to water? Could Germany's failure to regulate the activities of a German investor abroad result in a breach of its due diligence obligation, and therefore engage international responsibility? In the remainder of this paper I seek to answer these fundamental questions and explain their crucial relevance to conflicted societies.

B. Germany's Obligations as the Potential Home State

In what follows I argue that the operationalisation of pillar one of the *Protect, Respect and Remedy* Framework elaborated by the former Special Representative of the Secretary-General on business and human rights (SRSG) reveals that state obligations in relation to the right to water are not only vested upon Afghanistan as the host state but also, under certain circumstances, upon the home states of the companies investing in the Afghan mining sector.

As reiterated by the CESCR in General Comment 15, states, on the basis of their pledges under the UN Charter, should take steps 'to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries'.[115] Germany, as a potential home state under the Afghanistan-Germany BIT, is under a duty 'to avoid conduct that creates real risk to the enjoyment of economic, social, and cultural rights outside of [its] national territory'.[116] This is based on the state's general obligation to ensure that acts and omissions occurring 'within their jurisdiction and control respect the

[114] D Davitti (n 67) 445–48.
[115] CESCR, GC 15 para 33.
[116] Commentary to the Maastricht Principles (n 6), 1112.

environment of other States or of areas beyond national control'.[117]

Acts and omissions by Germany, therefore, would engage international responsibility where the resulting human rights harm is a foreseeable result of those acts and omissions. The use of the concept of 'foreseeability' was discussed by the International Law Commission (ILC) in its Commentary to Article 23 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts. According to the ILC, foreseeability includes both results that were actually foreseen and results that should have been foreseen. The latter case incorporates a requirement to ascertain 'whether at the time of the conduct steps were taken to obtain the scientific and other knowledge necessary to undertake a determination of risk',[118] which, in my view, is strictly linked to a need to carry out *ex ante* and on-going human rights impact assessments of international investment agreements.[119] If at the moment of entering into the Afghanistan-Germany BIT it was foreseeable that such an agreement could have resulted in a violation of human rights (in our case, the right to water), such violation can be attributed to the conduct of Germany. Based on each state's obligation 'not to allow its territory to be used for acts contrary to the rights of other States',[120] reiterated in the *Corfu Channel* case, the knowledge that German authorities had or ought to have had of the consequences of their conduct is relevant to the establishment of state responsibility for the violation.

From the due diligence argument articulated in the *Corfu Channel* case, it is also conceivable to articulate that the state is under a duty to regulate the extraterritorial activities of non-state actors, including private investors, in order to ensure that they do not interfere with the enjoyment of human rights abroad.[121] In relation to extraterritorial corporate

[117] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, ICJ 226, para 29.
[118] Commentary to the Maastricht Principles (n 6), 1113-1114.
[119] See also Maastricht Principle 14 on Impact Assessment and Prevention and the commentary to it, (n 6), 1115–118.
[120] The Corfu Channel Case (*UK v Albania*), Merits, 9 April 1949 ICJ 4, 22.
[121] As noted by Brownlie, 'the state is under a duty to control the activities of private persons within its state

activities, the CESCR reiterated that home states' obligations are to be understood as complementary to the obligation of host states, as home states should 'take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant'.[122] As recognised by Maastricht Principle 25, regulation by the home state is required in the following situations:

> a) the harm or threat of harm originates or occurs on its territory;
> b) where the non-State actor has the nationality of the State concerned;
> c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned;
> d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-state actor's activities are carried out in that State's territory;
> e) where any conduct impairing economic, social and cultural rights constitutes a peremptory norm of international law.[123]

This type of prescriptive jurisdiction, in particular paragraph (c) relating to the regulation of non-state actors incorporated in another state but controlled by a parent company incorporated in the home state, is useful to address the issue of the legal separation between a parent company and its subsidiaries within a business group.[124] To answer a potential objection that the exercise of prescriptive jurisdiction could violate the international legal principle of non-intervention in the affairs of another state, it is crucial to note that 'a prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. (…) Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.'[125] When a home state exercises prescriptive jurisdiction to regulate its investors' conduct abroad in order to protect human rights, the home state is fulfilling its due diligence obligation through the adoption of

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territory and the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another state': I Brownlie, *System of the Law of Nations: State Responsibility, Part 1* (1983), 165. See also CESCR General Comment 14, para 39, and General Comment 15, para 31.

[122] CESCR, Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, UN Doc E/C.12/2011/1 (2011), para 5.

[123] Commentary to the Maastricht Principles (n 6), 1137.

[124] See Davitti (n 3).

[125] *Military and Paramilitary Activities in and Against Nicaragua*, 1986 ICJ 14, 64, at 205.

extraterritorial legislation. In the case of Germany and Afghanistan in our example, such legislation is applicable to German investors operating in Afghanistan, and not to Afghan companies. In the case in which a German investor was to restructure its investment through an Afghan subsidiary, this Afghan subsidiary would also be subject to German law for the purposes of human rights regulations, on the basis of what the subsidiary itself and/or its parent company knew or ought to have known. The practice of regulating corporations by determining their nationality on the basis of the nationality of its parent is not uncommon and already used, for instance in the area of taxation.[126]

Conclusion

In this paper, through the case study of Afghanistan, I brought the ongoing discussion on the interplay between IHRL and IIL to a real context of armed conflict, that of Afghanistan. After contextualising the political and economic situation currently faced by Afghanistan, I have analysed the host country's potentially contrasting obligations flowing from the ICESCR on the one hand and the Afghanistan-Germany BIT on the other.

I have argued that the obligation to protect articulated in pillar one of the UN Framework entails an obligation on home states to regulate the extraterritorial activities of their foreign investors. This regulation is supported by international law and would ensure that foreign investors operating in the Afghan mining sector are not left to their own devices and it would complement Afghanistan's due diligence obligation to regulate non-state actors operating on its territory. It would also ensure that, whilst the mining investments of foreign

[126] Restatement (Third) of the Foreign Relations Law of the United States, para 213. The nationality of subsidiaries can also be determined 'on the basis that they are owned or controlled by nationals of the regulating state', para 414. In the US Model BIT 2012, this approach is also used to extend the protection of US BITs to investments made by foreign nationals, 'even and particularly when their investment consists in participation involving a degree of direct or indirect control in a corporation incorporated in the host country': see Commentary to the Maastricht Principles (n 6) at 1140.

investors continue to be protected under the existing Afghanistan-Germany BIT, the 84 per cent of Afghan households considered multi-dimensionally poor will not see their chance to access potable water nullified by the encroaching interests of the mining sector.

The above discussion, in my view, also acquires relevance in relation to outlining a need to renegotiate the Afghanistan-Germany BIT, on the basis of the obligations vested upon both countries as outlined in this paper.